NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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ROBERT F. ORR

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Former Justices

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DONALD L. SMITH[8]	Raleigh

1. Appointed and sworn in 9 March 1998 to replace James R. Strickland who died 23 December 1997.
2. Appointed and sworn in 2 January 1998 to replace F. Gordon Battle who retired 31 December 1997.
3. Appointed and sworn in 1 January 1998 to replace James C. Davis who retired 31 December 1997.
4. Appointed and sworn in 25 November 1997 to replace Chase B. Saunders who retired 31 December 1997.
5. Retired and sworn in as Emergency Judge 1 March 1998.
6. Sworn in as Emergency Judge 1 January 1998.
7. Sworn in as Emergency Judge 2 September 1997.
8. Recalled to the Court of Appeals 1 September 1995.

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H. HORTON ROUNTREE[12]	Greenville
SAMUEL M. TATE	Morganton

1. Appointed and sworn in 25 November 1997.
2. Appointed and sworn in 30 January 1998 to replace Carolyn D. Johnson who retired 1 December 1997.
3. Appointed Chief Judge 5 January 1998 to replace Janeice B. Tindal who retired 31 December 1997.
4. Appointed and sworn in 17 February 1998.
5. Appointed Chief Judge 5 January 1998 to replace Adam C. Grant, Jr. who retired 1 January 1998 and became an Emergency Judge on 9 January 1998.
6. Appointed and sworn in 13 February 1998 to replace Clarence E. Horton, Jr. who was appointed to the Court of Appeals.
7. Appointed and sworn in 13 February 1998.
8. Appointed Chief Judge 6 March 1998 to replace Roland H. Hayes who resigned 6 March 1998.
9. Appointed and sworn in 2 January 1998.
10. Deceased 30 October 1997.
11. Deceased 14 December 1997.
12. Deceased 14 March 1998.

ATTORNEY GENERAL OF NORTH CAROLINA

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WILLIAM D. WORLEY
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DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
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3B	W. DAVID MCFADYEN, JR.	New Bern
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5	JOHN CARRIKER	Wilmington
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7	HOWARD S. BONEY, JR.	Tarboro
8	DONALD M. JACOBS	Goldsboro
9	DAVID R. WATERS	Oxford
9A	JOEL H. BREWER	Roxboro
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11	THOMAS H. LOCK	Smithfield
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13	REX GORE	Bolivia
14	JAMES E. HARDIN, JR.	Durham
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21	THOMAS J. KEITH	Winston-Salem
22	EUGENE T. MORRIS, JR.	Lexington
23	BEIRNE N. HARDING	Wilkesboro
24	JAMES T. RUSHER	Boone
25	DAVID T. FLAHERTY, JR.	Lenoir
26	PETER S. GILCHRIST III	Charlotte
27A	MICHAEL K. LANDS	Gastonia
27B	WILLIAM CARLOS YOUNG	Shelby
28	RONALD L. MOORE	Asheville
29	JEFF HUNT	Rutherfordton
30	CHARLES W. HIPPS	Waynesville

PUBLIC DEFENDERS

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

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 19th day of September, 1997 and said persons have been issued license certificates.

JULY 1997 NORTH CAROLINA BAR EXAMINATION

NEDRE DENISE CAMPBELL ..... Chattanooga, Tennessee
RODNEY EUGENE DAVIS, JR. ..... Carrboro
JASON GLENN GOINS ..... Asheboro
PATRICK T. LAWLESS ..... Raleigh
NATASHA MARINA NAZARETH ..... Hillsborough
ALFRED THOMAS RIPLEY ..... Durham
MARC ROBERTS ..... Charlotte
ANN MARIE SCHUT ..... Pineville
HENRY L. SHOTWELL ..... Wilmington
TRAVIS HERLANDIS SIMPSON ..... Winston-Salem
ELIZABETH BARRETT TEMPLE ..... Tarboro
RODERICK MORRIS WRIGHT, JR. ..... Greensboro

Given over my hand and seal of the Board of Law Examiners this the 24th day of September, 1997.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 26th day of September, 1997 and said person has been issued a license certificate.

JULY 1997 NORTH CAROLINA BAR EXAMINATION

BRYSON MOORE GEER ..... Charlotte

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 26th day of September, 1997 and said persons have been issued certificates of this Board:

ARDEN LYNN ACHENBERG ..... Huntersville
Applied from the State of Ohio
STEVEN MARK ARBOGAST ..... Emerald Isle
Applied from the State of Ohio
CARL JAMES BECKER ..... Charlotte
Applied from the State of Indiana
REBECCA SUSAN CHAFFIN ..... Huntersville
Applied from the State of Virginia
CARL STEPHEN CONROY ..... Concord
Applied from the State of New York

DAVID S. HARLESS ..... Charlotte
Applied from the State of West Virginia

ERNEST GLEN HENTSCHEL II ..... Charleston, West Virginia
Applied from the State of West Virginia

EDWARD KENT ODEN ..... Charlotte
Applied from the State of Texas

CATHLEEN M. PRITCHARD ..... Pinehurst
Applied from the State of Virginia

DWANE EDWARD VICKSTROM ..... Charlotte
Applied from the State of Nebraska

GAIL WHEELER ..... Charlotte
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 7th day of October, 1997.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 31st day of October, 1997 and said persons have been issued license certificates.

FEBRUARY 1997 NORTH CAROLINA BAR EXAMINATION

ROBERT RABASCH FARRINGTON, JR. ..... Winston-Salem

JULY 1997 NORTH CAROLINA BAR EXAMINATION

MICHAEL ALAN BRADBURY ..... Charlotte
ROBERT ERIC DAVIS ..... Columbia, South Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 31st day of October, 1997 and said persons have been issued certificates of this Board:

W. ALLEN SCHMITT ..... Jamestown
Applied from the State of Kentucky

SANDRA WALLACE-SMITH ..... Raleigh
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 5th of November, 1997.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 21st day of November, 1997 and said person has been issued a license certificate.

FEBRUARY 1997 NORTH CAROLINA BAR EXAMINATION

JOHN I. BLOOMENTHAL ..... Chapel Hill

Given over my hand and seal of the Board of Law Examiners this the 26th day of November, 1997.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 12th day of December, 1997 and said persons have been issued license certificates.

JULY 1997 NORTH CAROLINA BAR EXAMINATION

MICHAEL D. WHATLEY ..... Charlotte
SCOTT MAITLAND ..... Chapel Hill
CHRISTOPHER M. KROGER ..... Greensboro
DANIEL SEBASTIAN HUFFENUS ..... Charlotte
ADAM BENEDICT HIRSCHFELD ..... Winston-Salem
KENNETH ALLEN FREE, JR. ..... Greensboro
MATTHEW STEPHEN CHENEY ..... Winston-Salem
WILLIAM A. BARRETT ..... Whitsett
JENNIFER PEARSON WRIGHT ..... Arlington, Virginia
PAMELA C. SUREDA ..... Durham
MELISSA KYLE KALUZNY ..... Chapel Hill
DEBRA J. CLARK ..... Charlotte
MONICA DAWN DAVIS ..... Jefferson
SUSAN ELIZABETH BROOKS ..... Jacksonville, Florida
JAYE ELIZABETH BINGHAM ..... Raleigh
JAMILA NEGRITA NAJAT BENNOU ..... Durham
ELIZABETH ANN BARRY ..... Durham

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 12th day of December, 1997 and said persons have been issued certificates of this Board:

EDWIN GERHART FOULKE, JR. ..... Simpsonville, South Carolina
Applied from the District of Columbia
THOMAS W. MURRELL III ..... Charlotte
Applied from the State of Pennsylvania
JUDY T. GILLESPIE BLEVINS ..... Charlotte
Applied from the State of Virginia

NICHOLAS JEROME VALENZIANO, JR. . . . . .Winston-Salem
Applied from the State of Illinois

JOHN PAUL GRAVALEC-PANNONE . . . . . .Norwich, Connecticut
Applied from the State of Connecticut

WAYNE FRANK ERDELACK . . . . . .Moreland Hill, Ohio
Applied from the State of Ohio

EDWARD THOMAS TIRPAK . . . . . .Blasdell, New York
Applied from the State of New York

ERANIA EBRON-FUBARA . . . . . .Charlotte
Applied from the State of New York

CHRISTOPHER J. I. GANNON . . . . . .CARY
Applied from the State of Pennsylvania

SAUL GEOFFREY GLICK . . . . . .Virginia Beach, Virginia
Applied from the State of Virginia

ROBERT LEE SAMUEL, JR. . . . . .Chesapeake, Virginia
Applied from the State of Virginia

REBECCA ANNE LEIGH . . . . . .Greensboro
Applied from the State of Texas

EDWARD JAMES POWERS . . . . . .Norfolk, Virginia
Applied from the State of Virginia

JOSEPH FRANKLIN LONG . . . . . .Bluefield, West Virginia
Applied from the State of West Virginia

DANIEL HENRY COHAN . . . . . .Wallingford, Connecticut
Applied from the State of Connecticut

TODD A. BRENNER . . . . . .Hilliard, Ohio
Applied from the State of Ohio

MARCELLE COMPTON QUIST . . . . . .Bozeman, Montana
Applied from the State of Montana

Given over my hand and seal of the Board of Law Examiners this the 15th of December, 1997.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 26th day of December, 1997 and said person has been issued a certificate of this Board:

JOHN BENGIER . . . . . .Camp Lejeune
Applied from the State of West Virginia

Given over my hand and seal of the Board of Law Examiners this the 5th day of January, 1998.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 12th day of December, 1997 and said person has been issued a license certificate.

JULY 1997 NORTH CAROLINA BAR EXAMINATION

LAURA L. SINGLETON ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 7th day of January, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 16th day of January, 1998 and said persons have been issued certificates of this Board:

LYNETTE BROOKS LENARD ..... Kitty Hawk
Applied from the State of Virginia

ROBERT LAUREANO ..... Nanuet, New York
Applied from the State of New York

RICHARD D. BALLOU ..... Honesdale, Pennsylvania
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 20th day of January 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 6th day of March, 1998 and said persons have been issued certificates of this Board:

ROBERT H. BRINK ..... Raleigh
Applied from the State of Minnesota

ALLEN ROBERT BAUM ..... Cary
Applied from the State of Virginia

LISA CERABINO MATTIMOE ..... Cary
Applied from the State of New York

KAREN S. LYONS ..... Chapel Hill
Applied from the State of Illinois

THOMAS FRANCIS MCKIM . . . . . Winston-Salem
Applied from the District of Columbia
RICHARD JOSEPH LUTZEL . . . . . Cornelius
Applied from the State of New York
JOHN EDWARD BELTZ . . . . . Charlotte
Applied from the State of New York
KEVIN PHILIP STICHTER . . . . . Charlotte
Applied from the State of Colorado
JO ANN RIZER . . . . . Charlotte
Applied from the State of Ohio
RICHARD N. DRAKE . . . . . Clemmons
Applied from the State of Ohio
JILL RAMIREZ LANOIS . . . . . Mooresville
Applied from the State of Virginia
NANCY ELLEN HALE . . . . . Jacksonville, Florida
Applied from the State of Indiana
WARREN SHANK . . . . . Caswell Beach
Applied from the State of Iowa
ANTHONY P. ALFANO . . . . . Slidell, Louisiana
Applied from the State of Michigan
LARRY DAVID VICK . . . . . Fayetteville
Applied from the State of Pennsylvania
H. LIN SHIAU ALTAMURA . . . . . Cornelius
Applied from the State of New York
CHARLES W. MILLER . . . . . Raleigh
Applied from the State of Michigan
DEBORAH ARMSTRONG WHITFIELD . . . . . Austin, Texas
Applied from the State of Texas
HOWARD L. KUSHNER . . . . . Niagara Falls, New York
Applied from the State of New York
ANDREA BURNS SLUSSER . . . . . Asheville
Applied from the State of Virginia
JAIME P. SERRAT . . . . . Westlake, Ohio
Applied from the State of Ohio
DANIEL SHERWOOD CHAMBERLAIN . . . . . Indianapolis, Indiana
Applied from the State of Indiana
GLEN ALTON HUFF . . . . . Virginia Beach, Virginia
Applied from the State of Virginia
MINDY ROZ KORNBERG . . . . . Durham
Applied from the State of Arkansas
LYNN FLEMING HENDON . . . . . Louisville, Kentucky
Applied from the State of Kentucky
SCOTT GEORGE SALEMI . . . . . Rockford, Illinois
Applied from the State of Illinois
PATRICIA JANICE SHAW . . . . . Chapel Hill
Applied from the State of Michigan
GERALD FRANCIS MURRAY . . . . . Oriental
Applied from the State of Wyoming
JACQUELINE ANN MCGAVRAN . . . . . Urbana, Illinois
Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners this the 9th day of March, 1998.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. GARY FERNANDEZ

No. 198A95

(Filed 9 May 1997)

1. Evidence and Witnesses § 1255 (NCI4th)— custodial interrogation—invocation of right to counsel—further interrogation—initiation of conversation by defendant

Once an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing merely that he responded willingly to further police-initiated custodial interrogation, even if he had been again advised of his rights. In such case, the accused may not be further interrogated until counsel has been made available to him unless the accused himself initiates further communication with the police.

Am Jur 2d, Criminal Law §§ 788-797.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

What constitutes assertion of right to counsel follow *Miranda* warnings—state cases. 83 ALR4th 443.

2. Evidence and Witnesses § 1250 (NCI4th)— custodial interrogation—right to counsel not invoked—voluntariness of statement

Defendant did not invoke his right to an attorney during custodial interrogation, and his inculpatory statement indicating the location of a shotgun used in two murders was the product of a voluntary, intelligent, and knowing waiver of defendant's *Miranda* rights, where the evidence at a pretrial hearing to determine the admissibility of defendant's custodial statements showed that defendant signed a note asking to speak with the sheriff; when brought to the sheriff's office, defendant asked for an officer who spoke Spanish to act as a translator although defendant spoke English; defendant stated that he did not need a lawyer; when the translator arrived, he advised the sheriff that defendant had an attorney; defendant wrote a note that he wanted to talk with officers without his attorney present; defendant was advised of his rights in Spanish, including his right to have counsel present, and he stated that he understood his rights; defendant read and signed the waiver of rights form; and defendant then gave his statement during which the location of the shotgun was revealed.

Am Jur 2d, Criminal Law §§ 788-797.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

What constitutes assertion of right to counsel follow *Miranda* warnings—state cases. 83 ALR4th 443.

3. Searches and Seizures § 100 (NCI4th)— search warrant—false information in affidavit—failure to show bad faith

Defendant failed to show that a search warrant was invalid and that evidence seized thereunder was inadmissible under *Franks v. Delaware*, 438 U.S. 154 (1978) and N.C.G.S. § 15A-978 on the ground facts necessary to establish probable cause were asserted in the affidavit either with knowledge of their falsity or with a reckless disregard for the truth where the affiant, an SBI agent, testified at the hearing on defendant's motion to suppress that the vast majority of information set forth in the affidavit was gleaned from discussions with other law officers who had talked

directly with witnesses, and other evidence presented by defendant at the hearing only served to contradict assertions contained in the affidavit but failed to show bad faith by the affiant.

Am Jur 2d, Searches and Seizures §§ 119, 120.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

4. Evidence and Witnesses § 657 (NCI4th)— search warrant—motion to suppress—knowing falsehoods in affidavit—deposition inadmissible

In a hearing on a motion to suppress evidence seized pursuant to a search warrant on the ground that the affidavit contained known falsehoods, the trial court properly refused to admit the deposition of a witness to illustrate contradictions between the affidavit and his deposition testimony where defendant conceded that the deposition did not state that the witness did not make the statements attributed to him in the affidavit, and the deposition did not tend to establish knowing falsehoods or reckless disregard for the truth by the affiant. Even if the trial court erred by excluding the deposition, such error was harmless where the affidavit was sufficient to establish probable cause for issuance of the search warrant even if the portions of the affidavit that defendant claims are inconsistent with the deposition are stricken.

Am Jur 2d, Searches and Seizures §§ 119, 120.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

5. Searches and Seizures § 19 (NCI4th)— standing to contest search—withdrawal of motion to suppress—ruling deemed correct

The trial court's determination that defendant did not have standing to contest the search of a storage building used by his natural and "adopted" families will be deemed correct where defendant, after attempting briefly to establish standing, withdrew his motion to suppress the evidence seized during the search and ultimately decided not to contest the search.

Am Jur 2d, Evidence § 646.

6. Criminal Law § 120 (NCI4th Rev.)— discovery—failure to produce written statement—statement lost—refusal to strike testimony

The trial court did not err by refusing to strike the testimony of a witness in a kidnapping and murder trial as a sanction for the State's failure to produce the written statement of the witness pursuant to a court order where the record shows that the State diligently attempted to locate the written statement but that it was lost, and the State thus did not "elect" not to comply with the court's order in violation of N.C.G.S. § 15A-903(f)(4). Moreover, defendant was not prejudiced by the loss of the statement where the witness's testimony related only to her discovery of the crime scene upon arriving at work and seeing the male victim's car heading in a direction away from the scene; notes taken by an officer on the morning of the crimes show that the witness made statements consistent with the trial testimony; and defendant could not have shown that the witness made a prior inconsistent statement.

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

Sanctions against defense in criminal case for failure to comply with discovery requirements. 9 ALR4th 837.

7. Appeal and Error § 150 (NCI4th)— double jeopardy—failure to preserve issue for appeal

Defendant failed to preserve for appellate review the issue as to whether he was placed in double jeopardy when he was convicted and sentenced for two murders and his convictions for kidnapping the same victims were elevated to first-degree based on his failure to release the victims in a safe place because they were murdered where defendant failed to object at trial to the submission of first-degree kidnapping on the ground of double jeopardy.

Am Jur 2d, Appellate Review § 614.

8. Constitutional Law § 202 (NCI4th)— conviction of murder—elevation of kidnapping based on murder—not double jeopardy

Defendant did not receive multiple punishments for the same offense in violation of the prohibition against double jeopardy when he was convicted and sentenced for two murders and his convictions for kidnapping the same victims were elevated to first-degree based on his failure to release the victims in a safe

place because they were murdered since each crime required proof of an element not required to be proved in the other crime.

Am Jur 2d, Criminal Law § 266.

9. Criminal Law § 878 (NCI4th Rev.)— jury's failure to return complete verdict—further deliberation—inability to agree—instructions on duties of jurors

In a murder prosecution wherein the jury returned a verdict finding defendant guilty of first-degree murder based upon the felony murder rule but left blank its finding as to first-degree murder based upon premeditation and deliberation, the trial court sent the jury back to the jury room to continue deliberation on the charge of first-degree murder based upon premeditation and deliberation, and the jury advised the court shortly thereafter that it had not reached unanimity based on this charge, the trial court did not then coerce a verdict in favor of the prosecution by its instructions on the duties of the jurors during deliberations, although the court did not give all of the instructions listed in N.C.G.S. § 15A-1235(b) verbatim, where the instructions contained the substance of the statutory instructions in that they fairly apprised the jurors of their duty to reach consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict.

Am Jur 2d, Trial §§ 1580, 1588, 1593-1595.

10. Criminal Law § 878 (NCI4th Rev.)— deadlocked jury—substance of statutory instructions

When the trial court perceives the jury may be deadlocked or may be having some difficulty reaching unanimity, and the trial court in its discretion gives further instruction, no clear violation of N.C.G.S. § 15A-1235(b) will be found to exist as long as the trial court gives the substance of the four instructions found in that statute. Any contrary inference from *State v. Williams*, 315 N.C. 310 (1986), is disavowed.

Am Jur 2d, Trial §§ 1580, 1588, 1593-1595.

11. Criminal Law § 467 (NCI4th Rev.)— prosecutor's closing argument—statements supported by evidence or inferences from evidence—no denial of fair trial

Statements in the prosecutor's closing argument in a kidnapping and murder trial that defendant had sex with the female vic-

tim the night she was kidnapped, that the male victim witnessed the assault and suffered lacerations to his face as he reacted to it, that the victims suffered extreme indignities as explained in a book, and that the victims would not be bearing any children for their parents were supported by the evidence or were reasonable inferences drawn from the evidence and did not deprive defendant of a fair trial.

Am Jur 2d, Trial §§ 632-639.

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 Strickland, J., at the 17 October 1994 Criminal Session of Superior Court, Onslow 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 convictions was allowed 19 August 1996. Heard in the Supreme Court 11 December 1996.

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

Nora Henry Hargrove for defendant-appellant.

LAKE, Justice.

On 7 January 1992, defendant was indicted for two counts of first-degree murder and two counts of first-degree kidnapping. On 19 July 1994, an additional indictment was issued for second-degree burglary, felonious larceny, and felonious possession of stolen goods. Also on 19 July 1994, defendant was indicted for felonious breaking and entering, felonious larceny, felonious possession of stolen goods and safecracking. Defendant was tried capitally to a jury at the 17 October 1994 Criminal Session of Superior Court, Onslow County, Judge James R. Strickland presiding. On 15 November 1994, the State changed the charge of first-degree burglary to breaking and entering and dismissed all possession of stolen goods charges.

The jury found defendant guilty of both murders on the basis of malice, premeditation, and deliberation and under the felony murder rule; it additionally found defendant guilty of two counts of felonious breaking and entering, two counts of felonious larceny, two counts of first-degree kidnapping and one count of safecracking. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the

jury was unable to reach a unanimous decision as to sentencing in either murder case. Accordingly, Judge Strickland sentenced defendant to a mandatory life sentence for each of the first-degree murder convictions. Judge Strickland also sentenced defendant to consecutive terms of imprisonment totaling 130 years for the remaining convictions. For the reasons stated herein, we conclude that the defendant received a fair trial, free of prejudicial error.

The State's evidence tended to show that in July of 1990, the two victims, Scott Gasperson and Phyllis Aragona, were living together and were engaged to be married. Gasperson was the manager of Woodson Music and Pawn Store, located in the Piney Green Shopping Center, in Jacksonville, North Carolina, one of seven Woodson stores owned by Gasperson, Inc. Aragona managed one of the other Woodson stores.

On the morning of 12 July 1990, Kimberly Paulson was scheduled to work at the Piney Green store and was to open the store with Gasperson at 9:00 a.m. She was running late, however, and on her way to the store she saw Gasperson's car, a red Chevrolet Baretta, with two people inside heading in a direction away from the store about a mile from the Piney Green location. She arrived at the store at approximately 9:10 a.m. and knocked on the locked front door. There was no answer. The metal gate to the front door was open, and upon looking inside through the glass door, Paulson saw a jewelry box on the floor and a light on in the back of the store. She left the store and went to the home of Donald Whalen, the assistant manager of the Piney Green store, to tell him what she had observed.

Whalen went to the store and found it had been ransacked. Upon entering the store, he noticed that the alarm had been deactivated, that the safe was open, and that items were spread all over the store. An accounting of merchandise revealed that approximately $69,606.39 in cash and jewelry were missing from the store. As well as the scattered inventory, Whalen noticed pieces of duct tape on the floor. Whalen called the police, who conducted an analysis of the scene. In addition to the above-described scene, the police also found a bloodstained pillowcase in the store.

Shortly thereafter, a Sheriff's Department employee went to the residence of Gasperson and Aragona in an attempt to locate them. The back door of the residence was ajar. After knocking and calling for Gasperson and Aragona and after receiving no reply, a room-to-room search was conducted of the residence. A plastic wrapper from

a package of duct tape was found in the toilet, and a piece of duct tape was located on the bed in the master bedroom. Further examination revealed that the front door and lock had been damaged from being pried open. Also, numerous personal items were missing from the residence, including Aragona's jewelry and Gasperson's shotgun, camcorder and comic book collection.

A search for Gasperson's car on 12 July 1990 revealed the car and Gasperson's body in a wooded area approximately seven to nine miles from the store. His body was found lying in a fetal position on the ground between the open car door and the car body, with a large wound to the left side of his head. There was duct tape in his hair, and a homemade "hood" was over his head. There were two types of duct tape wrapped around Gasperson's head, one with cloth-backing reinforcement, the other a cheaper brand without the reinforcement. An autopsy revealed that Gasperson had been killed by a shotgun blast to the head at point-blank range.

Aragona's body was not located until almost nine months later. On 7 April 1991, the skeletal remains of Phyllis Aragona were recovered from a wooded area near the intersection of Highways 421 and 53 in Pender County and identified by dental records. Authorities noted the presence of scattered skeletal remains, pieces of duct tape connected to hair, a .380 automatic shell casing and numerous items of clothing nearby. An autopsy revealed that Aragona died from a single gunshot wound to the head. The pathologist who performed the autopsy found metallic bullet fragments in the skull and turned them over to authorities for analysis.

Jeannette Ocasio, the daughter of Maria Monserrate, defendant's girlfriend, testified at trial. She stated that the defendant, the defendant's son Orlando, and Maria Monserrate were living in a trailer at Lot 41, Pelletier Mobile Home Park with other family members in July 1990. On the afternoon of 12 July 1990, defendant, Monserrate and Orlando picked up Ocasio from work in their blue Ford Thunderbird. On the way home, they stopped at a gas station, where defendant and Monserrate both gave Ocasio several hundred dollars in cash from a "wad of money" they were carrying. Monserrate told Ocasio that the three of them were leaving for Florida because they had committed a robbery and they thought someone had seen them. From the gas station, they went to a storage unit, where clothes, a bag full of gold jewelry and a gun were removed. Ocasio was dropped off at a local motel, and the three others left. Ocasio received a phone call from

Monserrate on 18 July 1990 inquiring about the situation back in North Carolina. Later that day, the authorities questioned Ocasio, and Ocasio told them everything she had seen and heard.

Pursuant to a search warrant, authorities conducted a search on 18 July 1990 of the trailer at Lot 41, Pelletier Mobile Home Park in Jacksonville, the residence of the defendant and Maria Monserrate. Captain Keith Bryan of the Onslow County Sheriff's Department testified that upon entering the trailer, he saw a poster with a piece of duct tape wrapped around it, and he found another piece of duct tape under the couch. Proceeding down the hallway, Bryan saw a pillowcase with a floral pattern that "matched completely" the curtains and sheets in Gasperson's and Aragona's bedroom. Located on a chest in the bedroom was a duct tape label identical in manufacturer and price tag to the label recovered from the toilet of the victims' residence. Inside the chest of drawers, Bryan seized two .380 automatic pistol bullets and one shotgun shell. Also in the dresser was a partial roll of the cheaper duct tape identical to the cheaper duct tape found on Gasperson's head and on the victims' bed. Bryan also found three homemade "hoods" similar to the hood on Gasperson's head, as well as a pillow on which a stain matched the pattern, color and location of the stain found on the pillowcase in Woodson Music and Pawn. Bryan saw a screwdriver on a shelf in the closet; the unusual shape of the end matched the markings he had observed on the door of the victims' residence. Bloodstained towels were found in a basket of dirty clothes. The blood was later identified as type AB, the most rare blood type, and the same blood type as Gasperson, but different from all of the trailer's residents. Bryan found several more pieces of the same duct tape and a partially burned business card from Woodson Music and Pawn in a garbage bag outside the trailer.

The same day, 18 July 1990, Bryan conducted a search pursuant to a warrant of unit C-23 at Autry's Mini Storage south of Jacksonville. Bryan recovered a tennis-type bag that was similar to one known to be missing from one of the victims' cars. Inside the bag was a claim ticket for film with Gasperson's name on it. Other items in the bin matched descriptions of items known to be missing from the victims' cars and residence.

The evidence established that the defendant, Monserrate and Orlando drove to Miami and then fled by boat to the Dominican Republic. Defendant's blue Ford Thunderbird was recovered in Florida. Defendant and Monserrate were arrested in December 1991.

While in jail, defendant gave a statement to Onslow County authorities about the crimes and helped them locate a Mossburg shotgun used in the crimes. Also while in jail, defendant talked to a fellow inmate, Arthur Bollinger, and disclosed that he had been involved in the killings. Specifically, he told Bollinger that he had shot "the girl" and that his son Orlando had shot "the boy." He also told Bollinger that the girl had been "beaten up" and sexually assaulted, and that he and his son had sex with her several times before she was shot. Defendant told Bollinger that he had taken officers to the location of the shotgun used to shoot Gasperson as well.

Defendant presented no evidence.

In his first assignment of error, defendant argues that the trial court erred by denying his motion to suppress his statement made to law enforcement authorities, and the shotgun subsequently recovered, because defendant was denied his right to counsel, right to silence, and right to due process as guaranteed by the state and federal constitutions. This is based on defendant's assertion that he did not initiate the conversation on 26 June 1992 to discuss his case, but only to talk about plea bargain arrangements for family members. Defendant claims that he indicated in his note to the sheriff that he would not talk about the case until the following Monday in the presence of his attorney, and that the officers' refusal to honor this request resulted in the improper statements and evidence. We conclude that the findings of fact, which are supported by evidence in the record, and in turn sustain the conclusions of law, do not support defendant's argument.

[1] " 'The ultimate test of the admissibility of a confession is whether the statement was in fact voluntarily and understandingly made.' " *State v. Braxton*, 344 N.C. 702, 708, 477 S.E.2d 172, 175 (1996) (quoting *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982)). In order to ensure voluntariness and understanding, an accused is entitled, under the Fifth and Fourteenth Amendments, to have counsel present during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). *Miranda* enunciates a "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Fare v. Michael C.*, 442 U.S. 707, 719, 61 L. Ed. 2d 197, 209 (1979). Once the accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing merely that he responded willingly to further

police-initiated custodial interrogation, even if he has been again advised of his rights. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981). In such case, the accused may not be further interrogated by law enforcement officials until counsel has been made available to him unless the accused himself initiates further communication with the police. *Id.* However, the question of who initiated communication between a defendant and the authorities becomes relevant *only after* a defendant has requested counsel. *Id.*

On defendant's motion *in limine*, a pretrial hearing was conducted before Judge Strickland on 17 August 1994 to determine the admissibility of defendant's custodial statements. Evidence was presented by the State and the defendant. Defendant himself testified at the hearing. At the close of the evidence, Judge Strickland made findings of fact and conclusions of law that defendant's statements were made freely, understandingly and voluntarily; that he freely, knowingly, intelligently and voluntarily waived his rights under *Miranda*; that he agreed to speak with the officers without the presence of an attorney; and that there was no violation of defendant's right to counsel or other constitutional rights.

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). The trial court's findings of fact must be supported by the evidence, and the conclusions of law must be supported by the findings of fact. *State v. Payne*, 327 N.C. 194, 208-09, 394 S.E.2d 158, 166 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Further, the trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found. *Id.* at 209, 394 S.E.2d at 166.

[2] The evidence in the record from the motion hearing supports Judge Strickland'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. Just before 5:00 p.m. on Friday, 26 June 1992, defendant sent word, by a jailer, that he wanted to talk with Sheriff Brown. Brown, however, required a note from defendant before he would talk with him. Accordingly, defendant sent a note stating that he "need[ed] to speak with [Brown]," that it was "impor-

tant." Brown would still not talk with defendant until he signed the note, which defendant did. Brown immediately notified Major Freeman, who was working on the case, that defendant had asked to speak with Brown. Defendant was then brought to Sheriff Brown's office, and a discussion took place wherein defendant requested that their conversation be recorded. At the beginning of the conversation, defendant asked for Jacksonville Police Detective Candido Suarez, who spoke Spanish, to act as a translator. Even though defendant spoke English, he wished to converse more fluently. Before Suarez arrived, defendant was tape recorded as saying the following:

> Okay, now I'll tell the Sheriff Brown and the Major Freeman my name is Gary Fernandez. I feel now that I need to talk with the and major, the Major Freeman, District Attorney. District Attorney, Bill Andrews in person to person in reference my case and I telling now I don't need a lawyer for myself. I, I give me my authorization but I do not need a lawyer. You know. But I need to talk soon as possible for Bill Andrews and in front of the Sheriff Brown and Major Freeman as is possible one interpreter in English and Spanish.

Sheriff Brown contacted Prosecutor Andrews, who advised Brown that the code of ethics would not permit him to talk with defendant. When the tape concluded, the recorder was turned off, and all present waited for Suarez, the interpreter, to arrive. There was no further conversation until Suarez arrived.

The evidence then shows that, when Detective Suarez arrived around 6:00 p.m., Suarez advised Sheriff Brown and Major Freeman that defendant had an attorney. Sheriff Brown told the defendant, through the interpreter, that if defendant wanted to talk with them without his attorney present, he needed to write a note to that effect. Defendant did so. Thereupon, defendant was advised of his rights in Spanish, including his right to have counsel present, and he stated in response that he understood his rights. Defendant was familiar with these rights, having been advised of them approximately four times in the past. Defendant then read the waiver of his rights and signed it. Only then did defendant give his statement from which the location of the shotgun was revealed. As shown by the evidence, it is clear that defendant did not invoke his right to an attorney, and that the statement and resulting evidence were the product of a voluntary, intelligent and knowing waiver of defendant's *Miranda* rights. Thus, this assignment of error is overruled.

[3] In his second assignment of error, defendant contends that the search warrant issued for the search of the mobile home located at Lot 41, Pelletier Mobile Home Park was fatally flawed because it was based on an affidavit containing known falsehoods or made with a reckless disregard for the truth. Specifically, the defendant argues that several of the statements in the affidavit attributed to Timothy Snyder, the mobile home park maintenance man, were not made by Snyder, and that the deposition of another witness upon whom the affidavit was based, Miguel Angel Guzman, should have been admitted because it would have shown that statements attributed to Guzman also were not made. Defendant contends that because the search warrant was improperly obtained, the evidence seized from the mobile home should have been suppressed. We disagree.

The requirement that a search warrant be based on probable cause is grounded in both constitutional and statutory authority. U.S. Const. amend. IV; N.C.G.S. § 15A-244 (1988). Probable cause for a search is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender. *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984). It is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute "probable cause" anticipates a truthful showing of facts. *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L. Ed. 2d 667, 678 (1978). "Truthful," as intended here, "does not mean . . . that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." *Id.* at 165, 57 L. Ed. 2d at 678. Rather, "truthful" in this context means "that the information put forth is believed or appropriately accepted by the affiant as true." *Id.* "[R]esolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 689 (1965). *Franks* held that where a search warrant is issued on the basis of an affidavit containing false facts which are necessary to a finding of probable cause, the warrant is rendered void, and evidence obtained thereby is inadmissible if the defendant proves, by a preponderance of the evidence, that the facts were asserted either with knowledge of their falsity or with a reckless disregard for their truth. *Franks*, 438 U.S. at 155-56, 57 L. Ed. 2d at 672; *State v. Louchheim*, 296 N.C. 314, 320-21, 250 S.E.2d 630, 635, *cert. denied*, 444 U.S. 836, 62 L. Ed. 2d 47 (1979).

There is a presumption of validity with respect to the affidavit supporting the search warrant. *Franks*, 438 U.S. at 171, 57 L. Ed. 2d at 682. Before a defendant is entitled to a hearing on the issue of the veracity of the facts contained in the affidavit, he must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit. *Id.* at 155-56, 57 L. Ed. 2d at 672. Upon any evidentiary hearing, the only person whose veracity is at issue is the affiant himself. *Id.* at 171, 57 L. Ed. 2d at 682. A claim under *Franks* is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith. *State v. Winfrey*, 40 N.C. App. 266, 269, 252 S.E.2d 248, 249, *disc. rev. denied*, 297 N.C. 304, 254 S.E.2d 922 (1979). N.C.G.S. § 15A-978 codifies the rule enunciated in *Franks* and sets forth the following:

> (a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder *by contesting the truthfulness of the testimony showing probable cause for its issuance.* The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in *good faith* the circumstances relied on to establish probable cause.

N.C.G.S. § 15A-978(a) (1988) (emphasis added).

In this case, the defendant moved to suppress evidence seized from his residence on the ground that the information used to obtain the search warrant was based on an unreliable, incompetent source. The trial court determined that defendant's initial showing was sufficient to require a hearing under the authority of *Franks*. At the motion hearing, the affiant, Special Agent Tony Cummings of the North Carolina State Bureau of Investigation, testified to the information upon which his affidavit in support of the search warrant was based. The vast majority of the information was gleaned from discussions with other law enforcement officers who had talked directly with witnesses. Information attributed to Snyder was relayed by Major Doug Freeman of the Onslow County Sheriff's Department. Most of the information from Guzman was related by Detective Mack Whitney, also of the Onslow County Sheriff's Department. The affidavit noted the secondhand sources of the information, and

Cummings affirmed the attributions during the motion hearing. Snyder also testified at the hearing. Portions of his testimony matched the information in the affidavit, portions contradicted the affidavit and portions revealed Snyder's inability to remember exactly what happened. Next, defendant attempted to introduce the deposition of Guzman that had been taken two years after the affidavit (and two years prior to the trial) due to Guzman's failing health related to AIDS. The State objected, arguing that the deposition did not properly address the *Franks* issue of the affiant's belief in the truthfulness of the information contained in the affidavit. After extensive argument by all parties, the trial court sustained the State's objection and refused to admit Guzman's deposition. The trial court went on to hold that the search warrant had been properly granted.

After a careful review of the record, we hold that the trial court was correct in its determination that a sufficient showing was not made under *Franks* to warrant excluding the evidence seized from Lot 41, Pelletier Mobile Home Park. Evidence presented by defendant at the motion hearing only served to contradict assertions contained in the affidavit. Defendant presented no evidence that the affiant had alleged such facts in bad faith such that they were knowingly false or in reckless disregard of the truth. Thus, defendant failed to meet his burden of proof under *Franks*.

[4] We further hold that the trial court acted properly in not admitting the deposition of Guzman. Defendant sought to introduce Guzman's deposition to illustrate contradictions between the information in the affidavit and Guzman's subsequent testimony through deposition. However, when asked directly by the trial court, defendant conceded that nowhere in his deposition did Guzman testify that he did not say the things that were attributed to him in the affidavit. Since the only value of the deposition testimony was to establish contradictions in the facts underlying the affidavit, and not to establish knowing falsehoods or reckless disregard of the truth on the part of the affiant, it was not relevant to the establishment of a *Franks* claim and was properly excluded. Defendant submits that under such an application, defendants will never be able to establish a *Franks* violation. This is not the case. If a defendant puts forth evidence establishing that a witness never said what was attributed to him or her in the affidavit, then the finder of fact is free to find such testimony persuasive and thereby exclude a search pursuant to *Franks*. The simple fact is that defendant failed to do so in this case.

Assuming *arguendo* that the trial court erred by excluding Guzman's deposition, such error was harmless. In the deposition, Guzman testified that he overheard defendant and his son Orlando discuss abducting Gasperson and Aragona and robbing the pawn shop on at least two occasions prior to the actual crimes. He stated that defendant and Orlando tried to get him to take part in the robbery. Guzman further revealed that defendant told him about a month before the robbery that he would be leaving town and that Guzman could have all of the furniture in his trailer for one hundred dollars. Guzman also testified that he was able to connect defendant to the murders because he heard defendant talking about the plan previously. He stated that defendant came to his house on the day after the robbery, and that he gave defendant's name to the authorities because defendant's appearance at Guzman's house that day made Guzman fearful for his life. Based on this evidence, the affidavit is sufficient to establish probable cause even if the portions of the affidavit that defendant claims are inconsistent with the deposition are stricken. *Louchheim*, 296 N.C. at 320-21, 250 S.E.2d at 636. Thus, any error alleged as a result of not admitting Guzman's deposition was harmless.

[5] Defendant next assigns error to the trial court's ruling that defendant did not have standing to contest the search of the storage unit used by both his natural and "adopted" family. Defendant contends that he had an expectation of privacy in the storage unit because of the closeness of the family situation and the location of many of his personal items in the unit. Thus, defendant maintains the trial court should have granted him standing to challenge the evidence seized. We determine that defendant's contentions are without merit.

"An individual's standing to claim the protection of the Fourth Amendment depends upon whether the place invaded was an area in which such individual 'had a reasonable expectation of freedom from governmental intrusion.' " *State v. Alford*, 298 N.C. 465, 471, 259 S.E.2d 242, 246 (1979) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 368, 20 L. Ed. 2d 1154, 1159 (1968)). "Absent ownership or possessory interest in the premises or property, a person has no standing to contest the validity of a search." *State v. Greenwood*, 301 N.C. 705, 707-08, 273 S.E.2d 438, 440 (1981). In this case, defendant made a motion to suppress the evidence seized during a search of the storage unit. The trial court first addressed whether defendant had standing to contest the search. After attempting briefly to establish standing,

defendant withdrew his motion and ultimately decided not to contest the search of the storage unit. As a result, the trial court's determination that defendant did not have standing was correct in light of defendant's concession on this issue. Defendant's assignment of error is overruled.

[6] In his next assignment of error, defendant asserts that the trial court erred by denying defendant's motions for sanctions after the State failed to produce the written statement of witness Kimberly Paulson. Defendant argues that the trial court should have stricken the testimony of witness Paulson because defense counsel was unable to cross-examine her regarding her written statement, depriving defendant of his rights to confrontation and due process. We find defendant's argument unpersuasive.

N.C.G.S. § 15A-903(f)(4) governs the sanctioning of the State regarding compliance with orders to produce evidence. The statute provides in pertinent part that if the State "*elects* not to comply" with the order, "the court shall strike from the record the testimony of the witness . . . unless the court determines that the interests of justice require that a mistrial be declared." N.C.G.S. § 15A-903(f)(4) (1988) (emphasis added). The "elects" language in the statute indicates that this section only applies to willful failures to produce evidence.

In this case, the record does not establish that the State willfully "elected" not to comply with the order in violation of N.C.G.S. § 15A-903(f). In fact, the record shows the State diligently and repeatedly attempted to locate witness Paulson's written statement in its files. The statement, however, was simply lost. Defendant acknowledged this during *voir dire* when he agreed that the State was not "refusing" to turn over Paulson's statement. The trial court's ruling was correct, as a result.

Moreover, defendant cannot show any prejudice from not having the statement. Paulson's testimony was related to only two relevant facts, her discovery of the crime scene upon arriving at work and seeing Gasperson's red Baretta heading away from the direction of the store. The purpose for obtaining the statement would be to examine it for prior inconsistent statements or omissions regarding these facts. However, notes taken by Major Freeman on the morning of the crimes show that Paulson made statements consistent with her testimony shortly after her discovery of the crime scene. Defendant could not have shown that Paulson made a prior inconsistent statement, and therefore he was not prejudiced by the loss of Paulson's state-

ment. As to defendant's assertions of constitutional error, such arguments were not raised at trial and are thereby waived on appeal. *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), ("Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court."), *cert. denied*, — U.S. —, 135 L. Ed. 2d 1080 (1996); N.C. R. App. P. 10(b)(1). Defendant's assignment of error on this issue is thus overruled.

In his next assignment of error, defendant argues that he received multiple punishments for the same offense in violation of the prohibition against double jeopardy. Specifically, he contends that he was punished twice for the murders of Gasperson and Aragona, once when convicted and sentenced for their murders and again when the kidnapping conviction was elevated to first-degree based on the murders. This is based on his contention that the elevating element of first-degree kidnapping—that the victims were not released in a safe place (because they were killed)—was already the subject of the murder convictions and cannot also be the catalyst for elevating the kidnapping conviction. We disagree.

[7] A thorough review of the record reveals that defendant did not object at trial to the submission of first-degree kidnapping on the grounds asserted here.

> 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). Accordingly, defendant has failed to preserve this issue for appellate review.

[8] Assuming *arguendo* that this issue had been preserved for appellate review, we conclude that double jeopardy does not preclude punishing defendant for first-degree kidnapping 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). Nonetheless, this Court in *Gardner* noted that "even if the elements of the two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended." *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709 (citing, *e.g.*, *Missouri v. Hunter*, 459 U.S. 359, 74 L. Ed. 2d 535 (1983); *Albernaz v. United States*, 450 U.S. 333, 67 L. Ed. 2d 275 (1981)); *accord State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994). Such an analysis of legislative intent is not necessary in this case, however, because the offenses at issue are not the same. This Court recognized in *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), that:

> [E]ven where evidence to support two or more offenses overlaps, *double jeopardy does not occur unless the evidence required to support the two convictions is identical.* If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

Murray, 310 N.C. at 548, 313 S.E.2d at 529 (emphasis added); *accord State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). This is traditionally referred to as the *Blockburger* test, after the case of *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), in which the Supreme Court stated:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one[] is whether each provision requires proof of a fact which the other does not.

Id. at 304, 76 L. Ed. at 309.

In this case, each crime charged contains an element not required to be proved in the other. First-degree murder is the unlawful killing of another human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17 (1993); *State v. Watson*, 338 N.C. 168, 449 S.E.2d 694 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995), *overruled on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). First-degree kidnapping is (a) the unlawful, nonconsensual confinement, restraint or removal of a person for the purpose of committing certain specified acts; and (b) either the

failure to release the person in a safe place, or the injury or sexual assault of the person. N.C.G.S. § 14-39 (1993); *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540 (1984). First-degree kidnapping 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 kidnapping of and failure to release the victim in a safe place or condition. "It is clear then, that here at least one essential element of each crime is not an element of the other. We find no merit, therefore, in the defendant's contentions that he was subjected to double jeopardy." *Murray*, 310 N.C. at 548-49, 313 S.E.2d at 529.

[9] Defendant's next assignment of error addresses instructions given the jury regarding its duties during deliberations. After being properly charged, the jury retired to deliberate. It indicated subsequently that it had reached unanimous verdicts in all cases. However, a review of the verdict sheets by the trial court revealed that the jury had found defendant guilty of first-degree murder based upon the felony murder rule, but had left blank its finding as to first-degree murder based upon premeditation and deliberation. After taking the verdicts on all other offenses, the trial court sent the jury back to the jury room to continue deliberation on the charge of first-degree murder based upon premeditation and deliberation. The jury sent a note to the trial court shortly thereafter advising that it had not reached unanimity on this charge. Upon the jury's return to the courtroom, the trial court instructed as follows:

> Mr. Ballard [foreman], as to your inquiry, which you stated that the jury is not unanimous as to its response relative to the "A" section of the verdict sheets in both cases . . . and you made inquiry do we enter "no" in that section, let me convey this to you, Ladies and Gentlemen of the Jury. That as to that particular place for the answer in 1A, your foreman has informed the court that you have so far been unable to agree upon a verdict. The court does want to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences if you can without the surrender of conscientious conviction. But no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict. I will now let you resume your deliberations and see if you can reach verdicts in, relative to 1A of those particular cases.

The jury returned soon thereafter with a unanimous verdict of guilty of first-degree murder on the basis of premeditation and deliberation. Defendant contends that the trial court's instructions were erroneous under *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), because the trial court failed to give all of the jury instructions listed in N.C.G.S. § 15A-1235(b), the guidelines regarding the duty to deliberate. The crux of such argument is that instructions not following the statute verbatim might tend to coerce a jury into a verdict in favor of the prosecution. We disagree with defendant's contention.

"[I]t has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985). The statutory guidelines in N.C.G.S. § 15A-1235, addressing the trial court's obligations in connection with a deadlocked jury, provide:

> 15A-1235. Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge *may* give an instruction which informs the jury that:
>
> *(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;*
>
> *(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;*
>
> *(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and*
>
> *(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.*

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and *may* give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C.G.S. § 15A-1235 (1988) (emphasis added). In *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980), we held that this statute is the "proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict." *Id.* at 608, 268 S.E.2d at 809. However, "[i]t is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to N.C.G.S. § 15A-1235(c)." *Williams*, 315 N.C. at 326-27, 338 S.E.2d at 85. This is because § 15A-1235(c) is permissive rather than mandatory. *Id.* at 326, 338 S.E.2d at 85; *Peek*, 313 N.C. at 211, 328 S.E.2d at 253. The plain language of the statute provides that the trial court "*may* give or repeat the instructions provided in subsections (a) and (b)." N.C.G.S. § 15A-1235(c) (emphasis added).

An examination of the circumstances under which the instructions were made, and of the instructions themselves, establishes that the trial court's instructions in this case merely served as a catalyst for further deliberations and did not force a verdict. The jury left blank the verdict on the issue of premeditation and deliberation. The trial court returned the jury for further deliberation. After a short time, the jury indicated it had not reached a verdict. The jury did not, however, indicate that it was hopelessly deadlocked. The trial court then gave the instruction at issue, and the jury deliberated further on the issue of premeditation and deliberation alone. The trial court's instructions did not suggest that jurors should surrender their beliefs or include extraneous references to the expense and inconvenience of another trial, as has been found erroneous by this Court. *See, e.g., State v. Lipfird*, 302 N.C. 391, 276 S.E.2d 161 (1981); *State v. Alston*, 294 N.C. 577, 243 S.E.2d 354 (1978). Subsequently, the jury was able to reach a verdict without undue delay and also without unreasonable haste. These circumstances do not evidence the types of judicial conduct held to be coercive by our previous rulings.

Moreover, by comparing the trial court's instructions with those contained in Section 15A-1235 above, it is clear that the trial court's

instructions contained the substance of the statutory instructions. The instructions fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict. Thus, these instructions cannot be said to have forced a verdict in favor of the prosecution. As such, the instructions are not violative of the statute or this Court's precedent in *Williams*.

[10] Defendant's suggestion that the trial court must read N.C.G.S. § 15A-1235(b) verbatim is misplaced. Such is not required by the express language of the statute or by *Williams*. In *Williams*, Justice Meyer wrote that "whenever the trial judge gives the jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he must give all of them." *Williams*, 315 N.C. at 327, 338 S.E.2d at 85. No authority mandates a word-for-word recital of the statute. Of course, "[c]lear violations of the procedural safeguards contained in G.S. 15A-1235 cannot be lightly tolerated by the appellate division. Indeed, it should be the rule rather than the exception that a disregard of the guidelines established in the statute will require a finding on appeal of prejudicial error." *Easterling*, 300 N.C. at 609, 268 S.E.2d at 809-10. However, in situations where the trial court perceives the jury may be deadlocked or may be having some difficulty reaching unanimity, and the trial court in its discretion gives further instruction, no "clear violation" of the statute will be found to exist as long as the trial court gives the substance of the four instructions found in N.C.G.S. § 15A-1235(b). Any inference from *Williams* to the contrary is disavowed. This assignment of error is overruled.

[11] In his final assignment of error, defendant contends that the trial court erred by failing to sustain objections to and by failing to intervene *ex mero motu* to correct certain jury arguments made by the State on closing argument. During closing argument, the prosecutor argued to the jury that the defendant had sex with the female victim the night she was kidnapped, and that the male victim witnessed the assault and suffered lacerations to his face as he reacted to it. The prosecution also gave a description of the indignities suffered by a murder victim as described in a book and asked the jurors to remember that the victims would not be bearing any grandchildren for their parents. Defendant objected at trial to the arguments regarding the lacerations and the indignities suffered by the victims. Defendant asserts that the trial court erred by failing to sustain

defendant's objections to these arguments on the ground that they were not supported by competent evidence. Defendant did not object to the arguments regarding the sexual assault and the fact there would be no grandchildren. Defendant submits that the trial court erred by failing to intervene *ex mero motu* to correct these arguments since the arguments were made solely to elicit mercy, pity and a sense of obligation to the victims' families from the jury.

In *State v. Worthy*, 341 N.C. 707, 462 S.E.2d 482 (1995), this Court summarized the law governing closing arguments:

> It is well settled that arguments of counsel rest within the control and discretion of the presiding trial judge. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992); *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). In the argument of hotly contested cases, counsel is granted wide latitude. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. While it is not proper for counsel to "travel outside the record" and inject his or her personal beliefs or other facts not contained within the record into jury arguments, or place before the jury incompetent or prejudicial matters, counsel may properly argue all the facts in evidence as well as any reasonable inferences drawn therefrom. *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975).
>
> > Additionally, as this Court has previously pointed out, "for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " In order to reach the level of "prejudicial error" in this regard, it now is well established that the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process."
>
> *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40 (citations omitted), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Moreover, "prosecutorial statements are not placed in an isolated vacuum on appeal." *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

Worthy, 341 N.C. at 709-10, 462 S.E.2d at 483-84. Also, alleged error in the prosecution's arguments must be evaluated in the context of the

defendant's arguments. *State v. Gladden*, 315 N.C. 398, 423, 340 S.E.2d 673, 689, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Finally, where a party does not object to a jury argument, the allegedly improper argument must be so prejudicial and grossly improper as to interfere with defendant's right to a fair trial in order for the trial court to be found in error for failure to intervene *ex mero motu*. *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995).

When measured by these standards, a thorough examination of the record establishes that the prosecution's statements in this case do not rise to such a level as to constitute an interference with defendant's right to a fair trial. Regarding the argument that the defendant had sex with Aragona, the evidence that defendant told a fellow inmate that he and his son had sex with Aragona supports such an argument. The argument that Gasperson suffered lacerations during his reaction to the assault of Aragona was a permissible, reasonable inference drawn from the evidence of sexual assault and the presence of lacerations on the face of Gasperson. The reference to the book about indignities suffered by murder victims was dropped immediately after objection. However, the evidence of Gasperson's being bound in a fetal position and shot in the head, of Aragona's being sexually assaulted and shot in the head, of Aragona's remains being scattered in the woods, of their possessions being taken by defendants, and of their most private spaces becoming the subject of public analysis supports the argument that they suffered extreme personal indignities as murder victims. Finally, the argument that their parents would not have grandchildren because of the killings was factually undeniable, and the point was not belabored by the prosecution. Thus, we hold that the prosecution's arguments did not rise to such a level as to deny defendant due process of law, and this assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JEFFREY P. DICKENS

No. 189A96

(Filed 9 May 1997)

1. Evidence and Witnesses § 1220 (NCI4th)— first-degree murder—defendant's statement to officers—probable cause to arrest—statement admissible

The trial court did not err by not suppressing a first-degree murder defendant's statements in their entirety for lack of probable cause for his arrest and interrogation where the evidence indicated that Woods told a Special Agent when arrested that he had an accomplice; his earlier questions to the Sanford Police Department during a 911 call about what would happen to an accomplice intimated the same and the officers therefore knew that Woods had not acted alone; their suspicions were confirmed when a witness informed an officer that Woods had told her that he and defendant had broken into the victim's home and that defendant had killed the victim; that information was relayed to other investigating officers, who had examined the body at the scene and determined that the victim had been beaten to death with a blunt object; and a detective saw a hammer in defendant's truck that he thought could have been the murder weapon. The officers had probable cause to believe defendant had participated in the murder and burglary and therefore to place him under arrest.

Am Jur 2d, Evidence § 752.

2. Evidence and Witnesses § 1224 (NCI4th)— confession—delay of four hours in appearance before a magistrate—confession admissible

The trial court did not err by not suppressing a first-degree murder defendant's statement where he was arrested at 9:50 p.m. and interrogated from 11:00 p.m. until 12:30 a.m.; warrants for his arrest were served between 1:30 and 2:00 a.m.; he was brought before a magistrate at 2:00 a.m.; and defendant contended that his statement should have been suppressed in its entirety because of the delay in taking him before a magistrate. The delay was four hours; a delay of four and one-half hours has been found not unreasonable or prejudicial. More importantly, defendant has failed to show that he would not have made an inculpatory statement absent the delay.

Am Jur 2d, Evidence §§ 732, 734.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases. 28 ALR4th 1121.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS sec. 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in presentment before magistrate. 124 ALR Fed. 263.

3. Searches and Seizures § 87 (NCI4th)— search warrant—blood samples from defendant—probable cause

The trial court did not err in a first-degree murder prosecution by failing to suppress blood samples drawn from defendant pursuant to a search warrant where defendant argued that there was no forecast of evidence that defendant's blood either constituted evidence of murder or would assist in identifying the perpetrator, but the affidavit signed by an agent to support the issuance of the warrant contained ample data to support the warrant and the cumulative effect of the information establishes that the blood samples seized from defendant provide evidence of the offense and the identity of the person participating in the crime.

Am Jur 2d, Searches and Seizures §§ 118, 119, 123, 125.

4. Homicide § 374 (NCI4th)— first-degree murder—sufficiency of evidence—acting in concert

The trial court did not err by instructing the jury in a first-degree murder prosecution that it could convict defendant on the basis of malice, premeditation, and deliberation under the theory of acting in concert where the evidence indicated that an accomplice, Woods, initially told defendant a story about being able to break into the victim's trailer without being caught; defendant suggested that they break in and steal something; they drove to the victim's trailer together, pried open window panes to the back door, and entered; and, when the victim discovered them, Woods grabbed her hands and forced her into the bedroom, whereupon defendant delivered the fatal blows. This evidence sufficiently indicates that the two men were acting together pursuant to a common plan.

Am Jur 2d, Homicide § 445.

5. Criminal Law § 473 (NCI4th Rev.)— first-degree murder—prosecutor's argument—comment on legal maneuvering

The trial court did not err during a first-degree murder prosecution by overruling defendant's objection to the prosecutor's argument that prosecutors don't normally enter into plea agreements "until all of the defense legal maneuvering is over" where the State had entered into a plea agreement with an accomplice by which he received two life sentences in exchange for his truthful testimony, defense counsel suggested during closing arguments that the accomplice's testimony was tainted because of the plea agreement, and the State argued in response that the defense lawyers had suggested that there was something amiss because the State waited until the eve of trial to enter into this agreement. The prosecutor was merely informing the jury that the timing of the plea agreement was normal and did not affect the veracity of Woods' testimony; there was no suggestion that defense counsel was lying to the jury or of an intention to disparage counsel's credibility.

Am Jur 2d, Trial §§ 497, 499, 566, 683, 684.

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

6. Jury § 35 (NCI4th)— first-degree murder—supplemental list of jurors three days before trial—no error

The trial court did not err during jury selection in a first-degree murder prosecution where a supplemental list of jurors was prepared three days before trial and defendant's motion that these jurors be discharged because N.C.G.S. § 9-5 requires that prospective jurors be selected for service at least thirty days prior to the session was denied. It is true that N.C.G.S. § 9-5 mandates that jurors be selected at least thirty days in advance of the scheduled session, but N.C.G.S. § 9-11 specifically allows a trial court to summon a special venire of jurors at any time and the thirty-day notice provision in N.C.G.S. § 9-5 therefore did not apply to the trial court's selection of a supplemental jury panel.

Am Jur 2d, Jury §§ 126-130.

7. Jury § 99 (NCI4th)— first-degree murder—jury selection—excusal of accepted juror—no additional peremptory challenge

The trial court did not err in a first-degree murder prosecution by failing to award defendant an additional peremptory challenge following the reexamination and excusal for cause of one of the supplemental jurors where the juror was initially passed by both sides before further examination revealed reasons supporting removal for cause. N.C.G.S. § 15A-1214(g) allows the trial court for good cause to examine and excuse a juror already accepted and provides that any replacement juror is subject to examination and challenge, but does not afford additional peremptory challenges. Indeed, the trial court is precluded from authorizing any party to exercise more peremptory challenges than specified by statute.

Am Jur 2d, Jury §§ 234, 235, 238-240.

8. Jury §§ 203, 206, 215 (NCI4th)— first-degree murder—jurors not excused for cause—having read newspaper accounts—related to state troopers—belief in capital punishment

The trial court did not abuse its discretion in a first-degree murder prosecution by failing to excuse two jurors for cause where the first admitted to reading about defendant's case in the newspaper, specifically noting the information concerning jury selection because she had been summoned for jury service, the court further discovered that this juror's son was a state trooper and her husband a retired state trooper, and the second juror was challenged based on her unequivocal statement that she believed in the death penalty and favored it as a punishment for first-degree murder. The record reveals that the first juror demonstrated a conscientious resolve to be fair and impartial and indicated that she had formed no opinion about defendant's guilt or innocence, and, while the second juror believed in the death penalty, she clearly stated that she could impose life imprisonment as punishment for first-degree murder and that she could follow the law with respect to the capital sentencing procedure.

Am Jur 2d, Jury §§ 266, 267, 279, 289, 304.

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

9. Searches and Seizures § 114 (NCI4th)— first-degree murder—search warrant—tires seized from defendant's vehicle—affidavit sufficient

The trial court did not err in a first-degree murder prosecution by not suppressing tires seized from defendant's vehicle where defendant argued that the warrant application lacked sufficient information to support probable cause for issuance of a search warrant. The affidavit accompanying the warrant application avers that police officers found tire tracks in the sand about twenty-five yards below the victim's trailer; plaster impressions of the tracks were taken; and an accomplice indicated that he and defendant drove to the victim's trailer in defendant's truck and parked the truck below the trailer on a sand driveway. These facts and circumstances create a reasonable ground to believe that the proposed search would reveal the presence of the objects sought and that those objects would aid in the apprehension or conviction of the offender.

Am Jur 2d, Searches and Seizures §§ 118-121, 123, 125.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

10. Evidence and Witnesses §§ 1700, 1704 (NCI4th)— first-degree murder—photographs of body at scene—autopsy photographs—admissible

The trial court did not abuse its discretion in a first-degree murder prosecution by permitting the State to introduce five autopsy photographs as well as six photographs of the body as found at the crime scene. The autopsy photographs were used to illustrate the testimony of the medical examiner and demonstrated with clarity the nature and placement of the wounds and supported the State's theory that the cause of the victim's death was repeated blows to the head with a blunt weapon. The crime scene photographs were introduced to illustrate the testimony of officers with respect to the crime scene and the position of the body.

Am Jur 2d, Evidence §§ 960-965.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

11. Evidence and Witnesses § 1209 (NCI4th)— first-degree murder—gestures and comments by defendant in jail—admissible

The trial court did not abuse its discretion in a first-degree murder prosecution by permitting a State's witness to testify about gestures and comments defendant made in jail where defendant contended that the testimony was unfairly prejudicial and of no probative value. Defendant's anger toward his visitor and threats to his accomplice constituted self-incriminating actions probative of defendant's awareness of his guilt.

Am Jur 2d, Evidence §§ 327, 328, 333, 763.

12. Evidence and Witnesses § 2811 (NCI4th)— first-degree murder—defendant's girlfriend—State permitted to lead—no abuse of discretion

The trial court did not abuse its discretion in a first-degree murder prosecution by permitting the prosecutor to lead a State's witness where the witness had been defendant's girlfriend for five years, did not wish to testify against him and was evasive in response to questions from the State, and the State informed the court that the witness was not cooperating and had refused to talk with prosecutors the day before she was to take the witness stand.

Am Jur 2d, Witnesses § 754.

13. Criminal Law § 1242 (NCI4th Rev.)— first-degree burglary—sentencing—nonstatutory mitigating factors—not found—no abuse of discretion

The trial court did not abuse its discretion by sentencing defendant to life imprisonment for first-degree burglary where the presumptive sentence is only fifteen years and defendant had requested that the court find nonstatutory mitigating factors regarding defendant's age, his support system in the community, and his positive employment history. The evidence in support of defendant's proposed nonstatutory mitigating factors all came from interested witnesses and substantially supported the statutory mitigator that defendant was a person of good character or had a good reputation in the community, which the court found. Defendant was sentenced under the Fair Sentencing Act, so that the Structured Sentencing Act and its statutory mitigating factors had no relevance.

Am Jur 2d, Criminal Law §§ 598, 599.

14. Evidence and Witnesses § 2047 (NCI4th)— first-degree murder—demeanor of witness during interview—testimony of detective—admissible

The trial court did not err in a first-degree murder prosecution by allowing a detective to testify about the demeanor of a State's witness, who was also defendant's girlfriend, during interviews with law enforcement officers where he testified that she was uncooperative and reluctant to answer questions the first time he talked with her and more open the second. N.C.G.S. § 8C-1, Rule 701 permits a lay witness to testify as to opinions or inferences which are rationally based on that witness's perceptions and are helpful to a clear understanding of the testimony or a determination of a fact in issue.

Am Jur 2d, Expert and Opinion Evidence §§ 26, 29-31, 53, 54.

15. Evidence and Witnesses § 887 (NCI4th)— first-degree murder—tape of 911 call—proof that call made—not hearsay

The trial court did not err in a first-degree murder prosecution by admitting a tape recording and transcript of a 911 call in which an accomplice called the Sanford Police Department and asked hypothetically "if two guys broke in a place, and one guy killed somebody right in there, how much time would that guy get that didn't do the killing?" The tape and transcript were not offered to prove the truth of the matter asserted, but that the 911 call was made.

Am Jur 2d, Evidence §§ 664, 665.

16. Evidence and Witnesses § 3027 (NCI4th)— first-degree murder—accomplice's prior violent conduct—excluded

The trial court did not err in a first-degree murder prosecution by excluding evidence of an accomplice's prior violent conduct based on N.C.G.S. § 8C-1, Rule 608 (b), which bars introduction of evidence of specific instances of conduct to attack or support the credibility of a witness, with a limited exception for evidence clearly probative of truthfulness or untruthfulness. Although defendant contends that the evidence was offered to show that it was the accomplice who actually inflicted the fatal blows, the conduct must be sufficiently similar to support a reasonable inference that the same person committed both the ear-

lier and the later acts and there is here no commonality between the proffered evidence and the events surrounding this murder.

Am Jur 2d, Witnesses §§ 901-904.

17. Evidence and Witnesses § 119 (NCI4th)— first-degree murder—accomplice's prior misconduct—properly excluded

The trial court did not err in a first-degree murder prosecution by excluding evidence of an accomplice's prior violent conduct where the alleged misconduct indicates only that the accomplice had in the past displayed aggression toward other men upon being provoked, not that he mercilessly beat to death an eighty-nine-year-old woman, and in no way exculpates defendant or provides any inconsistency with his guilt. It appears that defendant attempted to introduce the evidence to show conformity with past violent acts, the only purpose specifically prohibited by N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 587.

Admissibility of evidence of commission of similar crime by one other than accused. 22 ALR5th 1.

18. Evidence and Witnesses § 2750.1 (NCI4th)— first-degree murder—accomplice's prior violent acts—door not opened

The State did not open the door to evidence of an accomplice's prior violent conduct where a witness testified that she believed the accomplice when the accomplice said that defendant killed the victim, when the accomplice read to the jury a letter he had written to the victim's grandson in which he said he could not have done it, or when the State asked the accomplice if he had ever been convicted of any crimes. The statement of the witness does not raise the issue of the accomplice's prior violent conduct or reflect in any way upon the likelihood that the accomplice rather than defendant committed the murder, the statement in the letter referred not to the physical inability of the accomplice to kill the victim but to emotional ties to the victim and her family, and defendant may not avail himself of N.C.G.S. § 8C-1, Rule 609(a) because he sought to introduce instances of conduct rather than convictions.

Am Jur 2d, Evidence §§ 404, 408, 412-414, 417, 418, 421.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Bowen, J., at the 1 May 1995 Criminal Session of Superior Court, Harnett 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 of imprisonment entered upon his conviction for first-degree burglary was allowed 30 April 1996. Heard in the Supreme Court 12 November 1996.

Michael F. Easley, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Staton, Perkinson, Doster, Post, Silverman & Adcock, by Norman C. Post, Jr., and Jonathan Silverman, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder of eighty-nine-year-old Roseline Murphy. He was also tried for the first-degree burglary of Murphy. The jury found him guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule and recommended a sentence of life imprisonment. The trial court accordingly sentenced defendant to life imprisonment on the first-degree murder conviction and to life imprisonment for the first-degree burglary conviction, to run consecutive to the sentence for murder.

The State presented evidence that on the evening of 30 October 1993, after drinking beer and smoking marijuana, defendant and his friend David Woods went to a party. While at the party, Woods told defendant he had smoked crack cocaine with Gibbs Davenport behind Roseline Murphy's trailer three days before. Woods had dared Davenport to go into the trailer and bragged that he could go in without being caught; however, neither Davenport nor Woods went in the trailer at that time. After hearing the story, defendant suggested to Woods that they break into Roseline Murphy's trailer and steal something. Defendant and Woods left the party and drove to Murphy's trailer. Defendant had a hammer in his truck which he used to pry open the window panes of the back door of the trailer. As soon as they were inside, however, Murphy came out of her bedroom, apparently recognized Woods, and said, "Get out. Why are you here? Get out." Woods grabbed her hands and forced her back into the bedroom. Murphy told Woods she knew who he was, whereupon he told

her he was leaving. Defendant then walked into the bedroom and hit Murphy with the hammer. As Woods fled the trailer, he heard several thuds and gurgling noises coming from the bedroom. Defendant emerged from the trailer a short time later, and he and Woods left the premises. Defendant and Woods then drove to a known "crack house" and purchased crack cocaine.

The following day Woods told several people that he had "messed up" and that defendant had murdered Murphy after breaking into her home. Later, Woods placed a 911 call to the Sanford Police Department and asked, hypothetically, "If these two guys broke in a place, and one guy killed somebody right in there, how much time would that guy get that didn't do the killing?" The police traced the call to the home of Susan Davis. When they arrived at the Davis residence, Susan Davis told them Woods had used her phone. The police proceeded to Woods' trailer and placed him under arrest.

Marie Wilder was present when Woods was arrested. She told the police officers that defendant was the one who had committed the murder and that he was staying in Amy Smith's trailer. The officers went to Smith's trailer, found defendant, and placed him under arrest as well. Defendant's truck was impounded, and a hammer was seized from a tool belt found on the front seat.

Defendant waived his rights and gave a statement to Special Agent Paul Munson and Detective Jerry Lamm. Defendant initially stated that after the party he went straight to his girlfriend's house and fell asleep. Detective Lamm asked him if he remembered going to Murphy's trailer. Defendant replied "no" and then stated that he did not wish to answer any more questions. At this point Special Agent Mike East entered the room and told defendant that Woods was making a statement and that Agent East knew what had happened. Defendant stated that he wanted to talk to a lawyer. Agent East and Detective Lamm left the room. As Agent Munson was lifting his notebook and jacket from the floor, defendant asked if he could have water and time to think. Agent Munson gave defendant some water and left him alone for approximately five minutes. When Agent Munson reentered the room, he asked defendant if he wanted to talk about what happened. Defendant replied, "I didn't mean to kill her," and then gave a detailed confession to the murder and burglary.

Defendant filed a pretrial motion to suppress all statements he made to law enforcement officers. The trial court allowed the motion with respect to statements defendant made after invoking his Fifth

Amendment right to counsel. The statement defendant made prior to invocation of his rights was admitted.

[1] By his first assignment of error, defendant argues that his statements should have been suppressed in their entirety because there was no probable cause for his arrest and the ensuing interrogation. Defendant contends that the trial court's findings of fact establishing that probable cause for arrest existed at the time law enforcement officers took him into custody are not supported by competent evidence. At best the evidence demonstrated that officers responded to a 911 call placed from Susan Davis' trailer in which the caller asked questions about the potential consequences of being present when someone else committed a murder. Defendant's name was not mentioned; and Woods, the caller, did not mention it when he was subsequently arrested. Woods stated only that he had an accomplice. Defendant contends that prior to his arrest, police found no evidence at the scene linking defendant to the crimes. He further contends that Sergeant Larry Munson testified that he did not recall having any specific information that defendant had been involved in a crime when he went to Smith's trailer looking for defendant. Defendant argues that because he was seized without probable cause in violation of his constitutional rights, the entire statement resulting from his seizure must be suppressed. We disagree.

An officer may make an arrest for a felony that was committed out of the officer's presence when the officer has probable cause to believe the person has committed the felony. N.C.G.S. § 15A-401(b)(2) (1988). Probable cause exists when the information known to the officer is " 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' " *State v. Bright*, 301 N.C. 243, 255, 271 S.E.2d 368, 376 (1980) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964)). Here, the evidence indicates that when Woods was arrested, he told Agent East he had an accomplice. His earlier questions to the Sanford Police Department during his 911 call intimated the same. The officers therefore knew that Woods had not acted alone. Their suspicions were confirmed when Wilder informed Sergeant Munson that Woods told her he and defendant had broken into Murphy's home and defendant had killed Murphy. Sergeant Munson relayed this information to the other investigating officers, including Detective Lamm, who had examined Murphy's body at the scene and determined that she had been beaten to death with a blunt object. While outside the Smith residence, Detective Lamm saw in the front seat of defendant's

truck a hammer which he thought could have been the murder weapon. From these circumstances, the officers had probable cause to believe defendant had participated in the murder and burglary and therefore to place him under arrest.

When findings of fact are supported by competent evidence, they are conclusive on appeal. *State v. McRae*, 276 N.C. 308, 314, 172 S.E.2d 37, 41 (1970). Here, there was extensive evidence to support the findings, which in turn support the conclusion of law that there was probable cause to arrest defendant. Accordingly, the findings and conclusion are binding on this Court.

[2] Defendant further contends that his statement should have been suppressed in its entirety because of delay in taking him before a magistrate. Defendant was arrested at 9:50 p.m. and interrogated from 11:00 p.m. until 12:30 a.m. Warrants for his arrest were served between 1:30 and 2:00 a.m., and he was finally brought before a magistrate at 2:00 a.m. Defendant asserts that this four-hour interval between arrest and appearance violated the requirement that an officer take an arrested person before a magistrate without unnecessary delay. N.C.G.S. § 15A-511(a) (1988). We disagree.

Section 15A-511 does not prescribe mandatory procedures affecting the validity of a trial. *State v. Martin*, 315 N.C. 667, 679, 340 S.E.2d 326, 333 (1986). For a violation of section 15A-511 to be substantial, defendant must show that the delay prejudiced him in some way, for example, by resulting in a confession that would not have been obtained but for the delay. *Id.*; *State v. Hunter*, 305 N.C. 106, 113, 286 S.E.2d 535, 539-40 (1982). The delay here was four hours; this Court has previously declined to find a four and one-half hour delay inherently unreasonable or prejudicial. *State v. Richardson*, 295 N.C. 309, 323-24, 245 S.E.2d 754, 763-64 (1978). More importantly, defendant has failed to show that he would not have made an inculpatory statement absent the delay. This assignment of error is overruled.

[3] By his next assignment, defendant argues that the trial court erred in failing to suppress blood samples drawn from him pursuant to a search warrant authorizing the State to seize head hairs, pubic hairs, saliva, and blood samples. The invasion of a person's body to withdraw blood is the most intrusive type of search, and a warrant authorizing the seizure of blood must be based upon probable cause to believe the blood constitutes evidence of an offense or the identity of a person who participated in the crime. *State v. Carter*, 322 N.C. 709, 722-23, 370 S.E.2d 553, 561 (1988); *see* N.C.G.S. § 15A-242(4)

(1988). Defendant argues that it is clear from the face of the warrant that there was no forecast of evidence that defendant's blood either constituted evidence of the murder or would assist in identifying the perpetrator(s). Although the warrant application stated that the items seized would be used in comparative analysis with serological evidence obtained from the autopsy of Murphy and from the articles of defendant's clothing collected by Detective Lamm, the application did not contain any physical findings suggesting sexual assault or a description of the serological evidence obtained from Murphy or any indication that there was blood found on defendant's clothing. Defendant therefore contends that no probable cause existed for issuance of the warrant.

The affidavit signed by Agent East contained ample evidence to support issuance of the warrant, *inter alia*: (1) an account of the murder; (2) Woods' statement wherein he recounted hearing defendant strike Murphy several times and indicated that he was unsure whether defendant sexually assaulted her; (3) defendant's counter assertion that he did not actually see Woods sexually assault Murphy, although she was on the floor and the mattress was partially off the bed when defendant entered the bedroom; (4) Woods' description of the clothes defendant was wearing at the time of the murder; (5) confirmation that defendant's clothes were submitted to the SBI serology laboratory; (6) Special Agent Bodee's advice concerning the advantages of obtaining a DNA profile from a suspect; and (7) defendant's admission that he struck Murphy in the head with a hammer multiple times. The cumulative effect of this information establishes that the blood samples seized from defendant provide evidence of the offense and the identity of the person participating in the crime. Accordingly, probable cause existed to support issuance of the search warrant. This assignment of error is overruled.

[4] Defendant next argues that the trial court erred in instructing the jury that it could convict defendant of first-degree murder on the basis of malice, premeditation, and deliberation under the theory of acting in concert. Defendant was found guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule, in addition to being convicted of and sentenced for first-degree burglary. According to defendant, the evidence showed either that he personally killed Murphy or that he was not a participant in any crime; it did not support a charge that he and Woods acted with a common purpose and scheme to kill Murphy. Defendant asserts that because the trial court erroneously instructed

on acting in concert, the only fair interpretation of the verdicts is that defendant was convicted of first-degree murder under the felony murder rule on the theory that he acted in concert with Woods, who killed Murphy during the commission of a burglary. Because defendant lacked the specific intent to kill Murphy, the guilty verdict based on malice, premeditation, and deliberation must necessarily fail. With only felony murder remaining as the basis for the conviction of first-degree murder, defendant argues that the first-degree burglary conviction merges with the murder conviction and that judgment must be arrested on the burglary charge.

The trial court instructed the jury on acting in concert as follows:

> For a person to be guilty of a crime, it is not necessary that he personally do all the acts necessary to constitute that crime. If two or more persons with a common purpose act together to commit the crime, every person with the specific intent to commit the crime is responsible for the acts of the other participants.
>
> So members of the jury, I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant either by himself or acting together with David Woods intentionally killed the victim with a deadly weapon and that this proximately caused the victim's death, and that the defendant intended to kill the victim, and that he acted with malice, and with premeditation and deliberation, your duty would be to return a verdict of guilty of first-degree murder on the basis of malice, premeditation and deliberation.

This instruction is substantially similar to the pattern instruction on acting in concert, N.C.P.I.—Crim. 202.10 (1994), and to the instruction held proper in *State v. McCarver*, 341 N.C. 364, 386-87, 462 S.E.2d 25, 37-38 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 482 (1996). Likewise, under these facts it was proper for the trial court to give the instruction. The evidence indicates that Woods initially told defendant a story about being able to break into Murphy's trailer without being caught. After hearing the story, defendant suggested to Woods that they break into the trailer and steal something. Together they drove to Murphy's trailer, pried open the window panes to the back door, and entered. When Murphy discovered them, Woods grabbed her hands and forced her into the bedroom, whereupon defendant delivered the fatal blows. This evidence sufficiently indicates that the two men were acting together pursuant to a common plan. *See State v. Joyner*, 297 N.C. 349, 358, 255 S.E.2d 390, 395

(1979). Defendant was therefore properly convicted of first-degree murder on the basis of malice, premeditation, and deliberation; the first-degree burglary conviction thus need not merge with the conviction for first-degree murder.

[5] By a further assignment, defendant contends the trial court erred in allowing the prosecutor to make improper and prejudicial statements to the jury during closing argument. On the eve of trial, the State entered a plea agreement with Woods. In exchange for a promise of his truthful testimony concerning the murder, Woods received two consecutive class C life sentences. During closing argument, defense counsel suggested that the testimony of Woods was tainted because of this plea agreement and urged the jurors to consider the testimony with skepticism because Woods possibly saved his own life by testifying against defendant. The prosecutor, in response, argued:

> The defense lawyers suggest to you that there's something amiss, perhaps even sinister or underhanded, because the State waits until the eve of trial to enter into this agreement with [Woods]. Well, don't be deceived by that. His lawyers know full well that prosecutors typically don't enter into such agreements . . . until all of the defense legal maneuvering is over.

Defense counsel objected, but the trial court overruled the objection. Defendant now argues that the clear import was that defense counsel was not being truthful in commenting on the significance and timing of Woods' plea agreement. Because the remarks were plainly intended to prejudice the jury against defendant and his counsel, the trial court should have sustained defendant's objections. After careful review of the record, we conclude that the prosecutor was merely informing the jury that the timing of the plea agreement was normal and did not affect the veracity of Woods' testimony. There was no suggestion that defense counsel was lying to the jury or of an intention to disparage counsel's credibility. This assignment of error is overruled.

[6] Defendant's next assignment of error contains three parts. Defendant first contends the trial court committed reversible error during jury selection because the panel of jurors selected for the jury venire was not drawn in accordance with N.C.G.S. § 9-5, which requires prospective jurors to be selected for service at least thirty days prior to the session. Here, three days before trial, a supplemental list of jurors was prepared. Defendant moved that these

jurors be discharged, but the trial court denied the motion. Seven from the supplemental list were ultimately called to the jury box. The State and defendant excused two and three of these prospective jurors respectively, and two were excused for cause. Thus, while no supplemental juror was selected, defendant nevertheless argues that their presence on the eve of trial created tactical difficulty for the defense. Defendant therefore urges this Court to determine that failure to comply with N.C.G.S. § 9-5 is a substantial breach of due process in that it denies an accused the opportunity to study in advance those who will sit in judgment of him. We decline to do so.

It is true that section 9-5 mandates that jurors be selected at least thirty days in advance of the scheduled session. N.C.G.S. § 9-5 (1988). However, N.C.G.S. § 9-11 specifically allows a trial court to summon a special venire of jurors at any time. N.C.G.S. § 9-11 (1986). "The language of G.S. 9-11 is clear and unambiguous, and its provisions authorize the trial judge to order the summonsing of supplemental jurors in order to insure orderly, uninterrupted, and speedy trials." *State v. Fountain*, 282 N.C. 58, 64, 191 S.E.2d 674, 679 (1972). The thirty-day notice provision in section 9-5 therefore did not apply to the trial court's selection of a supplemental jury panel.

[7] Defendant next argues that the trial court erred in failing to award him an additional peremptory challenge following the reexamination and excusal for cause of one of the supplemental jurors. Juror Peggy Hubbard was initially passed by both sides before further examination revealed reasons supporting removal for cause. After Hubbard was excused, defendant moved for an additional peremptory challenge, which the trial court denied. Defendant now argues that N.C.G.S. § 15A-1214 requires the trial court to grant an additional peremptory challenge after a juror previously accepted is removed for cause. This section allows the trial court, for good cause, to examine and excuse a juror already accepted by a party. N.C.G.S. § 15A-1214(g) (1988). The statute further provides that "[a]ny replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror." *Id.* The statute does not, however, afford additional peremptory challenges. Indeed, the trial court is precluded from authorizing any party to exercise more peremptory challenges than specified by statute. *State v. Johnson*, 298 N.C. 355, 363, 259 S.E.2d 752, 758 (1979). The trial court therefore properly denied defendant's motion.

[8] Finally, defendant contends the trial court erred in failing to excuse jurors Sinclair and West for cause. During *voir dire* Sinclair admitted to reading about defendant's case in the *Dunn Daily Record*. She specifically noted the information concerning jury selection for the case because she had been summoned for jury service. The trial court further discovered that Sinclair's son was a state trooper and that her husband was a retired state trooper. Based on this information, defendant asserts that Sinclair could not be fair and impartial and therefore should have been removed for cause. Defendant's challenge for cause of West was based on her beliefs concerning the death penalty. West stated unequivocally that she believed in the death penalty and favored it as a punishment for first-degree murder.

The trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial. *State v. Yelverton*, 334 N.C. 532, 543, 434 S.E.2d 183, 189 (1993). The record reveals that Sinclair demonstrated a conscientious resolve to be fair and impartial and indicated that she had formed no opinion about defendant's guilt or innocence based on what she had read. The trial court's decision was based on answers given by Sinclair, and defendant has failed to show any abuse of discretion in the denial of his challenge for cause of this juror.

The trial court also properly denied defendant's challenge for cause of West. While West believed in the death penalty, she clearly stated that she could impose life imprisonment as punishment for first-degree murder and that she could follow the law with respect to the capital sentencing procedure. This assignment of error is overruled.

[9] By his next assignment, defendant contends the trial court erred by failing to suppress the tires seized from defendant's vehicle. He argues that the warrant application lacked sufficient information to support a finding of probable cause for the issuance of a warrant to search his vehicle and seize his tires.

The affidavit accompanying the warrant application avers that police officers found tire tracks in the sand approximately twenty-five yards below Murphy's trailer. Plaster impressions of the tracks were taken and sent to the SBI crime laboratory. The affidavit further reports that in his confession Woods indicated that he and defendant drove to Murphy's trailer in defendant's truck and parked the truck

below the trailer on a sand driveway. These facts and circumstances create a reasonable ground to believe that the proposed search would reveal the presence of the objects sought and that those objects would aid in the apprehension or conviction of the offender. *State v. McKinnon*, 306 N.C. 288, 292, 293 S.E.2d 118, 121 (1982). We therefore hold that the search warrant was duly issued and the evidence properly admitted. This assignment of error is overruled.

[10] Defendant next argues that the trial court erred by permitting the State to introduce five autopsy photographs as well as six photographs of Murphy's body as it was found at the crime scene. Defendant contends these photographs should have been excluded because they were inflammatory and duplicative and their probative value was greatly outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992). We disagree.

What represents "an excessive number of photographs" and whether the "photographic evidence is more probative than prejudicial" are matters within the trial court's sound discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Photographs of the victim depicting injuries to the body and the manner of death may be used to illustrate the witness' testimony to this effect. *State v. Daughtry*, 340 N.C. 488, 518, 459 S.E.2d 747, 762 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 739 (1996). Likewise, photographs "showing the condition of the body when found, its location when found, and the surrounding scene at the time . . . are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982). Here, the autopsy photographs were used to illustrate the testimony of the medical examiner. They demonstrated with clarity the nature and placement of the wounds and supported the State's theory that repeated blows to the head with a blunt weapon were the cause of Murphy's death. The crime-scene photographs were introduced during the testimony of both Deputy Parker and Agent Munson and were used to illustrate testimony "with respect to the crime scene in general" and "the location and position of the body when found." *State v. Smith*, 320 N.C. 404, 416, 358 S.E.2d 329, 336 (1987). Defendant has failed to show an abuse of discretion in the admission of these photographs. This assignment of error is overruled.

[11] By his next assignment, defendant argues the trial court erred in permitting State's witness Derrick White to testify about gestures and comments defendant made while in jail. White and defendant were in

the Harnett County jail in November 1993. White testified that on a Sunday in late November, defendant had a visitor. Although White could not see the visitor, he observed defendant pounding the fist of one hand on the palm of the other and heard him utter the word "bitch" twice while talking to the visitor. White further testified that one evening after lights were out, he heard defendant call to Woods through the air vents, saying, "I'm not going down alone. You're going down with me." Defendant contends that this testimony was unfairly prejudicial and of no probative value and that it thus should have been excluded under Rule 403.

"[M]ost evidence tends to prejudice the party against whom it is offered. However, to be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed." *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995). Here, defendant's anger toward his visitor and threats to his accomplice constituted self-incriminating actions probative of defendant's awareness of his guilt. The trial court therefore did not abuse its discretion in permitting White's testimony. This assignment of error is overruled.

[12] Defendant next contends the trial court improperly permitted the prosecutor to lead State's witness Smith through the bulk of her testimony. Specifically, defendant asserts that the prosecutor read for the jury the statement Smith made to the police and simply asked Smith to confirm certain portions.

Leading questions ordinarily should not be used to develop the direct examination of a witness. When a party calls a hostile or adverse witness, however, interrogation may be by leading questions. N.C.G.S. § 8C-1, Rule 611(c) (1992). Rulings concerning the admissibility of leading questions are in the sound discretion of the trial court and should not be disturbed absent an abuse of that discretion. *State v. Howard*, 320 N.C. 718, 722, 360 S.E.2d 790, 792 (1987).

The record discloses that Smith was a witness hostile and adverse to the party calling her, the State. She was defendant's girlfriend and had been so for five years. She did not wish to testify against him and was evasive in response to questions from the State concerning defendant's behavior on the day after the murder. The State informed the trial court that Smith was not cooperating and had refused to talk with prosecutors the day before she was to take the witness stand. Given the witness' obvious bias favoring defendant, defendant cannot demonstrate that the trial court abused its discre-

tion by allowing the prosecutor to ask leading questions. This assignment of error is accordingly overruled.

[13] Defendant next assigns error to the trial court's decision to sentence defendant to life imprisonment for first-degree burglary when the presumptive sentence for a class C felony is only fifteen years. Prior to sentencing, defendant requested that the trial court find nonstatutory mitigating factors regarding defendant's age at the time of the offense, his support system in the community, and his positive employment history. Defendant asserts that each factor was supported by uncontroverted testimony from his mother, father, sister, and grandmother. Because all three are now statutory mitigating factors under the Structured Sentencing Act and are therefore considered reasonably related to the purpose of sentencing, defendant contends it was error to decline to find their existence and to conclude that the factors in aggravation outweighed those in mitigation. We disagree.

Although the presumptive term for a class C felony is fifteen years, the trial court may impose a greater sentence upon consideration of aggravating and mitigating factors. N.C.G.S. § 15A-1340.4(b) (1988) (repealed effective 1 October 1994; reenacted as N.C.G.S. § 15A-1340.16 effective 1 October 1994). In contrast to statutory mitigating factors, the trial court *may* consider nonstatutory factors but is not required to do so. *State v. Cameron*, 314 N.C. 516, 518-19, 335 S.E.2d 9, 10 (1985). "[C]onsideration of a non-statutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion" of the trial court. *State v. Spears*, 314 N.C. 319, 322, 333 S.E.2d 242, 244 (1985). Failure to find such a nonstatutory mitigating factor will not be disturbed on appeal absent a showing of abuse of that discretion. *Id.* at 322-23, 333 S.E.2d at 244. Here, the evidence in support of defendant's proposed nonstatutory mitigating factors all came from interested witnesses and substantially supported the statutory mitigator that defendant was a person of good character or had a good reputation in the community in which he lived, which the trial court did find. Further, defendant was sentenced under the Fair Sentencing Act; thus, the Structured Sentencing Act, including its statutory mitigating factors, has no relevance. The trial court therefore did not abuse its discretion in rejecting defendant's proposed nonstatutory mitigating factors or in sentencing defendant to life imprisonment for the first-degree burglary conviction.

[14] By his next assignment of error, defendant argues that the trial court erred in allowing Detective Lamm to testify about Smith's demeanor during interviews with law enforcement officers. On redirect examination Detective Lamm described Smith as being uncooperative and reluctant to answer questions the first time he spoke with her and as "more open" during their second conversation. Defendant contends that Detective Lamm's opinions about Smith's demeanor do not meet the evidentiary test for admissibility of lay-witness opinions and that his motion to strike should therefore have been allowed.

Rule 701 permits a lay witness to testify as to opinions or inferences which are "(a) rationally based on the perceptions 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). Here, Detective Lamm's opinion about Smith's demeanor was based on his personal observations over the course of two meetings and was helpful to a clear understanding of his testimony concerning the differences between Smith's statements. As such, the trial court properly allowed him to offer it.

[15] Defendant next argues that the trial court erred in admitting a tape recording and the transcript of the 911 call Woods made to the Sanford Police Department. Defendant contends these materials were inadmissible hearsay not subject to any of the hearsay exceptions.

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). If a statement is offered for any other purpose, it is not hearsay and is admissible. *State v. Reid*, 335 N.C. 647, 661, 440 S.E.2d 776, 784 (1994). Here, the tape and transcript were not offered to prove the truth of the matter asserted therein, that is, that Woods had an accomplice; rather, their significance lies solely in the fact that the 911 call was made. The dispatcher verified the tape recording as being a true and accurate reproduction of the 911 call he received from Woods. Woods testified that he made the call and that it was his voice on the tape. The tape and transcript were simply further proof to the jury that the call was made and that Woods was the caller. The hearsay rule is therefore inapposite. This assignment of error is overruled.

[16] By his final assignment or error, defendant argues that the trial court improperly excluded evidence of Woods' prior violent conduct.

In opening remarks to the jury and during his case-in-chief, defendant attempted to put before the jury that Woods almost got into two or three fights the night of the murder, that he was reading a book about satanic worship and bizarre murders, that he had once stabbed a friend in the chest, and that he had assaulted a man by trying to hit him in the back of the head with a horseshoe spike. The trial court sustained the State's objection to defense counsel's forecast of this evidence and after *voir dire*, granted the State's motion *in limine* to exclude any further evidence of Woods' prior violent conduct. The trial court based its ruling on Rule 608(b), which bars introduction of evidence of specific instances of conduct to attack or support the credibility of a witness, with the limited exception of evidence clearly probative of truthfulness or untruthfulness.

This Court addressed a factually similar situation in *State v. Strickland*, 321 N.C. 31, 361 S.E.2d 882 (1987). The defendant there attempted to introduce evidence of prior assaults purportedly committed by a witness who was with the defendant at the time of the murder. We held that " 'extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness,' and therefore are inadmissible under Rule 608(b)." *Id.* at 39, 361 S.E.2d at 886-87 (quoting *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986)).

Defendant attempts to bolster his argument by contending that he did not offer this evidence to attack Woods' credibility but to show that it was Woods who actually inflicted the fatal blows. He argues that Rule 404(b) allows evidence of other crimes, wrongs, or acts to prove *modus operandi*, identity, and intent; Woods' *modus operandi* was to drink alcohol or use drugs and then engage in assaultive behavior. Because the identity of the actual murderer is at issue, defendant contends, Woods' pattern of assaultive conduct is relevant and admissible.

Rule 404(b) permits the use of extrinsic conduct evidence so long as the evidence is relevant for some purpose other than to show that the witness acted in conformity with the prior misconduct. If the evidence is introduced to show the same mode of operation, the conduct must be sufficiently similar to support a reasonable inference that the same person committed both the earlier and the later acts. *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991). "Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes or particularly similar acts which would indi-

cate that the same person committed both.' " *Id.* at 304, 406 S.E.2d at 890-91 (quoting *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988)).

Woods testified on *voir dire* that he had stabbed James Warwick in 1990 after Warwick had provoked him, that he threatened to hit a man with a horseshoe rod after the man first threatened to pull out a gun, that he and defendant had been in a fistfight, and that he had read one paragraph from an encyclopedia of satanic worship but that it was not his book. The State's evidence tends to show that Woods and defendant broke into Murphy's trailer; that upon being discovered, Woods dragged Murphy back to her bedroom; and that defendant went into the bedroom and beat Murphy to death with a hammer. We fail to see any commonality between the proffered evidence of Woods' prior misconduct and the events surrounding the Murphy murder.

[17] We likewise reject defendant's argument that he offered the evidence as proof of the identity of Murphy's assailant.

> "[W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt."

State v. Burr, 341 N.C. 263, 293, 461 S.E.2d 602, 618 (1995) (quoting *State v. McNeill*, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990)), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996). Defendant's proffered evidence fails this test. The alleged misconduct indicates only that Woods had in the past displayed aggression toward other men upon being provoked, not that he mercilessly beat to death an eighty-nine-year-old woman. Likewise, the evidence in no way exculpates defendant or provides any inconsistency with his guilt. Indeed, it appears that defendant attempted to introduce the evidence to show conformity with past violent acts, the only purpose specifically prohibited by Rule 404(b).

[18] Defendant concludes by contending that the State thrice "opened the door" to the admissibility of evidence about Woods' prior violent conduct. Defendant asserts first that the testimony of Patricia Benson opened the door to rebuttal evidence concerning Woods' conduct. On cross-examination Benson testified that "because he had no

reason to lie to me," she believed Woods when he told her defendant killed Murphy. We fail to see how this statement raises the issue of Woods' prior violent conduct or reflects in any way upon the likelihood that Woods, not defendant, committed the Murphy murder.

Defendant next argues that the State "opened the door" during its direct examination of Woods himself. Woods read aloud to the jury a letter he had written to Murphy's grandson, which stated in part:

> I'm sorry, very sorry that what happened, happened. I never would have let it happen if only I knew. Tell you the truth, I wish he would have killed me too, because it made no sense. I know I was a friend. I let you down. But, believe me, I could not have done it. Before I knew what was happening, it happened.

Defendant contends he was forced to rebut the assertion that Woods "could not have done it" with evidence of Woods' capability and propensity to injure others. Again, in context, it is evident that Woods was not referring to a physical inability to kill Murphy but rather to emotional ties to Murphy and her family that would have psychologically prohibited him from committing such an inhumane act.

Finally, defendant asserts that the State opened the door by asking Woods if he had ever been convicted of any crimes. Convictions and undocumented random acts of violence are subject to distinct evidentiary rules. As a general matter, evidence of convictions for crimes punishable by more than sixty days' confinement may be admitted to impeach a witness. N.C.G.S. § 8C-1, Rule 609(a) (1992). However, as noted, evidence of prior acts may not be admitted except under limited circumstances we have already deemed inapplicable here. Because defendant sought to introduce instances of conduct rather than convictions, he may not avail himself of the benefits of Rule 609(a). Accordingly, the trial court properly excluded the evidence concerning Woods' prior violent conduct, and this assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES DAVID RICH

No. 384A95

(Filed 9 May 1997)

1. Constitutional Law § 264 (NCI4th)— announcement of ruling—absence of defendant and attorney—no violation of right to counsel

A superior court judge's announcement in open court of his ruling on the State's request for release of defendant's prison records to the State was not a hearing, and the absence of defendant and his counsel when the announcement was made did not violate defendant's Sixth Amendment right to counsel, where the attorneys for both sides had been heard twice in separate pretrial hearings on this issue.

Am Jur 2d, Criminal Law §§ 743 et seq., 972 et seq.

2. Constitutional Law § 343 (NCI4th)— announcement of ruling—no right of defendant to be present

A defendant charged with a capital first-degree murder did not have a right under Art. I, § 23 of the N.C. Constitution to be present when a superior court judge announced in open court his ruling on the State's request for release of defendant's prison records to the State after pretrial hearings on the issue had been held with defendant and his counsel both present. Assuming *arguendo* that defendant should have been present for this ruling, his absence was harmless error since the judge had already decided the issue and was merely announcing his ruling.

Am Jur 2d, Criminal Law §§ 695, 696, 910 et seq.

3. Constitutional Law § 161 (NCI4th)— opportunity to be heard before final ruling—statement by judge—failure to comply—no due process violation

The trial judge did not violate defendant's due process rights by his failure to comply with his statement that defendant would have an opportunity to be heard prior to any final ruling on disclosure of his prison records to the prosecution where defendant and his attorneys were on notice that the State had subpoenaed the prison records and twice had the opportunity to be heard about the release of those records; they knew that disclosure to

the State was a possibility; and the trial judge's failure to carry out his commitment was inadvertent and harmless.

Am Jur 2d, Criminal Law §§ 996, 997.

4. Criminal Law §§ 179, 205 (NCI4th Rev.)— incompetency to waive counsel or proceed—appointment of mental health expert

If a defendant demonstrates or if matters before the trial court indicate that there is a significant possibility that a defendant is incompetent to waive counsel or to proceed to trial, the trial court must appoint an expert or experts to inquire into defendant's mental health in accord with N.C.G.S. § 15A-1002(b)(1).

Am Jur 2d, Criminal Law §§ 95 et seq.

5. Criminal Law §§ 179, 205 (NCI4th Rev.)— waiver of counsel—failure to have mental evaluation of defendant

The trial court did not err by allowing defendant to waive counsel and proceed *pro se* in a capital trial without having defendant evaluated by a mental health professional where there was nothing in the record tending to indicate that defendant was incompetent to waive his right to counsel or to proceed *pro se*; defendant was adamant and unequivocal about not wanting a mental health examination and insisted that he would not cooperate with a psychiatrist; and the trial court elicited the required information from defendant which was sufficient for the court to determine that defendant's decision was knowing and voluntary. N.C.G.S. § 15A-1242.

Am Jur 2d, Criminal Law §§ 95 et seq.

6. Criminal Law § 1346 (NCI4th Rev.)— capital sentencing—two aggravating circumstances—failure to instruct not to use same evidence—not plain error

The trial court did not commit plain error by failing to instruct the jury in a capital sentencing proceeding that it could not consider the same evidence to find the aggravating circumstances that the murder was committed by a person lawfully incarcerated and that defendant had been previously convicted of a felony involving the use or threat of violence to the person where the evidence showed that defendant had been convicted of shooting into an occupied vehicle and of second-degree murder

and was serving a life sentence for the second-degree murder when he killed the victim in this case; there was separate and independent evidence to support each of the aggravating circumstances; the aggravating circumstances were not interdependent; and there was no reasonable basis for suspicion that the jury used the evidence of defendant's prior convictions as evidence that he was incarcerated at the time of this killing.

Am Jur 2d, Trial §§ 1441 et seq.

7. Criminal Law § 692 (NCI4th Rev.)— capital sentencing—mitigating circumstances—peremptory instructions not required

The trial court did not err by refusing to give peremptory instructions on the (f)(2) emotional disturbance and the (f)(6) impaired capacity mitigating circumstances in a capital sentencing proceeding where testimony by defendant's psychiatrist tended to show that defendant had a learning disability, attention deficit hyperactivity disorder, and mixed personality disorder, but the existence of these mitigating circumstances was negated by evidence of actions and statements by defendant tending to show that this murder was deliberated and carefully planned and that defendant was fully capable of appreciating the criminality of his conduct. N.C.G.S. § 15A-2000(f)(2), (f)(6).

Am Jur 2d, Trial § 1021.

8. Criminal Law § 1402 (NCI4th Rev.)— killing of another inmate—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 pled guilty to first-degree murder; defendant was serving a life sentence for second-degree murder at the time he committed this murder of another inmate, and the jury found the (e)(1) aggravating circumstance that the murder was committed by a lawfully incarcerated person; and defendant killed the victim because he knew that such action would get him transferred from the Eastern Correction Center to Central Prison where he wanted to be.

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 Stephens (Ronald L.),

J., on 28 August 1995, in Superior Court, Greene County, upon a plea of guilty of first-degree murder. Heard in the Supreme Court 12 February 1997.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Marshall Dayan, Assistant Appellate Defender, for defendant-appellant.

James D. Rich, defendant-appellant, pro se.

MITCHELL, Chief Justice.

Defendant James David Rich was indicted on 31 October 1994 for the first-degree murder of Paul Sanford Gwyn. On 27 March 1995, defendant asked to proceed *pro se*. On 15 May 1995, Judge James Llewellyn allowed the request but appointed standby trial counsel. On 15 August 1995, defendant entered a plea of guilty to first-degree murder. After a capital sentencing proceeding, the jury recommended a sentence of death, and the trial court sentenced defendant accordingly.

The State's evidence tended to show, *inter alia*, that on 8 August 1994, Paul Gwyn, an inmate at the Eastern Correctional Center in Maury, North Carolina, was stabbed to death by defendant, also an inmate. Gregory Bagley, another inmate, witnessed both the killing and the events leading up to the killing. Bagley testified that on the day of the killing, he, defendant, and a number of other inmates were in the prison yard. He also stated that defendant had been offering to "put a hit" on someone because defendant did not want to stay at the Eastern prison facility. Bagley explained that, in prison jargon, to "hit" means to kill or hurt someone. Bagley further stated that defendant started a conversation with the victim and demanded defendant's money. The victim responded that he did not know what defendant was talking about and that he did not have defendant's money. Bagley stated that defendant pulled a knife out of his pants and said, "I'll kill you." The victim then ran from defendant, and defendant chased the victim. Bagley ran behind them and watched defendant stab the victim at least twice in the back.

Troy Covington, a correctional officer, testified that after he was advised of the disturbance, he came upon defendant, who was still holding the knife, in the prison yard. Covington took custody of

defendant and the knife. Special Agent Alan McMahan of the State Bureau of Investigation (SBI) testified that he advised defendant of his *Miranda* rights, which defendant waived, and then interviewed defendant concerning his involvement in the stabbing of Paul Gwyn. During the interview, defendant confessed that he intended to kill and did stab and kill the victim.

Defendant testified at his capital sentencing proceeding that he was frustrated by the mandatory schooling program at Eastern and decided that he would do something in order to get away from the facility. He said that he considered several plans and ultimately decided that he was going to kill someone. Defendant said that he decided on three potential victims that he considered "unworthy of living" and finally focused on the victim.

[1] By his first assignment of error, defendant argues that the trial court erred when, on 29 March 1995, it conducted what defendant contends was a pretrial hearing in the absence of both defendant and defense counsel. During a pretrial hearing held in open court 2 February 1995, Judge Herbert Phillips announced that another pretrial hearing would be scheduled for 10 February 1995. Prior to the conclusion of the 2 February hearing, the State asked Judge Phillips to sign a subpoena for defendant's prison records, and defendant objected. Judge Phillips ordered defendant's prison records to be sent to the judge presiding at the next hearing in this case. The next pretrial hearing was held on 9 February 1995 before Judge William Griffin, Jr., pursuant to Rule 24 of the General Rules of Practice for the Superior and District Courts. The purpose of a Rule 24 hearing is to determine pretrial matters in capital cases. At the 9 February hearing, the State again moved for defendant's prison records. The defense objected and moved to quash the subpoena on the ground that the records were confidential. Judge Griffin decided to review the records *in camera* to determine which materials, if any, should be divulged to the State. Judge Griffin also stated that he would not immediately release the records to the State without giving the defense an opportunity to be heard.

On 29 March 1995, Judge Griffin announced his ruling from the bench in open court. Neither defendant nor defense counsel was present. Defendant contends that this was a hearing at which he was entitled to be present and heard prior to the release of any of his prison records to the State. Defendant argues that the trial court violated his rights under the Sixth and Fourteenth Amendments to the

United States Constitution and Article I, Sections 18, 19, and 23 of the North Carolina Constitution and that this unfairly prejudiced him in this case. We disagree.

Prior to announcing his ruling on 29 March, Judge Griffin referred to the previously held Rule 24 hearing and underscored the fact that defense counsel, defendant, and the State had been present at that hearing. Judge Griffin stated:

> All of them were present. And everybody agreed that I should take these records and review them and see if it was appropriate to release them to Mr. Jacobs [prosecutor] based upon his subpoena to Mr. Barnett [superintendent of prison records] for those records. I have completed my review of those records a month ago; however, I've been in court so much and out of the office so much I haven't had a chance to dictate an order.

Judge Griffin then announced his ruling as follows:

> I, today, have prepared an order. I'll file it. Basically what I'm going to do is tell [the prosecutor] and [defense counsel] I'm going to seal one complete copy for the appellate courts. I have redacted from the second copy thirteen pages that I think it would be inappropriate for [the prosecutor] to receive at this time.
>
> I think, under the statute, G.S. 148-76, [the prosecutor] is entitled to his prison records; however, these thirteen pages relate to matters that might interfere with the defendant's defense in the case. I'm going to seal those thirteen pages in a separate envelope subject to review by the appellate courts or further orders of the court. [The prosecutor] is entitled to those records at some later time during the proceedings.
>
> I'm going to deliver a copy of those thirteen pages to [defense counsel]. The remaining part of the court's second set of those prison records, I'll deliver to [the prosecutor].

Defendant's contention that his right to counsel was violated is misplaced. The United States Supreme Court has held that an accused has the right to counsel "at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226, 18 L. Ed. 2d 1149, 1157 (1967). We conclude that Judge Griffin's announcement of his ruling in open court cannot reasonably be characterized as a hear-

ing, much less one at which defendant's presence was required. Judge Griffin simply took a final step in the process of deciding whether to release any part of defendant's prison records to the prosecution and announced his decision from the bench. Moreover, prior to Judge Griffin's ruling, this issue had been raised twice and attorneys for both sides had been heard twice in separate pretrial hearings. The proceeding during which Judge Griffin announced his ruling was not a hearing, and we conclude that his announcement of his ruling in the absence of defendant and his counsel did not violate defendant's Sixth Amendment right to counsel.

[2] We further disagree with defendant's contention that he had a right under the North Carolina Constitution to be present when Judge Griffin announced his ruling on this matter. 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). However, this right is limited to capital cases and "does not arise prior to the commencement of trial." *State v. Chapman*, 342 N.C. 330, 338, 464 S.E.2d 661, 665 (1995), *cert. denied*, — U.S. —, 135 L. Ed. 2d 1077 (1996). Although a better practice in this case may have been for the judge to have summoned defendant and defense counsel prior to announcing his final ruling, we find no error. Moreover, assuming *arguendo* that defendant should have been present for this ruling, his presence would have served no purpose. Judge Griffin had already decided the issue before him and was merely announcing his ruling. Thus, defendant's absence was harmless beyond a reasonable doubt.

[3] Defendant further contends that the trial court violated his right to due process by promising defendant that he would have an opportunity to be heard prior to any final ruling on disclosure of his prison records. In support of this contention, defendant cites *Lankford v. Idaho*, 500 U.S. 110, 114 L. Ed. 2d 173 (1991), wherein the defendant was misled by the trial court into believing that he could not receive the death penalty. We find this case to be inapposite. In *Lankford*, the Supreme Court found the trial court's imposition of the death penalty under such circumstances fundamentally unfair. The Court found that lack of adequate notice to defendant that the trial court was considering imposing the death penalty "created an impermissible risk that the adversary process may have malfunctioned in this case." *Id.* at 127, 114 L. Ed. 2d at 188-89. In *Lankford*, the defendant's attorney lacked notice that the death penalty was a sentencing option for her

client and thus did not raise several important issues in his defense. Thus, in *Lankford*, the defendant was prejudiced.

In the instant case, however, defendant and his attorneys were on notice that the State had subpoenaed the prison records and twice had the opportunity to be heard about the release of these records. They knew that disclosure to the State was a possibility. Although, as a general rule, trial judges should not fail to carry out commitments made to defendants, we believe that the failure here was inadvertent and harmless. We conclude that the announcement of the ruling was not an additional hearing and did not constitute a denial of defendant's due process rights.

Defendant also contends that he was prejudiced by the release of these records. However, defendant has not indicated how the release of his prison records to the prosecution, with a portion redacted by the trial court in order to protect defendant's rights, improperly or unfairly prejudiced him in this case. This assignment of error is overruled.

By another assignment of error, defendant argues that it was error to allow defendant to represent himself without having defendant evaluated by a mental health professional. Defendant contends that a good-faith doubt as to his competence to proceed and his ability to knowingly and intelligently waive his rights to trial and counsel were raised twice in this case. He argues that the trial court abused its discretion by not ordering a mental health evaluation of defendant and that defendant is therefore entitled to a new trial. We disagree.

The transcript reveals that during a hearing held 15 May 1995, defendant appeared before Judge James Llewellyn and stated that he wanted to have his appointed counsel removed from his case. Judge Llewellyn responded that before he would consider entering an order to remove appointed counsel, he would want to have defendant evaluated to determine his competence both to stand trial and to represent himself. Judge Llewellyn thus admonished defendant:

> Now my personal advice to you is this: Let's go ahead and get the [mental health] evaluation and after we get that evaluation then I can more intelligently make a decision about what to do in regard to your request to fire these two lawyers.
>
> But the people that are going to be trying this case against you have been trained in every facet of first degree murder capital cases, they know the rules of evidence, they know the motions

to file, they know the orders to comply with, and how to select juries, how not to pick jurors, and I assume that you don't know how to do that.

Now, you may think you do. But I've been doing this for twenty-seven years and I've never seen a layperson that could keep up with what goes on in a capital murder case.

Defendant reiterated his displeasure with appointed counsel and stated:

But as far as a mental health evaluation, I'll waive that. I don't even want it. They didn't give me no mental health evaluation in 1990—in 1990 when I caught this life sentence I'm doing now.

Again Judge Llewellyn admonished defendant that he was going to order him to be evaluated by a psychiatrist at Dorothea Dix Hospital. Defendant stated:

It's like this, Your Honor, I'm not going to cooperate with—I'm going to cooperate with them, and I'm not going to Dorothea Dix, and I'm not going to let no doctor come up here to evaluate me. That's—that's out. And I've got that right to choose that no matter what you, or the D.A., or anybody else says. I've got that right and it can't be violated.

Defendant continued, reiterating the fact that he was not going to cooperate with any doctors and that there was "nothing wrong with my head and I will not go to Dorothea Dix Hospital." He further stated that he knew he faced a possibility of receiving the death penalty and understood the consequences. Judge Llewellyn interjected and asked, "Are you telling me you don't want a lawyer period?" Defendant responded, "I don't want a lawyer period."

Judge Llewellyn asked defendant three more times if he wanted a lawyer, and each time, defendant responded that he did not. Judge Llewellyn then stated:

And even if I ordered you to go to Dorothea Dix, you're not going to go, and if they make you go, you're not going to cooperate with them; is that what you're telling me?

Defendant responded:

Yeah. I'm not going to cooperate with nobody concerning this case, Your Honor, you, or the District Attorney, or my counselors, or whatever, I'm—I'm, you know, I've had it. And it's disgusted

me—I've been disgusted with it three months ago when I figured that they would have it in—they'd have it getting ready to be tried.

And yet, I've still got to wait until August at the earliest to get tried over a simple prison killing.

And further more, there's nobody—nobody's got—there ain't nobody—nobody can judge me. I've got my own mind, and my own way of thinking, and it's not going to change. It is not going to change.

At this point, Judge Llewellyn asked defendant his age and the highest grade he had completed in school. Defendant responded that he was twenty-three and that he had completed the eighth grade. Judge Llewellyn then asked defendant if he could read and write, and defendant answered that he could. Judge Llewellyn then removed defendant's appointed counselors, stating:

The court is of the opinion the defendant is competent to stand trial, although I question his ability to represent himself, he is adamant in that, and that he doesn't want any lawyer of any kind from anywhere to represent him. He wants to represent himself and he will be allowed to do that.

I'm not going to make him go to Dorothea Dix because he's told me he wouldn't go and if he went he wouldn't cooperate with the physicians there.

At this point, defendant stated that he would sign a waiver to the effect that he did not want to be represented by counsel. Ultimately, defendant did so, and Judge Llewellyn signed the certificate. On 21 June 1995, Judge Llewellyn entered an order appointing standby trial counsel.

Defendant's decision to represent himself was revisited during trial proceedings by Judge Ronald Stephens on 14 August 1995. On that date, defendant's standby counsel moved for the court to find defendant incompetent to waive counsel and requested that the trial court review defendant's mental health records. After reviewing these records and those previously sealed by Judge Griffin, Judge Stephens questioned defendant about his decision not to cooperate with a psychiatrist. Defendant responded that he had "strongly considered" the matter and that he had personal reasons for not doing so. Judge Stephens then proceeded to explain to defendant in detail

the capital sentencing procedure, each step of the way asking defendant if he understood. After explaining the process, Judge Stephens asked defendant if he had any questions, and defendant replied, "No, your honor. I fully understand." At the conclusion of this hearing, Judge Stephens entered an order memorializing the fact that defendant, with the help of standby counsel, was representing himself.

On 15 August 1995, Judge Stephens again engaged defendant in extensive colloquy regarding his decision to plead guilty, making every effort to ensure that defendant's choice was knowing and intelligent. The discussion proceeded as follows:

> THE COURT: You understand that at least along life's way sometimes we vacillate on what we want to do from time to time, but if the court decides that you have now made your mind up that this is the best way for you to proceed and the court accepts your plea, then once that's done, it's done? And I'm not going to do this unless I'm satisfied that you're satisfied that this is what you want to do. Once you've made that decision, an hour or two from now, we cannot undo that decision.
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: And so the decision that you make once the court decides—and if the court decides that it is a willing and knowing decision on your part, once that has in fact been done, there will be no return to that?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Do you understand that, sir?
>
> [DEFENDANT]: That's right.
>
> THE COURT: Do you feel like that you need any additional time to either think about it or discuss it with [defense counsel] or take any additional time in consideration of what your decision is this morning?
>
> [DEFENDANT]: No, your honor. I don't need any more time.

At this point, Judge Stephens accepted defendant's guilty plea.

A trial court may order a mental health evaluation of a defendant when that defendant's capacity to proceed is questioned. N.C.G.S. § 15A-1002(b)(1) (1988). The trial court has the power on its own motion to order such an evaluation as part of an inquiry into the

defendant's capacity to proceed. *State v. Heptinstall*, 309 N.C. 231, 235, 306 S.E.2d 109, 112 (1983). In fact, under some circumstances, a trial court may have a constitutional duty to make such an inquiry and to require such an evaluation. *Id.* at 235-36, 306 S.E. 2d at 112. However, this case reveals no such circumstances.

[4] In deciding this issue, it is helpful to look to the United States Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985). In *Ake*, the Court held that when a defendant demonstrates that his sanity at the time of the offense is likely to be a significant factor at trial, a state is required to provide the defendant with psychiatric assistance in preparing for trial. *Id.* at 83, 84 L. Ed. 2d at 66. However, the burden is on the defendant in such situations to make an initial showing that a psychiatric evaluation would disclose a mental condition likely to be a significant factor at trial. *Id.* Although *Ake* dealt with appointment of an expert to help the defendant prepare and present evidence of his insanity at the time of the crime charged, we conclude that a similar rule must be applied in determining whether a trial court has erred in failing to appoint an expert to inquire into a defendant's capacity to waive counsel or to proceed to trial with or without counsel. If a defendant demonstrates or if matters before the trial court indicate that there is a significant possibility that a defendant is incompetent to waive counsel or to proceed to trial, the trial court must appoint an expert or experts to inquire into the defendant's mental health in accord with N.C.G.S. § 15A-1002(b)(1).

[5] Defendant points to nothing in the record in the present case, however, tending to indicate that he was incompetent to waive his right to counsel, to plead guilty, or to proceed *pro se*. There is evidence in the record, however, that points to defendant's competency to do all three of these things. On 14 August 1995, the date trial proceedings began, defendant's standby counsel addressed Judge Stephens as follows:

> I will say what I have told [defendant], that the discussions that I've had with him have been positive. I've had no problem in discussing matters with him and I don't feel like he's had any problems discussing matters with me.

After reviewing the record, we find that defendant was adamant and unequivocal about not wanting a mental health examination; he insisted that he would not cooperate with a psychiatrist and that sending him to Dorothea Dix would be a waste of time. In the

absence of any evidence suggesting that defendant may have been incompetent, we conclude that the trial court did not err in deciding not to order the evaluation.

We also conclude that the trial court properly granted defendant's request to proceed *pro se* and honored that decision throughout the proceedings. A criminal defendant has the right to represent himself provided he makes this decision knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 581 (1975). N.C.G.S. § 15A-1242 sets forth the duties of the trial court in determining the validity of a defendant's waiver of his right to counsel and decision to proceed *pro se*. Under the statute, a trial court must conduct an inquiry thorough enough to satisfy itself that the defendant

(1) [h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) [u]nderstands and appreciates the consequences of this decision; and

(3) [c]omprehends the nature of the charges and proceedings and the range of possible punishments.

N.C.G.S. § 15A-1242 (1988). In *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992), we held that before a defendant may be permitted to waive appointed counsel, the trial court is constitutionally required to determine two things. First, the court must determine that defendant "clearly and unequivocally" waived his right to counsel and elected to proceed *pro se*. *Id.* Second, it must determine whether defendant knowingly, intelligently, and voluntarily waived his right to in-court representation. *Id.* at 674, 417 S.E.2d at 476; *accord 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).

After carefully reviewing the transcript, we conclude that the trial court in this case "elicited the required information" from defendant and that this information was "sufficient for [it] to determine that defendant's decision was both knowing and voluntary." *Carter*, 338 N.C. at 583, 451 S.E.2d at 164. We take this opportunity to reiterate that so long as a trial court follows these guidelines in determining the validity of a defendant's waiver of his right to counsel, this Court will esteem that defendant's right to proceed *pro se*. As the Supreme Court stated in *Faretta*, "although [a defendant] may conduct his own defense ultimately to his own detriment, his choice

must be honored out of 'that respect for the individual which is the life-blood of the law.' " *Faretta*, 422 U.S. at 834, 45 L. Ed. 2d at 581 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 25 L. Ed. 2d 353, 363 (1970) (Brennan, J., concurring)). We conclude that the trial court below did not err in deciding not to order a psychiatric evaluation of defendant or in allowing defendant to waive counsel and to proceed *pro se*. This assignment of error is overruled.

[6] By another assignment of error, defendant argues that the trial court erred by failing to instruct the jury during the capital sentencing proceeding that it could not consider the same evidence to find two submitted aggravating circumstances. The two aggravating circumstances relied upon by the State were that the capital felony was committed by a person lawfully incarcerated, N.C.G.S. § 15A-2000(e)(1) (1988) (amended 1994), and 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). During the capital sentencing proceeding, the State presented evidence that defendant had been convicted of shooting into an occupied vehicle in 1988 and of second-degree murder in 1990. Further, defendant was serving a life sentence for the 1990 murder when he killed the victim in this case. Defendant and standby counsel raised objections to the presentation of this evidence to support the two statutory aggravating circumstances. However, neither defendant nor standby counsel requested the limiting instruction to which defendant now claims he was entitled.

In *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995), the defendant argued that it was error for the trial court to fail to give the same limiting instruction defendant requests here. However, as here, the defendant in *Rouse* failed to request the instruction at trial. We therefore concluded in that case that our review must be limited to one for plain error. *Id.* at 99, 451 S.E.2d at 565. In the instant case, we must accordingly limit our review to determining if the trial court committed plain error in failing to give a limiting instruction when it submitted these two aggravating circumstances. We conclude that it did not.

Defendant does not contend that the evidence to support the two aggravators overlapped, and indeed, he acknowledges that there was separate and independent evidence to support both the (e)(1) and the (e)(3) aggravating circumstances. Instead, he argues that the jurors could have used the same evidence to support the two aggravating circumstances, in violation of the law.

Defendant is correct that the trial court may not submit two aggravating circumstances when each circumstance is supported only by the evidence supporting the other. *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993). "However, where there is separate evidence to support each aggravating circumstance, it is not improper for both of the circumstances to be submitted even though the evidence supporting each may overlap. The trial court should nonetheless instruct the jury in such a way as to ensure that jurors will not use the same evidence to find more than one aggravating circumstance." *Id.* (citation omitted).

In the present case, separate evidence supported each of the aggravating circumstances. Therefore, the trial court properly submitted both aggravating circumstances for consideration by the jury. Further, we see no reasonable basis for suspicion that the jury used the evidence of defendant's prior convictions as evidence that he was incarcerated at the time of this killing. There was direct evidence that defendant was lawfully incarcerated at the time of the killing; whether he was incarcerated for a crime of violence was irrelevant in determining that the (e)(1) aggravator existed. Moreover, the fact that defendant was incarcerated for the specific crime of second-degree murder was not integral to finding the (e)(1) circumstance. In order to establish that aggravator, the State needed only to prove that the defendant was lawfully in prison within the meaning of N.C.G.S. § 15A-2000(e)(1). To establish the (e)(3) aggravator, on the other hand, it was irrelevant whether defendant was or ever had been incarcerated; the State merely had to show that he had previously been convicted of any crime involving the use or threat of violence.

In order to establish plain error, a defendant must "show that the error was so fundamental that another result would probably have obtained absent the error." *Rouse*, 339 N.C. at 99, 451 S.E.2d at 565. Given the fact that there was independent evidence supporting each aggravating circumstance, the fact that the aggravating circumstances were not interdependent, and the fact that defendant did not think it necessary to request a limiting instruction at sentencing, we conclude that it is unlikely any possible error affected the outcome. This assignment of error is overruled.

[7] By another assignment of error, defendant argues that the trial court erred in denying him peremptory instructions on the (f)(2) and (f)(6) statutory mitigating circumstances. These mitigators are, respectively, that the capital felony was committed while defendant was under the influence of a mental or emotional disturbance and

that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. N.C.G.S. § 15A-2000(f)(2), (6). Defendant contends that the testimony of his psychiatric expert established that defendant committed the murder while he was under the influence of a mental or emotional disturbance and that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Therefore, defendant argues, it was error for the trial court to deny defendant peremptory instructions as to these mitigating circumstances. We disagree.

A peremptory instruction is proper only when all the evidence, if believed, tends to show that the circumstance exists. *State v. Noland*, 312 N.C. 1, 20, 320 S.E.2d 642, 654 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). "However, a peremptory instruction is inappropriate when the evidence surrounding that issue is conflicting." *Id.*

The testimony of the psychiatrist in the instant case tended to show that defendant had a learning disability, attention deficit hyperactivity disorder, and mixed personality disorder. However, we find plenary evidence tending to negate the (f)(2) statutory mitigating circumstance and tending to show that defendant killed the victim after substantial deliberation. Most illuminating in this regard is the testimony of Alan McMahan, an SBI agent who took a statement from defendant just hours after the killing. Defendant stated that a couple of weeks before the murder, after he was written up for failing to attend class, he would "give them something to write him up for." Defendant admitted that he made the knife he used in the killing "with the intention of killing somebody." He also told McMahan that he had three inmate informants in mind as potential victims and that he had asked his fellow inmates if there was anyone they wanted harmed. Moreover, defendant himself testified at sentencing that in order to get away from the facility at Eastern, he felt he was going to have to kill somebody. He related his thought processes for getting out of Eastern: that a fistfight would only send him to lock-up for a time but would not get him transferred and that a stabbing would earn him only a "little bit worse" punishment. Thus, there was substantial evidence to indicate that this murder was deliberated and carefully planned. Accordingly, we conclude that the trial court properly denied defendant's request for a peremptory instruction as to the (f)(2) mitigating circumstance, that he killed while under the influence of a mental or emotional disturbance.

As to the (f)(6) mitigating circumstance, defendant's statement and actions tend to show that he was fully able to appreciate the criminality of his conduct. Following his apprehension by a prison official just after the murder, defendant stated that he was in prison for murder and that he guessed that he was going to "smell gas this time." The prison officer noted that defendant appeared to know where he was and what he had done. In light of the overwhelming evidence in this case which contradicted the opinion of defendant's psychiatric expert, we conclude that the trial court properly denied the peremptory instruction as to this mitigating circumstance. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant also raises for "preservation" the following three issues: (1) the trial court improperly instructed the jury on nonstatutory mitigating circumstances, (2) the trial court improperly instructed the jury on sentencing Issues Three and Four regarding consideration of proven mitigation, and (3) the trial court improperly instructed the jury regarding the meaning of a life sentence. We have previously considered and rejected 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

[8] We now turn to our statutory duty as codified in N.C.G.S. § 15A-2000(d)(2) and reserved exclusively for this Court in capital cases. We must 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 jury recommended the death sentence under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2). After thoroughly examining the record, transcripts, and briefs in this case, we conclude that the evidence fully supports the aggravating circumstances found by the jury. Moreover, the defendant admits that there was independent evidence to support each of them. Further, there is no indication that the sentence of death in this case was imposed under the influence of any arbitrary consideration. We turn then to our final statutory duty of proportionality review.

In the case *sub judice*, defendant pled guilty to first-degree murder. The jury found two aggravating circumstances: that the mur-

der was committed by a person lawfully incarcerated, N.C.G.S. § 15A-2000(e)(1), and that defendant previously had been convicted of the two violent felonies of firing into an occupied motor vehicle and second-degree murder, N.C.G.S. § 15A-2000(e)(3). In mitigation, one or more jurors found the statutory mitigating circumstance that the murder was committed while defendant was mentally or emotionally disturbed, N.C.G.S. § 15A-2000(f)(2), and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired, N.C.G.S. § 15A-2000(f)(6). Further, the jury found nine of twenty submitted nonstatutory mitigating circumstances.

In conducting our proportionality review, it is appropriate for us 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*, 512 U.S. 1254, 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 State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1977) WL 174309 (April 1, 1997) *and* by *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

None of the seven cases in which this Court has found the death penalty disproportionate is factually similar to the present case. None of the defendants in those cases had previously been convicted of killing another human being at the time they committed the murders for which they were sentenced to death. Moreover, this is the first appellate case in which a jury has found the (e)(1) aggravating circumstance, that the murder was committed by a lawfully incarcerated person. Defendant was serving a life sentence for second-degree murder at the time he committed the murder at issue. By killing a man in prison, defendant has demonstrated that he will not abide the rules and regulations of the most confining punishment society provides and indeed that he is indifferent to them. Defendant has shown himself to be a recidivist murderer while serving a life sentence for murder. The death penalty is not a disproportionate punishment for someone who demonstrates his recidivistic tendencies in this manner.

Defendant has shown a disregard for the value of human life. Most reprehensible, we believe, is defendant's motive, or lack thereof, for the killing. He killed because he knew that such action would get him transferred from the unit at Eastern Correctional Center and into Central Prison, where he wanted to be. Defendant's indifference toward human life tends to show that he is not likely ever to rehabilitate himself. We cannot conclude as a matter of law that the sentence of death is excessive or disproportionate, and we leave it undisturbed.

NO ERROR.

STACY L. PRICE v. ROBIN HOWARD

No. 312A96

(Filed 9 May 1997)

1. Parent and Child § 19 (NCI4th)— child custody—disputes between natural parents or nonparents—best interest of child test

In a custody dispute between two natural parents (biological or adoptive) or between two parties who are not natural parents, the "best interest of the child" test must be applied. N.C.G.S. § 50-13.2(a).

Am Jur 2d, Parent and Child §§ 23 et seq.

2. Parent and Child § 21 (NCI4th)— child custody—constitutionally protected status of parent—inconsistent conduct—best interest of child test

A natural parent may no longer enjoy a constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child if the parent's conduct is inconsistent with the presumption that he or she will act in the best interest of the child or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the par-

ent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the child" test without offending the Due Process Clause.

Am Jur 2d, Parent and Child § 24.

3. Parent and Child § 21 (NCI4th)— child custody—parent's constitutionally protected status—inconsistent conduct—best interest of the child test

While unfitness, neglect, and abandonment clearly constitute conduct inconsistent with a natural parent's constitutionally protected paramount status, other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level. Where such conduct is properly found by the trier of fact based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Am Jur 2d, Parent and Child §§ 23 et seq.

4. Parent and Child § 25 (NCI4th)— child custody—dispute between mother and nonparent—applicability of best interest of child test—remand for determination

A custody dispute between defendant natural mother and plaintiff nonparent, the child's *de facto* father, is remanded for a determination as to whether defendant's conduct was inconsistent with the constitutionally protected status of a natural parent so that the "best interest of the child" standard should be applied where defendant lived with plaintiff and the child in a family unit for the child's first three years of life, although plaintiff and defendant never married; knowing that plaintiff was not the child's natural father, defendant represented to plaintiff, the child and others that plaintiff was the natural father; after the parties separated, the child remained in the primary physical custody of plaintiff but also spent time with defendant, but the amount of contact defendant had with the child was strongly disputed in the parties' testimony; a court-ordered paternity test after the custody dispute arose excluded plaintiff as the child's father; and the testimony at trial shows that the parties disputed whether defendant's voluntary relinquishment of custody to plaintiff was intended to be temporary or indefinite and whether she informed plaintiff and the child that the relinquishment of custody was temporary. If defendant represented that plaintiff was the child's

natural father and voluntarily gave him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, use of the "best interest of the child" test would be appropriate; however, if defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, defendant would still enjoy a constitutionally protected status absent other conduct inconsistent with that status.

Am Jur 2d, Parent and Child §§ 28, 29.

5. Parent and Child § 21 (NCI4th)— child custody—natural parent—constitutionally protected interest—relinquishment of custody—notice that temporary—avoiding inconsistent conduct

While there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, in order to preserve the constitutional protection of parental interests, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with protected parental interests. Such conduct includes failure to maintain personal contact with the child and failure to resume custody when able.

Am Jur 2d, Parent and Child §§ 28 et seq.

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. 674, 471 S.E.2d 673 (1996), affirming in part and reversing in part a custody order entered by Chaney, J., on 29 March 1995 in District Court, Durham County. Heard in the Supreme Court 13 November 1996.

Vosburg and Fullenwider, by Ann Marie Vosburg, for plaintiff-appellant.

Mildred T. Hardy for defendant-appellee.

ORR, Justice.

The custody issue in this case arises out of the relationship between plaintiff and defendant, who lived together in Durham, North Carolina, from 1986 until 1989. On 10 June 1986, defendant Robin Howard gave birth to a daughter. The child's name on the birth

certificate was listed as Dominique Price, but the father's name on the birth certificate was left blank. However, from the time of the child's birth, defendant represented that plaintiff was the child's natural father. As a result, it was the child's belief that plaintiff was in fact her natural father.

Plaintiff and defendant separated in 1989, with the child remaining in the primary physical custody of plaintiff, but also spending time with defendant mother. Defendant stayed in the Durham area until the summer of 1991, when she moved to Eden, North Carolina. The child remained with plaintiff and attended school in Durham during the 1991-1992 school year. During the summer of 1992, defendant attempted to have the child's school records transferred to the Rockingham County school system.

Upon learning of defendant's attempt to have the child's school records transferred, plaintiff filed an action seeking custody of the child. In her answer, defendant denied that plaintiff was the natural father of the child. The court subsequently ordered a blood test, the results of which excluded plaintiff as the natural father of the child. In a 4 September 1992 order, the court found that it was in the child's best interests that she remain in the custody of plaintiff, and the court awarded plaintiff temporary custody of the child, subject to visitation by defendant. On 3 June 1993, plaintiff was married to Vanessa Price, and the child resided with them in Durham.

In its final order, dated 28 March 1995, the court concluded that both plaintiff and defendant were fit and proper persons to exercise the exclusive care and custody of the child. The court also concluded that it was in the child's best interests that she be in the primary physical custody of plaintiff. However, the court concluded that the recent ruling by this Court in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), *rev'g*, 111 N.C. App. 712, 433 S.E.2d 770 (1993), did not allow the court to make that award. Therefore, the court ordered that defendant be awarded the exclusive companionship, care, custody, and control of the child. The court also ordered that the child receive therapy and that plaintiff and defendant share equally all uninsured costs for the therapy.

Upon review by the Court of Appeals, the trial court's order that plaintiff share in therapy costs was reversed on the ground that support for minor children is a parental obligation. *Price v. Howard*, 122 N.C. App. 674, 471 S.E.2d 673 (1996) (citing *Boyd v. Boyd*, 81 N.C. App. 71, 77-78, 343 S.E.2d 581, 585-86 (1986)). The Court of Appeals'

majority affirmed the custody award, relying on the holding of *Petersen v. Rogers*. Judge Greene dissented, *id.* at 677, 471 S.E.2d at 675, arguing that *Petersen* does not govern the custody determination in this case. Plaintiff appealed pursuant to N.C.G.S. § 7A-30(2), based on Judge Greene's dissent. For the reasons stated below, we reverse the majority decision of the Court of Appeals.

[1] The General Assembly has prescribed the standard to be applied in a custody proceeding in North Carolina in N.C.G.S. § 50-13.2, which provides that "[a]n order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C.G.S. § 50-13.2(a) (1996). Therefore, in a custody dispute between two natural parents (we intend this phrase to include both biological and adoptive parents) or between two parties who are not natural parents, this "best interest of the child" test must be applied. The case now before us, however, is between a natural parent and a third party who is not a natural parent. In *Petersen*, this Court held that natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children. We stated that this interest must prevail in a custody dispute with a nonparent, absent a showing of unfitness or neglect. We are now called upon to decide whether other circumstances can require that interest to yield to the "best interest of the child" test prescribed by N.C.G.S. § 50-13.2(a). As will be discussed more fully, this decision requires a due-process analysis in which the parent's well-established paramount interest in the custody and care of the child is balanced against the state's well-established interest in protecting the welfare of children.

In the case *sub judice*, the trial court found that it was in the best interests of the child for custody to remain with plaintiff. However, relying on this Court's decision in *Petersen v. Rogers*, the trial judge felt compelled to award custody to defendant. *Petersen* involved a custody dispute between a child's natural parents and a couple who had unlawfully adopted the child. Although this Court voided the adoption in *In re Adoption of P.E.P.*, 329 N.C. 692, 407 S.E.2d 505 (1991), the couple that had unlawfully adopted the child filed an action seeking custody of the child. After inquiring into the religious practices and beliefs of the plaintiffs, the trial court applied the "best interest of the child" test and awarded custody to defendants, the child's natural parents. The Court of Appeals did not address the question of whether the "best interest of the child" test was correctly

applied or whether the natural parents' due-process interest was adequately protected. Instead, the Court of Appeals held that the "plaintiffs' right to freedom of religion, as guaranteed by the federal and state constitutions, was violated by the trial court's extensive inquiry into plaintiffs' religion," *Petersen*, 337 N.C. at 399-400, 445 S.E.2d at 902, and the court remanded the case " 'for proceedings free from unwarranted religious inquisition into the beliefs of the parties' ", *id.* (quoting *Petersen*, 111 N.C. App. at 725, 433 S.E.2d at 778).

Defendants appealed to this Court, contending that the case involved a substantial question arising under the state and federal Constitutions. This Court also granted defendants' petition for discretionary review. We held that the trial court's inquiry into the plaintiffs' religious beliefs, if error, was harmless because, "[b]ased on the record, defendants' paramount right to custody of their minor child had to prevail." *Id.* at 404, 445 S.E.2d at 905. The plaintiffs argued to this Court that "the welfare of the child is paramount to all common law preferential rights of the parents." *Id.* at 403, 445 S.E.2d at 905. This Court rejected that argument by recognizing that the parents' interest in the companionship, custody, care, and control of the child is protected by the United States Constitution. Relying in part on *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972), we recognized the general principle that because of the strength and importance of the parents' constitutionally protected interests, those interests must prevail against a third party unless the court finds that the parents are unfit or have neglected the welfare of their children. *See Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905.

It was unnecessary in *Petersen* to articulate anything more than general constitutional principles. In *Petersen*, the plaintiffs unlawfully adopted the defendants' natural child. This Court noted the trial court's findings of fact that the child "is not eligible for adoption; the rights of his parents have not been terminated; . . . his parents have not consented to any such adoption"; and the parents "are fit and appropriate persons to have custody of their son." *Id.* at 404, 455 S.E.2d at 905. This Court concluded:

> There was no finding that defendants had neglected their child's welfare in any way. Based on the record, defendants' paramount right to custody of their minor child had to prevail; and the trial court could not award custody to anyone other than defendants. Since as a matter of law the trial court could not award cus-

> tody to plaintiffs, inquiry into their fitness for purposes of custody was irrelevant.

Id. The Court did not discuss whether a "best interest of the child" test violated the Due Process Clause. However, in the case now before us, such a discussion is necessary.

"The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law." *Lehr v. Robertson*, 463 U.S. 248, 256, 77 L. Ed. 2d 614, 623 (1983). The interest implicated in the case before us and in *Petersen* is a natural parent's liberty interest in the companionship, custody, care, and control of his or her child. The United States Supreme Court has recognized that this interest is protected by the Constitution. In *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519 (1978), the Court stated: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." In *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 649 (1981), the Court stated:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."

Id. (quoting *Stanley v. Illinois*, 405 U.S. at 651, 31 L. Ed. 2d at 558).

The question now before us is whether, under the facts of this case, the trial court was required to hold that defendant's constitutionally protected interest in the companionship, custody, care, and control of her child must prevail or whether the statutorily prescribed "best interest of the child" test should have been applied to determine custody. As the United States Supreme Court observed in *Lassiter v. Department of Social Services*:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover

> what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter, 452 U.S. at 24-25, 68 L. Ed. 2d at 648 (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236 (1961)). Because the question presented in this case is resolved by an analysis of the nature and scope of defendant's due-process interest in the companionship, custody, care, and control of her child, a strict substantive or procedural due-process analysis is not necessary.

Due-process interests are based in part on history and tradition. *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91 (1989). Therefore, prior cases of this Court are instructive on the issue before us because they show how we have addressed custody issues in a wide variety of circumstances. North Carolina law traditionally has protected the interests of natural parents in the companionship, custody, care, and control of their children, with similar recognition that some facts and circumstances, typically those created by the parent, may warrant abrogation of those interests. The reasoning for such a rule was, perhaps, best explained in *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961), in which this Court stated that parents have a duty to care for their minor children and explained that "[b]ecause the law presumes parents will perform their obligations to their children, it presumes their prior right to custody, but this is not an absolute right." *Id.* This Court further explained that "[w]hen a parent neglects the welfare and interest of his child, he waives his usual right of custody." *Id.* at 437, 119 S.E.2d at 191. *See also Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967) (stating that "[w]hile it is true that a parent, if a fit and suitable person, is entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right"); *In re Gibbons*, 247 N.C. 273, 280, 101 S.E.2d 16, 21-22 (1957) (recognizing that the legal right of a parent to custody may yield to the interests of the child where the "parent has voluntarily permitted the child to remain continuously in the custody of others in their home, and has taken little interest in it, thereby substituting such others in his own place, so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness").

On several occasions, the United States Supreme Court has held that a state law inadequately protected a parent's due-process interest in the companionship, custody, care, and control of his child. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982) (holding that in a proceeding to terminate parental rights, the "preponderance of the evidence" standard of proof violates the Due Process Clause and that due process requires at least a "clear and convincing evidence" standard); *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (holding that an Illinois statute that conclusively presumed every father of a child born out of wedlock to be an unfit person to have custody of his children violated the Due Process Clause and that due process required the father to be given an opportunity to present evidence regarding his fitness as a parent); *cf. Lassiter v. Department of Social Servs.*, 452 U.S. 18, 68 L. Ed. 2d 640 (holding that although petitioner's due-process rights were not violated under the circumstances of that case, in some cases due process would require appointment of counsel in a decision to terminate parental status).

However, the United States Supreme Court has also recognized that protection of the parent's interest is not absolute. In *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, the Court held that a natural father's interest in his relationship with his child was not unconstitutionally infringed upon by a state procedure that allowed the child's stepfather to adopt the child against the father's wishes. The Court pointed out its traditional adherence to the principle that "the rights of the parents are a counterpart of the responsibilities they have assumed." *Id.* at 257, 77 L. Ed. 2d at 624. In discussing this principle, the Court stated:

> Thus, the "liberty" of parents to control the education of their children that was vindicated in *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070 (1925), was described as a "right, coupled with the high duty, to recognize and prepare [the child] for additional obligations." [*Pierce*, 268 U.S.] at 535, 69 L. Ed. [at 1078]. The linkage between parental duty and parental right was stressed again in *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, [652] (1944), when the Court declared it a cardinal principle "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." [*Id.* at 166, 88 L. Ed. at 652]. In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest

> in liberty entitled to constitutional protection. *See also Moore v. City of East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531 (1977) (plurality opinion).

Lehr, 463 U.S. at 257-58, 77 L. Ed. 2d at 624 (citations modified).

In *Lehr*, the Court stressed the linkage between parental duty and parental right and noted that the father in that case had "never had any significant custodial, personal, or financial relationship with [the child], and he did not seek to establish a legal tie until after she was two years old." *Id.* at 262, 77 L. Ed. 2d at 627. The Court reasoned that

> [w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban* [*v. Mohammed*], 441 U.S. [380], 392, 60 L. Ed. 2d 297, [307 (1979)], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." *Id.* at 389, n.7, 60 L. Ed. 2d [at 305, n.7]. But the mere existence of a biological link does not merit equivalent constitutional protection.

Lehr, 463 U.S. at 261, 77 L. Ed. 2d at 626 (citations modified). The Court further stated, " '[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children as well as from the fact of blood relationship.' *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844, 53 L. Ed. 2d 14, [35] (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33, 32 L. Ed. 2d 15, [34-35] (1972))." *Lehr*, 463 U.S. at 261, 77 L. Ed. 2d at 626 (citations modified).

In *Quilloin v. Walcott*, 434 U.S. 246, 54 L. Ed. 2d 511, the Court considered a central element found in the case before us, whether a court may apply the "best interest of the child" test instead of finding unfitness of a parent before infringing on that parent's rights in the relationship with the child. "*Quilloin* involved the constitutionality of a Georgia statute that authorized the adoption, over the objection of the natural father, of a child born out of wedlock." *Lehr*, 463 U.S. at 259, 77 L. Ed. 2d at 625. The child's mother remarried, and the child's new stepfather filed an adoption petition. The trial court found adoption by the child's stepfather to be in the child's best interests. *Id.* The father appealed to the Supreme Court of Georgia, argu-

ing that the adoption should not be allowed because the trial court did not make a finding of abandonment or other unfitness on his part. *Quilloin*, 434 U.S. at 252, 54 L. Ed. 2d at 517-18. The Georgia Supreme Court affirmed the decision of the trial court, relying generally on the strong state policy of rearing children in a family setting. "The court also emphasized the special force of this policy under the facts of this case, pointing out that the adoption was sought by the child's stepfather, who was part of the family unit in which the child was in fact living, and that the child's natural father had not taken steps to support or legitimate the child over a period of more than 11 years." *Id.* at 252-53, 54 L. Ed. 2d at 518. The father appealed to the United States Supreme Court, again arguing that Georgia law violated the Due Process Clause because it imposed a "best interests of the child" standard. He contended "that he was entitled to recognition and preservation of his parental rights absent a showing of his 'unfitness.' " *Id.* at 254, 54 L. Ed. 2d at 519. The United States Supreme Court unanimously held that the father's interests were adequately protected by a "best interests of the child" standard. *See id.*

In *Quilloin*, the Court stated:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63, 53 L. Ed. 2d 14, [46-47] (Stewart, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child."

Quilloin, 434 U.S. at 255, 54 L. Ed. 2d at 520 (citation modified). The result in *Quilloin* was, in effect, to terminate the parental rights of the natural parent. In the case *sub judice*, no such severe result would occur. Here, application of the legislatively mandated "best

interest of the child" test would result only in a determination by the trial court as to which party should have custody.

[2],[3] A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. *Lehr*, 463 U.S. 248, 77 L. Ed. 2d 614; *In re Hughes*, 254 N.C. 434, 119 S.E.2d 189. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. *See Petersen*, 337 N.C. 397, 445 S.E.2d 901; *see also Quilloin*, 434 U.S. at 255, 54 L. Ed. 2d at 520; *Smith*, 431 U.S. at 862-63, 53 L. Ed. 2d at 46-47. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, *see* N.C.G.S. § 7A-289.32 (1995), would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

[4] We now turn to consideration of whether the conduct involved in this case, a period of voluntary nonparent custody, may constitute conduct inconsistent with the protected status of natural parents and therefore result in the application of the "best interest of the child" test. As noted above, this Court addressed a similar question using common law principles in *In re Gibbons*, 247 N.C. 273, 101 S.E.2d 16. The *Gibbons* Court quoted with approval from *Merchant v. Bussell*, 139 Me. 118, 124, 27 A.2d 816, 819 (1942):

> "This petitioner for a period of more than four years showed not much more than a formal interest in his child. Circumstances were such that perhaps this was inevitable. He knew that the child was well cared for and was content to let the natural ties

> which bound him to his offspring grow very tenuous. Since the death of his wife there is little evidence that he has had any great yearning to have his child with him, to sacrifice for her, or to lavish on her the affection which would have meant so much to her in her tender years. Instead he surrendered this high privilege to the grandmother, who with the help of her unmarried daughters has given to this child the same devotion as it would have received from its own mother. Now having permitted all this to happen he claims the right, because he is the father, to sever the ties which bind this child to the respondent. In this instance the welfare of the child is paramount. The dictates of humanity must prevail over the whims and caprice of a parent."

Gibbons, 247 N.C. at 280-81, 101 S.E.2d 22.

A similar question was also addressed by the Court of Appeals of New York using constitutional principles in *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976). The *Bennett* court described the facts of that case as follows:

> Some eight years ago, the mother, then 15 years old, unwed, and living with her parents, gave birth to the child. Under pressure from her mother, she reluctantly acquiesced in the transfer of the newborn infant to an older woman, Mrs. Jeffreys, a former classmate of the child's grandmother. The quality and quantity of the mother's later contacts with the child were disputed. The Family Court found, however, that there was no statutory surrender or abandonment. Pointedly, the Family Court found that the mother was not unfit.

Id. at 544, 356 N.E.2d at 280, 387 N.Y.S.2d at 823. The mother brought a proceeding to obtain custody of her daughter. The *Bennett* court defined the issue as "whether the natural mother, who has not surrendered, abandoned, or persistently neglected her child, may, nevertheless, be deprived of the custody of her child because of a prolonged separation from the child for most of its life." *Id.* The court first recognized the constitutionally protected interest of natural parents in the custody of their children:

> Absent extraordinary circumstances, narrowly categorized, it is not within the power of a court, or, by delegation of the Legislature or court, a social agency, to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition. The State is *Parens*

> *patriae* and always has been, but it has not displaced the parent in right or responsibility. Indeed, the courts and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity (*See Stanley v. Illinois*, 405 U.S. 645, 651[, 31 L. Ed. 2d 551, 558-59]).

Bennett, 40 N.Y.2d at 545-46, 356 N.E.2d at 281, 387 N.Y.S.2d at 824. As in North Carolina, New York statutes required courts to base custody decisions solely upon the best interest of the child. *See id.* at 547, 356 N.E.2d at 282, 387 N.Y.S.2d at 825. However, the *Bennett* court noted that

> neither decisional rule nor statute can displace a fit parent because someone else could do a "better job" of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their "rights" by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These "rights" are not so much "rights", but responsibilities which reflect the view, noted earlier, that, except when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore entitled to do so.

Id. at 548, 356 N.E.2d at 282, 387 N.Y.S.2d at 826. The court also pointed out that

> where there is warrant to consider displacement of the parent, a determination that extraordinary circumstances exist is only the beginning, not the end, of judicial inquiry. Extraordinary circumstances alone do not justify depriving a natural parent of the custody of a child. Instead, once extraordinary circumstances are found, the court must then make the disposition that is in the best interest of the child.

Id. at 548, 356 N.E.2d at 283, 387 N.Y.S.2d at 826. In considering whether disruption of custody over an extended period of time may result in a possible displacement of a parent's constitutionally protected interests, the *Bennett* court recognized the danger of a fact situation such as that in *Petersen*, in which the custodians obtained custody unlawfully. The court stated that

> [t]he resolution of cases must not provide incentives for those likely to take the law into their own hands. Thus, those who obtain custody of children unlawfully, particularly by kidnapping, violence, or flight from the jurisdiction of the courts, must be

> deterred. Society may not reward, except at its peril, the lawless because the passage of time has made correction inexpedient.

Id. at 550, 356 N.E.2d at 284, 387 N.Y.S.2d at 827. Finally, the *Bennett* court concluded that the relatively lengthy period of nonparent custody, along with other factors, constituted sufficient extraordinary circumstances to remand the case for a hearing on the best interest of the child. The court again emphasized the following:

> In all of this troublesome and troubled area there is a fundamental principle. Neither law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from its parent unless the circumstances are compelling. Neither the lawyers nor Judges in the judicial system nor the experts in psychology or social welfare may displace the primary responsibility of child-raising that naturally and legally falls to those who conceive and bear children. Again, this is not so much because it is their "right", but because it is their responsibility. The nature of human relationships suggests overall the natural workings of the child-rearing process as the most desirable alternative. But absolute generalizations do not fulfill themselves and multifold exceptions give rise to cases where the natural workings of the process fail, not so much because a legal right has been lost, but because the best interest of the child dictates a finding of failure.

Id. at 552, 356 N.E.2d at 285, 387 N.Y.S.2d at 828-29.

As in *Bennett,* the case before us involves a period of voluntary nonparent custody rather than unfitness or neglect. The conduct in *Lehr* and *Quilloin,* failure to ever establish any significant custodial, personal, or financial relationship with the child, also is not present in the case before us. In this case, defendant had a custodial, personal, and financial relationship with the child for a period of time; she lived with plaintiff and the child in a family unit for the child's first three years of life. However, it was strongly disputed in the parties' testimony how much contact defendant had with her daughter after the parties separated. The trial court's findings of fact state only that "upon the separation of the parties, the minor child spent time with both parties until the summer of 1990"; that "during the summers, the minor child attended various summer camps with the plaintiff"; and that "the Defendant moved to Eden, North Carolina in July of 1991 and the child remained in Durham, North Carolina with the Plaintiff as she was previously attending Lakewood Elementary

School." Defendant testified that she initially opposed relinquishing custody to plaintiff, but that she later agreed that plaintiff should maintain custody, at least temporarily.

It is clear from the record that defendant created the existing family unit that includes plaintiff and the child, but not herself. Knowing that the child was her natural child, but not plaintiff's, she represented to the child and to others that plaintiff was the child's natural father. She chose to rear the child in a family unit with plaintiff being the child's *de facto* father. The testimony at trial shows that the parties disputed whether defendant's voluntary relinquishment of custody to plaintiff was intended to be temporary or indefinite and whether she informed plaintiff and the child that the relinquishment of custody was temporary. This is an important factor to consider, for, if defendant had represented that plaintiff was the child's natural father and voluntarily had given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, defendant would have not only created the family unit that plaintiff and the child have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.

However, if defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 53 L. Ed. 2d 14 (holding that natural parents could not lose parental rights to foster parents where the foster agreement contemplates a surrender of custody for only a temporary period of time).

[5] We wish to emphasize this point because we recognize that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment. However, to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests. Such conduct would, of course, need to be viewed on a case-by-case basis, but may include

failure to maintain personal contact with the child or failure to resume custody when able.

In the case before us, because the trial court made no findings about whether defendant and plaintiff agreed that the surrender of custody would be temporary, or about the degree of custodial, personal, and financial contact defendant maintained with the child after the parties separated, we cannot conclude whether defendant should prevail based upon the constitutionally protected status of a natural parent or whether the "best interest of the child" test should be applied.

The decision of the Court of Appeals is therefore reversed, and the case is remanded to the Court of Appeals for further remand to District Court, Durham County, for a determination of whether defendant's conduct was inconsistent with the constitutionally protected status of a natural parent. If so, then the court should determine custody based on the "best interest of the child" standard pursuant to N.C.G.S. § 50-13.2(a). We note that our holding nullifies the portion of the Court of Appeals opinion relating to the parties' responsibility for the costs of therapy. Although support of a child ordinarily is a parental obligation, other persons standing *in loco parentis* may also acquire a duty to support the child. *See* N.C.G.S. § 50-13.4(b) (1995). It is clear that the duty of support should accompany the right to custody in cases such as this one. Therefore, upon remand, the trial court should reconsider the issue of who should bear the costs of the child's therapy in light of its ultimate custody award.

REVERSED AND REMANDED.

DAVID EUGENE RADZISZ, EMPLOYEE v. HARLEY DAVIDSON OF METROLINA, INC., EMPLOYER, AND UNIVERSAL UNDERWRITERS, CARRIER

No. 411PA96

(Filed 9 May 1997)

Workers' Compensation § 86 (NCI4th)— settlement with tortfeasor before award—employer's subrogation lien

An employer and its insurance carrier possessed a workers' compensation subrogation and lien interest under N.C.G.S.

§ 97-10.2 in funds received by the injured employee through settlement with the third-party tortfeasor even though the employer had not filed a written admission of liability and no final award in favor of the employee had been entered by the Industrial Commission at the time of the disbursement of the third-party settlement proceeds. Furthermore, the settlement agreement acknowledged that the employer and workers' compensation carrier are legally entitled to a subrogation or lien interest and left undecided only the question of the amount of the lien.

Am Jur 2d, Workers' Compensation § 456

Justice FRYE dissenting.

Justices WEBB and LAKE join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 123 N.C. App. 602, 473 S.E.2d 655 (1996), reversing and remanding an opinion and award of the Industrial Commission entered 13 December 1994. Heard in the Supreme Court 17 April 1997.

Tim L. Harris & Associates, by Rebecca L. Thomas, for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Henry C. Byrum, Jr., and Scott A. Beckey, for defendant-appellees.

WHICHARD, Justice.

Plaintiff-employee, David Eugene Radzisz, a motorcycle mechanic employed by defendant-employer, was involved in a collision with an automobile on 1 June 1990 while operating a customer's motorcycle. As a result of injuries sustained in the accident, plaintiff filed both a workers' compensation claim with defendants and a civil action against the owners of the automobile ("third party"). Upon learning of the civil suit, defendant-carrier Universal Underwriters notified plaintiff and the third party of a potential subrogation lien in the workers' compensation action and requested that no settlement funds be disbursed in the civil action until the potential lien was satisfied. Defendants subsequently denied compensation, claiming that the collision occurred outside the course and scope of plaintiff's employment. On 24 September 1990, plaintiff and the third party agreed to settle the civil action for $25,000 and to the entry of a consent judgment in that amount.

In order to accommodate the potential workers' compensation lien on the proceeds of the civil action, plaintiff and defendants entered into a "Settlement Stipulation and Agreement" on 8 November 1990, which provides in pertinent part:

> In order to accommodate the potential worker's compensation lien on the proceeds of the civil action, [the parties] hereby execute this Stipulation and Agreement whereby [plaintiff] stipulates that if his worker's compensation claim is upheld by the Industrial Commission or if [defendants] file a written admission of liability for benefits with the Commission, [defendants] will have a lien, as provided in G.S. § 97-10.2, against these proceeds, and stipulates that they will be entitled to a credit against the worker[']s compensation benefits to the extent that they have a subrogation interest in the proceeds of the settlement of the civil action. The amount of this subrogation interest is to be determined as if the civil action were settled after the total amount of the worker's compensation lien is determined by the Industrial Commission or a court, and is to be determined in accordance with . . . G.S. § 97-10.2. The parties specifically reserve the right to contest the issue of the amount of the lien.
>
> . . . As of the date of execution of this agreement, [plaintiff] contends that no such interest exists in this case. This Agreement is not to be construed as granting or conceding the existence of any potential subrogation interest until [plaintiff's] worker[']s compensation claim is honored.

A consent order requiring payment of $25,000 by the third party to plaintiff was entered 16 November 1990, and the funds were thereafter disbursed to plaintiff, subject to the terms of the settlement agreement.

Following a June 1991 hearing before Deputy Commissioner Charles Markham, plaintiff was awarded workers' compensation benefits. The Deputy Commissioner also concluded that "[p]ursuant to the agreement between all the parties to the consent judgment," defendants were entitled to a credit or lien against the proceeds of the third-party settlement.

Plaintiff appealed to the full Commission, which, in a 13 December 1994 opinion and award, determined that plaintiff was entitled to workers' compensation benefits but denied defendants' subrogation interest. The Commission concluded that "[a]s defend-

ants did not admit liability for this injury and instead denied and contested liability, and as no final award has been entered by the Industrial Commission, defendants shall have no subrogation interest or lien as to the $25,000 third party settlement." The Commission also noted that the settlement agreement entered into by the parties did not create a subrogation interest but rather "purports and preserves any such interest as defendants may have eventually been found to exist" pursuant to the requirements of N.C.G.S. § 97-10.2.

The Court of Appeals, in a unanimous decision, reversed the Commission and held that defendants did possess a lien interest in funds received by plaintiff through settlement with the third party prior to the resolution of the workers' compensation claim. This Court allowed plaintiff's petition for discretionary review on 7 November 1996, and we now affirm the Court of Appeals.

N.C.G.S. § 97-10.2 defines the rights and remedies of employees and employers against third-party tort-feasors. The statute provides in pertinent part:

> (f)(1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . . .
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
>
> . . . .
>
> (g) The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

> (h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein . . . .

N.C.G.S. § 97-10.2(f)(1)(c), (g), (h) (1991).

Plaintiff argues that, when read *in pari materia*, subsections (f) and (h) of section 97-10.2 create a temporal requirement whereby written admission of liability or a final award from the Industrial Commission are conditions precedent to a subrogee's lien interest on the third-party proceeds. Subsection (h) provides that each party "shall have a lien to the extent of his interest under [subsection] (f)." Plaintiff contends that pursuant to subsection (f)(1), the Industrial Commission has jurisdiction to distribute third-party settlement proceeds to an employer only if the employer has filed a written admission of liability or if a final award favorable to plaintiff has been entered by the Commission. Here, at the time of disbursement of the third-party funds, defendant had denied liability, and there was no award, final or otherwise. Plaintiff argues that defendants therefore had no lien interest to enforce under subsection (h).

In response, defendants argue that they have a mandatory right to reimbursement under N.C.G.S. § 97-10.2 that is not waived by failure to admit liability or obtain a final award prior to distribution of the third-party settlement proceeds. Defendants contend that the Industrial Commission cannot abrogate an employer's subrogation interest by creating conditions precedent to recovery that the General Assembly has never expressed, implied, or intended. We agree.

This Court's primary task in statutory construction is to ensure that the legislative intent is accomplished. *State ex rel. Hunt v. N.C. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). The best indicia of legislative purpose are "the language of the

statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers. *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966). Section 97-10.2 and its statutory predecessors were designed to secure prompt, reasonable compensation for an employee and simultaneously to permit an employer who has settled with the employee to recover such amount from a third-party tort-feasor. *Brown v. Southern Ry.* Co., 204 N.C. 668, 671, 169 S.E. 419, 420 (1933). Absent extenuating circumstances not present here, the Act in general and N.C.G.S. § 97-10.2 specifically were never intended to provide the employee with a windfall of a recovery from both the employer and the third-party tort-feasor. Where "[t]here is one injury, [there is] still only one recovery." *Andrews v. Peters*, 55 N.C. App. 124, 131, 284 S.E.2d 748, 752 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982).

Turning to the provisions of N.C.G.S. § 97-10.2, we note that statutory interpretation properly commences with an examination of the plain words of a statute. *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Subsection (h) explicitly states that "[i]n any proceeding against or settlement with the third party, every party to the claim for compensation *shall have* a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury." (Emphasis added.) As the Court of Appeals correctly noted, the language "to the extent of his interest under (f)" refers to the priority of disbursement set out in subsection (f)(1)(a) through (d), and does not, as plaintiff asserts, require that defendants have claimed liability, made benefits payments, or sought a final award from the Commission at the time the third-party payment is made. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 123 N.C. App. 602, 608, 473 S.E.2d 655, 658 (1996). An employer's statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature, *Manning v. Fletcher*, 102 N.C. App. 392, 400, 402 S.E.2d 648, 652 (1991), *aff'd per curiam*, 331 N.C. 114, 413 S.E.2d 798 (1992), and the Industrial Commission may not unilaterally discharge that right. The Commission's authority to allocate third-party proceeds is limited to that stated by the legislature in subsection (f). The finding that defendants had no lien or subrogation interest whatsoever therefore exceeded the statutory authority

granted to the Commission and is contrary to the mandate of section 97-10.2.

Additionally, since the passage of the Workers' Compensation Act, the courts of this state have repeatedly affirmed employers' entitlement under section 97-10.2 to recovery from a responsible third party. For example, in *Byers v. N.C. State Highway Comm'n*, 275 N.C. 229, 166 S.E.2d 649 (1969), this Court held that an employer's failure to participate in an employee's wrongful death action did not waive the employer's right to reimbursement of proceeds from the wrongful death action. Similarly, in *Williams v. Insurance Repair Specialists of N.C., Inc.*, 32 N.C. App. 235, 232 S.E.2d 5, *disc. rev. denied*, 292 N.C. 735, 235 S.E.2d 789 (1977), the Court of Appeals upheld the employer's right to subrogation despite the fact that the Industrial Commission rejected the employer's compensation agreement. Most recently, in *Hieb v. Lowery*, 344 N.C. 403, 474 S.E.2d 323 (1996), this Court affirmed the Court of Appeals' decision that N.C.G.S. § 97-10.2 creates a lien for "all amounts *paid or to be paid*" to the employee. *Id.* at 408, 474 S.E.2d at 326. By inference, then, if the employer is entitled to a lien for benefits "to be paid," this includes benefits awarded after the employee settles his third-party claim or obtains a judgment, regardless of whether the employer first filed an admission of liability or obtained an award from the Commission.

Finally, we note that plaintiff signed a Settlement Stipulation and Agreement which expressly states that "if [plaintiff's] worker's compensation claim is upheld by the Industrial Commission . . ., [defendants] will have a lien, as provided in G.S. § 97-10.2, against these proceeds" and that defendants are "entitled to a credit against the worker[']s compensation benefits to the extent that they have a subrogation interest in the proceeds of the settlement of the civil action." The Industrial Commission found that the settlement agreement "merely purports and preserves any such interest as defendants may have eventually been found to exist." Contrary to the Commission's finding, we conclude that the agreement acknowledges that defendants are legally entitled to a subrogation or lien interest and leaves undecided only the question of the amount of the lien. Accordingly, the Court of Appeals correctly held that the Settlement Stipulation and Agreement "created no rights other than those already existing under G.S. § 97-10.2." *Radzisz*, 123 N.C. App. at 609, 473 S.E. 2d at 659.

We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

Justice FRYE dissenting.

I do not agree with the majority's interpretation of N.C.G.S. § 97-10.2 of the Workers' Compensation Act. I do not believe that it ensures that the legislative intent is accomplished. Nor do I agree that the "Settlement Stipulation and Agreement" entered into by the parties in this case acknowledges defendants' entitlement to a subrogation lien. Therefore, I respectfully dissent.

The purpose of the Workers' Compensation Act is to provide a swift and certain remedy to injured workers, as well as to ensure a limited and determinate liability for employers. *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966). This Court has noted:

> The [Workers' Compensation] Act represents a compromise between the employer's and employee's interests. The employee surrenders his right to common law damages in return for guaranteed, though limited, compensation. The employer relinquishes the right to deny liability in return for liability limited to the employee's loss of earning capacity.

Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 98-99, 348 S.E.2d 336, 341-42 (1986). The Workers' Compensation Act has been repeatedly amended, causing the potential for some of its language to be unclear. However, in light of possible ambiguity, "the Act should be liberally construed to effectuate its purpose." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 268, 425 S.E.2d 698, 704 (1993). I believe that construing the Act as defendants and the majority do is contrary to its terms and its purpose.

The Industrial Commission, the agency charged with the administration of the Workers' Compensation Act, made the following pertinent conclusions of law:

> 11. Defendants claim a subrogation interest pursuant to N.C.G.S. § 97-10.2, based upon a stipulation by the parties in paragraph 9 of the Pre-Trial Agreement, and Exhibit A thereto, which read that the defendants here "will have a lien, as provided in N.C.G.S. Section 97-10.2 against [the] proceeds [of a $25,000.00 settlement with the third-party tort feasor incorporated in a

November 16, 1990 consent judgment], and [Mr. Radzisz] stipulates that they will be entitled to a credit against the workers' compensation benefits to the extent they have a subrogation interest in the proceeds of the settlement of the civil action. The amount of the subrogation interest is to be determined as if the civil action were settled after the total amount of the workers' compensation lien is determined by the Industrial Commission . . . and is to be determined in accordance with N.C.G.S. Section 97-10.2. The parties specifically reserve the right to contest the issue of the amount of the lien."

Further, the agreement read: ["]the purpose of this agreement is to protect the potential subrogation interest, if any, of Harley-Davidson of Metrolina, Inc. and Universal Underwriters Group. As of the date of execution of this agreement, David Radzisz contends that no such interest exists in this case. This agreement is not to be construed as granting or conceding the existence of any potential subrogation interest until Mr. Radzisz's workers' compensation claim is honored. David Radzisz reserves all rights under N.C.G.S. § 97 and N.C.G.S. § 97-10.2 to contest the amount of the subrogation interest before the Industrial Commission of a Court of appropriate jurisdiction."

This settlement stipulation was entered into on November 9, 1990.

N.C.G.S. 97-10.2(f)(1) provides that:

"[i]f the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by Order of the Industrial Commission . . ."

As defendants did not admit liability for this injury and instead denied and contested liability, and as no final award has been entered by the Industrial Commission, defendants shall have no subrogation interest or lien as to the $25,000.00 third party settlement.

12. The settlement stipulation entered into by the parties does not purport on its face or otherwise to create a subrogation interest as agreed to by the parties. Instead, it merely purports

> and preserves any such interest as defendants may have eventually been found to exist. It was explicitly noted that the issue was still to be contested. Further, N.C.G.S. 97-10.2's requirements, and not any stipulated agreement to another effect by the parties, controls this matter.
>
> Accordingly, defendants are not entitled to any subrogation interest in the third party settlement of $25,000.00.

(Alterations in original.)

The Commission's interpretation of N.C.G.S. § 97-10.2 in this case is consistent with the overall intent of the Workers' Compensation Act to allow recovery by employees for work-related injuries. *See Barnhardt*, 266 N.C. at 427, 146 S.E.2d at 484. Under this interpretation, a final award must be made by the Commission or the employer must file an admission of liability *prior to* the disbursement of proceeds from a third-party settlement. This interpretation encourages the swift settlement of workers' compensation claims between injured workers and employers, which is a central purpose of the Act. *See id.*

However, defendants contend that the Industrial Commission's interpretation abrogates an employer's subrogation interest under N.C.G.S. § 97-10.2 by creating conditions precedent to recovery, namely, a final award or an admission of liability prior to distribution of the third-party settlement proceeds. I disagree with these contentions.

The plain language of the statute imposes a temporal requirement for an employer's subrogation lien. The statute clearly conditions the disbursement of proceeds from a third-party settlement to an employer as reimbursement on the filing of a written admission of liability for benefits or a final award entered by the Commission in favor of the employee in its use of the words "if" and "then." *See* N.C.G.S. § 97-10.2(f)(1) (1991). I further note that the language "all amounts *paid or to be paid*" quoted in the majority opinion comes from the language of the UIM policy in *Hieb v. Lowery*, 344 N.C. 403, 474 S.E.2d 323 (1996), rather than from N.C.G.S. § 97-10.2.

Moreover, the main purpose of the Act, a swift and certain remedy, is eviscerated by an interpretation of N.C.G.S. § 97-10.2 that guarantees a subrogation lien to the employer regardless of when it accepts or settles an employee's claim. There is no motivation for an employer to timely accept an employee's workers' compensation

claim when the employer is certain to be reimbursed by proceeds from a possible third-party settlement in the future. The employer's financial interest is served by denying a claim until a third party settles with the injured employee, at which time the employer can receive immediate reimbursement upon accepting the claim. In the meantime, the injured worker is unable to work, is without any means of financial support, and has creditors who still need to be paid. I do not believe that this result comports with the spirit and purpose of the Workers' Compensation Act.

In addition, when the third party does agree to settle, the third party may require the consent of the employer, as it did in this case. The injured worker is thus in the position of desperately needing the proceeds from a settlement and having to obtain the consent of his employer, who has denied his workers' compensation claim. This leaves the injured worker with little or no bargaining power with either the third party or his employer. In order to get the proceeds from the settlement, the injured worker is somewhat forced, due to his predicament, into entering an agreement, such as the one in this case, with the employer.

In this case, the Settlement Stipulation and Agreement states that "if [plaintiff's] worker's compensation claim is upheld by the Industrial Commission . . . or if [defendants] file a written admission of liability for benefits with the Commission, [defendants] will have a lien, as provided in G.S. § 97-10.2, against these proceeds" and further states that "[defendants] will be entitled to a credit against the workers['] compensation benefits to the extent that they have a subrogation interest in the proceeds of the settlement of the civil action." The majority holds that the agreement "acknowledges that defendants are legally entitled to a subrogation or lien interest and leaves undecided only the question of the amount of the lien." I disagree.

The agreement also states that

> [t]he purpose of this agreement is to protect the potential subrogation interest, *if any*, of [defendants]. As of the date of execution of this agreement, [plaintiff] contends that no such interest exists in this case. *This agreement is not to be construed as granting or conceding the existence of any potential subrogation interest.*

(Emphasis added.) Considering the language of the agreement as a whole, I find the Commission's finding that the settlement agreement

"merely purports and preserves any such interest as defendants may have eventually been found to exist" to be correct. Since the settlement agreement "created no rights other than those already existing under G.S. § 97-10.2," *Radzisz v. Harley-Davidson Metrolina, Inc.*, 123 N.C. App. 602, 609, 473 S.E.2d 655, 659 (1996), and defendants were not entitled to a lien under N.C.G.S. § 97-10.2, defendants are not entitled to a subrogation lien by virtue of the agreement.

Furthermore, concerns about an employee's potential recovery from both a settlement with a third party and a workers' compensation claim are misplaced. N.C.G.S. § 97-10.2(h) specifically requires the employer's consent to a settlement between the employee and a third party. This allows the employer to protect its interest in subrogation with respect to the workers' compensation claim and thereby prevent a double recovery.

Accordingly, I vote to reverse the Court of Appeals' decision and remand this case for reinstatement of the Industrial Commission's opinion and award.

Justices WEBB and LAKE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. BRIAN ALLEN BARNARD

No. 237A96

(Filed 9 May 1997)

1. Jury § 109 (NCI4th)— capital murder—jury selection—black defendant, white victim—individual voir dire denied

In a capital prosecution (life sentence) of a black defendant for the first-degree murder of a white victim, the trial court did not abuse its discretion by denying defendant's motion for individual *voir dire* and sequestration of jurors during *voir dire*. Defendant offered no convincing reason explaining how the denial of his motion may have harmed him and his arguments are similar to those in cases in which relief has consistently been denied.

Am Jur 2d, Jury § 198.

2. Jury § 26 (NCI4th)— first-degree murder—jury selection—jurors not summoned or not responding—contact by sheriff—no error

The trial court did not err in a first-degree murder prosecution by denying defendant's challenge to the jury panel where defense counsel learned prior to trial that the sheriff possessed a list of some of the jurors drawn for the session who had not been served with a summons or who had not made a proper return of summons, defendant filed a motion to continue on the basis that there might be insufficient prospective jurors for purposes of selecting an entire panel and alternates, and the clerk's office and the Sheriff's Department attempted to contact some of the prospective jurors who had not returned their notification of service to find out if they had received service. The record supports the trial judge's finding that no evidence exists to support a conclusion of impropriety or that any juror was included or excluded systematically.

Am Jur 2d, Jury §§ 155 et seq.

3. Jury § 26 (NCI4th)— first-degree murder—prospective jurors failing to acknowledge summons—contact by sheriff—no error

There was no error in a first-degree murder prosecution where two or three prospective jurors were contacted by the sheriff from a list he had received from the clerk's office or the district attorney's office, the sheriff asked the persons contacted if they had received their summons and if they intended to appear in court, and the sheriff and the chief deputy testified at trial. The communication was pretrial and clerical, assuring that the prospective jurors had been served with the summons. A juror was not likely to give the sheriff's testimony undue deference based on this minimal contact.

Am Jur 2d, Jury §§ 155 et seq.

4. Criminal Law § 248 (NCI4th Rev.)— first-degree murder—supplemental jury list—no continuance—no prejudice

The trial court did not violate a first-degree murder defendant's constitutional rights by denying his motion to continue where defendant filed a motion for sixty days notice of jury poll; that motion was granted; one hundred and fifty prospective jurors were drawn on 2 August for the session at which defend-

ant was scheduled to be tried; the court ordered on 19 September that one hundred fifty additional prospective jurors be drawn; and defendant contends that he had insufficient time in which to investigate the background of these additional jurors. Other than a generalized complaint about lack of time to investigate the additional prospective jurors, defendant made no showing to the trial court of prejudice if a continuance was not granted. Furthermore, defendant did not file the motion to continue until 11 October 1995 after learning on 19 September that the additional jurors would be drawn.

Am Jur 2d, Jury §§ 126-130.

5. Criminal Law § 378 (NCI4th Rev.)— first-degree murder—defense argument on reasonable doubt—reference to moral certainty—instruction to take legal definitions from court—no error

There was no error in a first-degree murder prosecution where defendant requested specific instructions on burden of proof and reasonable doubt; the trial judge stated outside the presence of the jury that he would allow defense counsel to give this definition of reasonable doubt but cautioned that he would instruct the jury that it should take the law from the court if an objection was made; defense counsel referred to "moral certainty" during closing argument; the prosecutor objected; and the court instructed the jury to listen to counsel but to take the definition of the law from the court. The comment by the court was not an expression of opinion related to any question of fact; assuming error, it cannot be concluded that the comment was prejudicial, given the overwhelming evidence presented against defendant. Additionally, the trial court had warned defense counsel of the consequences of using the proffered definition of "reasonable doubt."

Am Jur 2d, Trial §§ 284, 288, 1385.

6. Criminal Law § 470 (NCI4th Rev.)— first-degree murder—prosecutor's argument—comment on discovery—fair comment on evidence

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* during the prosecutor's closing argument to the jury where defendant contended that the prosecutor erroneously stated the law of discovery and used it to disparage defense counsel, but the fact that the State showed

defendant all of its evidence was apparent from the evidence and testimony presented at trial.

Am Jur 2d, Trial §§ 632-639.

7. Criminal Law § 470 (NCI4th Rev.)— first-degree murder—prosecutor's argument—characterization of testimony as confession

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* in the prosecutor's closing argument where defendant contended that the prosecutor improperly characterized the testimony of a witness as a confession, but the statement was fully supported by the evidence and is an appropriate characterization of the testimony.

Am Jur 2d, Trial §§ 632-639.

8. Criminal Law § 442 (NCI4th Rev.)— first-degree murder—prosecutor's argument—defendant's potential to rob or murder jury

There was no error requiring *ex mero motu* intervention by the trial judge in the prosecutor's closing argument where the prosecutor indicated that defendant might rob or murder the jury if released. While the argument is not approved, it does not rise to the level of gross impropriety requiring intervention, and the evidence of defendant's guilt was so overwhelming that it is unlikely that the jury would have reached a different result but for the improper remarks.

Am Jur 2d, Trial §§ 632-639.

9. Appeal and Error § 506 (NCI4th)— first-degree murder—motion to dismiss felony murder and lying in wait denied—conviction on premeditation and deliberation and lying in wait—no prejudice

There was no prejudicial error where the trial court denied defendant's motion to dismiss charges of first-degree felony murder and first-degree murder by lying in wait and the jury found defendant guilty on the basis of premeditation and deliberation. Defendants are convicted of crimes, not theories.

Am Jur 2d, Appellate Review §§ 531-613, 690-698.

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

at the 16 October 1995 Criminal Session of Superior Court, Madison County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 December 1996.

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

Durryl D. Taylor for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Bruce Dixon Williams ("victim"). The jury returned a verdict finding defendant guilty of first-degree murder upon theories of (i) malice, premeditation, and deliberation and (ii) lying in wait. In accordance with the jury's recommendation after a capital sentencing proceeding, the trial court entered judgment sentencing defendant to life imprisonment. For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error and uphold his conviction and sentence.

On 15 November 1994 the victim was shot to death on a back road in Madison County, North Carolina. The State's evidence tended to show that on 14 November at approximately 7:30 p.m., Sterling Lee Dula, nicknamed "Jodie"; Shane Wilson; and the victim drove to the victim's mother's house. Jodie had with him his .25-caliber pistol. The group took some guns and jewelry belonging to the victim's stepfather. The weapons included shotguns, a pistol, and an assault rifle.

The group then went to the home of Bobby Duane Goforth ("Duane") to ask for his assistance in selling the weapons. After dropping Shane off, Duane, Jodie, and the victim drove to Asheville, North Carolina. At approximately 11:00 p.m. they went into a game room and met defendant, nicknamed "Sniper," and several other people. Duane knew defendant and knew that he and the others were members of the "Crip Rolling 60's gang."

The victim, Duane, defendant, and others went to an apartment complex to sell the weapons. Some time after the group entered an apartment to show the guns, there was a knock at the door; everyone picked up guns and went outside. A person identified as "Don" allegedly picked up the assault weapon and stole it. The other guns were put in the trunk of Jodie's car.

Duane and defendant said that they were going to get the assault weapon back from Don. Duane borrowed Jodie's .25-caliber pistol, and defendant borrowed the .25-caliber pistol taken from the victim's stepfather. While Duane and defendant supposedly looked for the thief, Jodie and the victim went to another apartment and sold one of the stolen shotguns.

Defendant asked Duane if he wanted to rob Jodie and the victim. Defendant explained to Duane that if defendant killed one of them, he would obtain the gang ranking of "OG," which stands for "original gangster." Duane protested, and defendant stated, "let's just rob them then cause we'll get these guns." Defendant told Duane to get the men to a place where defendant could get the guns from them.

The victim and Jodie returned to the apartment complex where they had earlier left defendant and Duane. Defendant and Duane gave the borrowed weapons back. Defendant told Jodie and the victim that he knew where the thief, Don, "hid out." Defendant, Duane, Jodie, the victim, and two other men then got into Jodie's car and headed toward Madison County. Duane told Jodie where to drive. Someone told Jodie to pull the car over so they could smoke some marijuana, and everyone got out of the car. Jodie then went back and sat in the front seat of the car.

The victim began shooting his gun into the woods. Defendant walked over to the car window and asked Jodie for his .25-caliber pistol. After getting the pistol from Jodie, defendant walked behind the victim, pointed the gun at the victim's head, and pulled the trigger. Defendant was about three feet from the victim when he shot him. Jodie jumped out of the car, and defendant then pointed the gun at Jodie. The gun jammed, and Jodie was able to run back to the car and drive away.

Defendant presented evidence suggesting that Jodie shot the victim.

[1] Defendant first contends the trial court erred in denying his motion for individual *voir dire* and sequestration of jurors during *voir dire*. Defendant is black, and the victim was white. Defendant maintains that individual *voir dire* was necessary to explore the sensitive issues of bias and racial prejudice as well as to prohibit the education of prospective jurors as to the method of questioning employed by counsel on these sensitive issues.

Whether to grant individual *voir dire* of prospective jurors rests in the sound discretion of the trial court, and this ruling will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Sexton*, 336 N.C. 321, 349, 444 S.E.2d 879, 895, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). Defendant has offered no convincing reason explaining how the denial of his motion may have harmed him. Defendant concedes that his arguments are similar to those in cases in which we have consistently denied relief on this basis. *See, e.g., State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995); *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). After careful consideration, we decline to depart from our prior holdings on this issue and overrule this assignment of error.

[2] Defendant next argues that the trial court erred by denying his motion challenging the jury panel. Prior to defendant's trial, defense counsel learned that Sheriff James D. Brown possessed a list of some of the jurors drawn for the 16 October 1995 session. The list contained names, addresses, phone numbers, and other information on prospective jurors who had not been served with a summons for jury duty or who had not made a proper return of his or her summons. Apparently the list was being used to contact prospective jurors to determine if they intended to be at the hearing of this matter. Defendant contends that the list did not include every person who was not served or who had not responded to his or her summons and that prospective jurors were being systematically excluded.

N.C.G.S. § 9-10 requires the register of deeds, within three days after receipt of the numbers drawn for jury duty, to deliver the list of prospective jurors to the sheriff, who shall summon the persons named for jury duty. In the present case the clerk's office assisted the sheriff by mailing the summons to the prospective jurors. Close to the time of this trial, many of the people summoned had not sent back a notification of service.

On 11 October 1995 defense counsel filed a motion to continue on the basis that there might be insufficient prospective jurors for purposes of selecting an entire panel and alternates. The clerk's office and the Sheriff's Department attempted to contact some of the prospective jurors who had not returned their notification of service to find out if they had received service and, if not, to effect service. Prospective jurors Earl Wise and Yvonne Briggs and the brother of prospective juror Jason Murray were contacted by Sheriff Brown. Mr.

Wise ultimately served as a juror in this case. Sheriff Brown as well as Chief Deputy Dal Peek testified at defendant's trial.

Defendant makes two arguments regarding the jury selection in this case. Defendant first argues that preparing and using a list selecting some prospective jurors to contact to assure their attendance and excluding others "raises a suspicion of impropriety." Defendant also argues that a personal telephone call from the sheriff, who is a prosecution witness, to assure the appearance of prospective jurors, is "unconstitutional, improper, and unethical."

After a pretrial hearing on this matter, Judge Downs found that "no evidence exists in support of any of the allegations made pursuant to this motion that leads the Court to the conclusion that there was any impropriety in the selection or the drawing of the jury according to the law and, further, that any juror was included or excluded from service systematically."

We conclude that the record supports the trial court's finding. In response to a motion to continue filed by defense counsel, the clerk's office and the Sheriff's Department attempted to contact prospective jurors who had not returned their notification of service to find out if they had received service and, if not, to effect service. These individuals were asked if they had received their summons and if they intended to appear in court. These facts do not, in our view, create the potential for suspicion of impropriety in the jury-selection process.

[3] The remaining issue is whether the pretrial contact by Sheriff Brown with prospective jurors was prejudicial to defendant. A sheriff is not disqualified from summoning supplemental jurors because he or a member of the sheriff's office is testifying in the case. N.C.G.S. § 9-11(a) provides:

> If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire. Jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. If the presiding judge finds that service of summons by the sheriff is not suitable because of his direct or indirect interest in the action to be tried, the judge may appoint some suitable person in place of the sheriff to summon supplemental jurors. The clerk of superior court shall furnish the register of deeds the names of those additional jurors who are so summoned and who report for jury service.

N.C.G.S. § 9-11(a) (1986). In *State v. Yancey*, 58 N.C. App. 52, 60, 293 S.E.2d 298, 303 (1982), the Court of Appeals held that testimony by a person in the sheriff's office does not disqualify the sheriff from summoning supplemental jurors to hear the matter. The Court of Appeals stated: "Deputy sheriffs testify in many cases. We do not believe the legislature intended to disqualify sheriffs from summoning extra jurors in all of them. If this were so, we believe the legislature would have designated some other official to summon extra jurors." *Id.* We similarly conclude that the mere fact that the sheriff and the chief deputy were testifying in the instant case did not preclude members of the department from contacting jurors who failed to acknowledge their service of the summons.

Two or three prospective jurors were contacted by the sheriff himself from a list he had received from either the clerk of court's office or the district attorney's office. The sheriff merely asked the persons contacted if they had received their summons and if they intended to appear in court. The communication was pretrial and simply a clerical one assuring that the prospective jurors had been served with the summons. Based on this minimal contact, a juror was not likely to give the sheriff's testimony undue deference. This assignment of error is overruled.

[4] Defendant next contends the trial court violated his constitutional rights by denying his motion to continue. On 31 July 1995 defendant filed a "Motion for Sixty Days Notice of Jury Poll Prior to Trial." Judge Downs stated in an order filed 2 August 1995 that relief should be granted defendant and ordered that the Clerk of Superior Court of Madison County "provide to the Defendant and the District Attorney[ ] the names and addresses of jurors selected for the October 16, 1995, session of Madison County Superior Court as soon as the same have been pulled and compiled." One hundred fifty prospective jurors were drawn 2 August 1995 for the session at which defendant was scheduled to be tried. On 19 September 1995 the court ordered one hundred fifty additional prospective jurors drawn. Defendant contends that he had insufficient time in which to investigate adequately the background of these additional jurors in preparation for *voir dire* and the effective exercise of his peremptory challenges. Specifically, defendant stated in his motion that, "although the Court is authorized to direct selection of supplemental jurors at any time, it defeats the Defendant's purpose for request for adequate time to investigate the background of jurors and places an unfair burden on the defendant in preparing and defending this first

degree murder case." Defendant stated in his motion that he "has had less than thirty days notice as to the names and addresses of the one hundred fifty jurors drawn 19 September 1995, and has not had sufficient time to do an adequate investigation."

A motion for continuance is generally addressed to the discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Stager*, 329 N.C. 278, 318, 406 S.E.2d 876, 899 (1991). "If the motion raises a constitutional issue, the trial court's action involves a question of law which is fully reviewable upon appeal." *Id.* "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

Other than a generalized complaint about lack of time to investigate the additional prospective jurors, defendant made no showing to the trial court of prejudice to his case if a continuance was not granted. Furthermore, defense counsel learned on 19 September 1995 that additional jurors would be drawn, but did not file the motion to continue until 11 October 1995. Accordingly, defendant cannot show that his case was prejudiced by the trial court's denial of this motion.

[5] Defendant next contends the trial court improperly expressed an opinion in the presence of the jury on the veracity of defense counsel's legal argument as to reasonable doubt. 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).

Prior to closing arguments defendant filed a motion requesting specific jury instructions as to burden of proof and reasonable doubt. Specifically, defendant requested the following instruction:

> The Defendant had entered a plea of "not guilty." The fact that he had been indicted is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty," he is not required to prove his innocence; he is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.
>
> 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 of [or] insufficiency of the evidence, as the case

> may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces or satisfies you to a moral certainty of the defendant's guilt.

In response to this motion, the trial judge stated, outside the presence of the jury, that he would allow defense counsel to give this definition of reasonable doubt but cautioned that if an objection was made, he would instruct the jury that it should take the law from the court and not from defense counsel.

Defense counsel stated during his closing argument that "reasonable doubt" has been defined as "the state of a case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." The prosecutor objected to the use of the term "moral certainty." At this point the trial court instructed the jury as follows:

> Members of the jury, you will not take the definition of the law from counsel in his arguments. You will take the definition as to any aspect of the law in this case from the Court. You can listen to the argument, but don't take that definition as the one you'll be guided by.

Defendant argues that the trial court "improperly expressed an opinion on the veracity of the legal argument as to reasonable doubt proffered by defense counsel." Defendant further argues that this comment "improperly interrupted defense counsel," "interfered with his ability to effectively communicate the concept of reasonable doubt to the jury" and negatively affected defense counsel's credibility with the jury.

We first conclude that the comment by the court was not an expression of an opinion related to any question of fact and thus did not violate N.C.G.S. § 15A-1222. *See State v. Campbell*, 340 N.C. 612, 628, 460 S.E.2d 144, 152-53 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 871 (1996). The trial court did not comment on any question of fact in this case but rather properly cautioned the jury that it should listen to its instructions on the law.

Whether defendant was deprived of a fair trial by the trial court's remarks must be determined by what was said and its probable effect upon the jury in light of all existing circumstances. *See State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979). Defendant must show that he was prejudiced by the court's remark in order to

receive a new trial. *See State v. Howard*, 320 N.C. 718, 723, 360 S.E.2d 790, 793 (1987). Assuming error *arguendo*, given the overwhelming evidence presented against defendant in this case, we cannot conclude that this comment by the judge was prejudicial. *See State v. Burke*, 342 N.C. 113, 463 S.E.2d 212 (1995). In addition, the trial court forewarned defense counsel, out of the jury's presence, of the consequences of using the proffered definition of "reasonable doubt." This assignment of error is overruled.

[6] Defendant also contends the trial court erred in not intervening *ex mero motu* during the prosecutor's closing argument to the jury. Defendant contends that the prosecutor erroneously stated the law of discovery and used it to disparage defense counsel, improperly characterized the testimony of witness Goforth as a confession to murder and robbery, suggested that the defendant might rob or murder a member of the jury if he were released from jail, and engaged in "other improper argument."

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. *See Sexton*, 336 N.C. at 349, 444 S.E.2d at 895. "[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).

Defendant first maintains that the prosecutor erroneously stated the law of discovery and used it to disparage defense counsel. During his closing argument the prosecutor stated:

> I couldn't help but think . . . as these two fine attorneys talked with you and made their presentations to you that it would have been nice if [the victim] had had a lawyer the morning of the 15th of November, wouldn't it. Somebody to write out a big, long, flowery speech begging for his life. That would have been nice, wouldn't it? Someone to get together all the State's evidence and review it for a year so that they could fine [sic] some chink or cranny in it to come here and argue to you about. You've heard about how the State shows the defendant all their evidence. We talked about it and showed it to them twice I guess.

The fact that the State showed defendant all of its evidence was apparent from the evidence and testimony presented at trial. This statement was a fair comment on the evidence before the jury. Moreover, defendant fails to show how this comment about discovery prejudiced him.

[7] Defendant next complains that the prosecutor improperly characterized the testimony of witness Goforth as a confession to murder and robbery. The prosecutor stated the following:

> [W]hy would Duane Goforth get up here, say what he said unless it was true? Now, you think about that. We've heard all this oh, he had so much to gain by getting up here and telling a lie. Oh, there was just so much that he could help himself do by getting up here and telling a lie, but you know what he did. He got up here and he confessed to attempted armed robbery and under our law he confessed to first degree felony murder.
>
> . . . [D]oes a person lie to cause themselves to be guilty of first degree murder and to confess to first degree murder. Now, if he got up here and said, Lord, no, I didn't have nothing to do with none of this. I didn't have anything to do with it. It was just this and I was over there, you might have some cause for concern, but he confessed to you attempted armed robbery and murder and there will come a time when a jury will set [sic] here and deal with him and that jury will hear what he says from right here. Now, he's got lawyers that you saw back there and he knows that. You think his lawyers that were pointed out by the defense are going to let him get up here and confess to two crimes like that if it's a lie. Use your common sense.

We conclude that this statement by the prosecutor is fully supported by the evidence and is an appropriate characterization of Goforth's testimony.

[8] Defendant also complains that the prosecutor indicated that defendant "might rob or murder the jury if he were released from jail." The prosecutor stated:

> Maybe you believe that this defendant is a choir boy and that the members of the Crips gang, Rolling 60's, are just choir boys that go around singing 60's songs. . . . Maybe you believe this is just an innocent thing and these are all innocent boys and that they always walk around with their neckties on and their hair brushed and they don't wear these gang rags, their color. Maybe you

> believe that. If you do, turn him loose. We'll open the door of the jail and send him back to Asheville. Maybe you'll run into him over there, that Sniper, Cin, and Twinkle. Maybe they'll sing you some of these 60's songs. Maybe they'll rob you. Maybe they'll murder you. That's for you to decide.

While we do not approve of the prosecutor's remarks suggesting that defendant might harm members of the jury if he were released from jail, *see State v. Zuniga*, 320 N.C. 233, 257, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), the remarks do not rise to the level of such gross impropriety as to have required *ex mero motu* action by the trial judge. Furthermore, the evidence of defendant's guilt was so overwhelming that it is unlikely that the jury would have reached a different result but for the improper remarks. Therefore, any impropriety in the remarks was not prejudicial.

As to defendant's argument that the prosecutor engaged in "other improper argument," after reviewing the transcript, we conclude that the prosecutor's closing arguments were not so grossly improper as to require the trial court to intervene *ex mero motu*.

[9] Defendant next contends the trial court erred by denying his motion to dismiss the first-degree felony murder charge and by submitting to the jury the issue of first-degree felony murder.

Assuming *arguendo* that there was insufficient evidence to submit murder to the jury on the theory of felony murder, defendant cannot show prejudice since the jury did not convict defendant pursuant to this theory. *See State v. Price*, 344 N.C. 583, 476 S.E.2d 317 (1996); *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 596 (1992); *State v. Green*, 321 N.C. 594, 606, 365 S.E.2d 587, 594, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). Accordingly, this assignment of error is overruled.

Defendant similarly contends the trial court erred by denying his motion to dismiss the charge of first-degree murder by lying in wait and by submitting to the jury the issue of first-degree murder by lying in wait.

Again, even assuming error, defendant could not have been prejudiced since the special verdict form shows that the jury found defendant guilty on the basis of premeditation and deliberation as well as of lying in wait. Defendants are convicted of crimes, not theories. *State v. Wilson*, 345 N.C. 119, 478 S.E.2d 507 (1996). "[T]he verdict cannot be disturbed if the evidence supports a conviction based

on premeditation and deliberation." *State v. McLemore*, 343 N.C. 240, 249, 470 S.E.2d 2, 7 (1996). 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. JOHN THOMAS MACON

No. 146A96

(Filed 9 May 1997)

1. Criminal Law § 420 (NCI4th Rev.)— cross-examination—officer's reading of notes—introduction of evidence—loss of right to last argument

Although an officer's notes taken during an interview of defendant following the shooting of defendant's estranged wife were not themselves introduced into evidence, the officer's reading of those notes to the jury during cross-examination by defendant constituted the introduction of evidence by defendant which deprived defendant of the right to make the final argument to the jury where the jury received the contents of defendant's statement as substantive evidence without any limiting instruction. Rule 10, General Rules of Practice for the Superior and District Courts.

Am Jur 2d, Trial §§ 539-542.

2. Evidence and Witnesses § 167 (NCI4th)— possession of gun—threats by victim and family—relevancy to rebut premeditation and deliberation—exclusion not prejudicial

Evidence that a murder victim, her family members, and a friend had threatened defendant's life and that, for that reason, he carried a gun with him when he went to see the victim the night the victim was shot was relevant to explain defendant's conduct on the night of the shooting and to rebut the State's contention that the fact defendant carried a gun with him was evidence of premeditation and deliberation. However, the trial court did not abuse its discretion by excluding evidence of the alleged threats where defendant did not rely upon self-defense or other

legal provocation as a defense, and the trial court reasonably could have concluded that the admission of this evidence would have substantially prejudiced the State and would have served only to delay the proceedings, to inflame the jury, or to confuse the issues. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 340, 347.

3. Evidence and Witnesses § 876 (NCI4th)— fear of defendant—state-of-mind hearsay exception—irrelevancy—admission not prejudicial

Even if evidence of statements by a murder victim that she thought defendant had made some "hang-up" calls and she was afraid was improperly admitted under the state-of-mind exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(3) because neither the victim's state of mind nor the relationship of the victim and defendant was relevant to the shooting in this case, the admission of this evidence was not prejudicial error where the State introduced overwhelming evidence of defendant's guilt, the jury found defendant guilty of first-degree murder based on the theory of lying in wait, and defendant failed to meet his burden of showing that a reasonable possibility exists that a different result would have been reached absent the alleged error.

Am Jur 2d, Evidence §§ 556-558.

4. Criminal Law § 467 (NCI4th Rev.)— murder case—prosecutor's arguments—proper contentions and inferences

The prosecutor's arguments in a first-degree murder prosecution that it was not likely that defendant's automobile just happened to run out of gas in a wooded area near the place where he would soon kill his estranged wife and that self-defense was not a defense in this case were well within the wide latitude allowed counsel in stating contentions and drawing inferences from the evidence and did not improperly demean the defense and defense counsel.

Am Jur 2d, Trial §§ 632-639.

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.

STATE v. MACON

[346 N.C. 109 (1997)]

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Burke, J., at the 17 October 1995 Criminal Session of Superior Court, Randolph County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for assault was allowed 7 November 1996. Heard in the Supreme Court 20 March 1997.

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

Nora Henry Hargrove for defendant-appellant.

FRYE, Justice.

Defendant, John Thomas Macon, was properly indicted for kidnapping and murder in the first degree of Donna Inman Macon. In the District Court, Randolph County, defendant was tried and convicted of assault by pointing a gun at Phillip Ray Inman. He appealed this conviction to the Superior Court, Randolph County, and the assault charge was tried with the kidnapping and murder charges. Defendant was tried capitally to a jury at the 17 October 1995 Criminal Session of Superior Court. The jury found defendant guilty of first-degree murder by lying in wait, guilty of assault by pointing a gun, and not guilty of kidnapping. Judge L. Todd Burke determined that there were no aggravating circumstances to submit to the jury and thus sentenced defendant to a mandatory term of life imprisonment for the first-degree murder conviction. Defendant was also sentenced to a concurrent six-month sentence for the assault conviction. Defendant appeals to this Court as of right from the first-degree murder conviction; his motion to bypass the Court of Appeals on the assault conviction was allowed.

On appeal to this Court, defendant brings forward four assignments of error. After reviewing the record, transcript, briefs, and oral arguments of counsel in this case, 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. The victim, Donna Inman Macon, and defendant had been married for approximately five years before they separated in March 1994. On 17 March 1994, the victim and defendant separated, and the victim moved into the home of her father, Phillip Inman (Mr. Inman), and his wife, Mary Ethel Inman

(Mrs. Inman). The victim and Mrs. Inman worked together at Graybrier Nursing Home in Archdale.

On Sunday, 10 April 1994, Mr. Inman drove to the nursing home at 12:50 a.m. to pick up his wife and daughter from work. As his daughter was getting into the automobile, defendant suddenly appeared, grabbed her by the neck, and held a gun to her head. Defendant "stuck" the gun in Mr. Inman's face, and defendant told Mr. Inman to back off or he would blow Mr. Inman's head off. As Mr. Inman backed away from defendant, he pleaded with defendant to put the gun down. The victim struggled as defendant, with the gun to victim's head, forced her back toward the entrance of the nursing home. When defendant and the victim reached the front door of the nursing home, defendant was talking to her and the gun discharged. The victim fell on the grass, and defendant ran toward the road. Mr. Inman testified that about one minute elapsed between the time the victim exited the building and the shooting. The victim died as a result of a single gunshot wound to the right side of her head.

At the conclusion of the State's case, the trial court denied defendant's motion to dismiss. After the court held the jury instruction conference, it informed defendant that he would not be allowed to make the final argument to the jury because he had introduced evidence when he cross-examined a police officer about his statement to police. Defendant argued that he had already told the court that he would not introduce any evidence and excepted to the court's ruling. In light of the court's ruling on the closing argument, defendant requested that he be allowed to put on evidence. The motion was allowed, and defendant introduced evidence tending to show his relationship with the victim and her family and rumors of threats made by the victim, her family members, and a friend against defendant's life. Defendant also introduced evidence of the dramatic change in his demeanor after the separation. Defendant did not testify at trial.

The trial court denied defendant's motion to dismiss made at the close of all the evidence.

[1] By an assignment of error, defendant contends that the trial court erred in not allowing him the final argument to the jury. We disagree.

"Rule 10 of the General Rules of Practice for the Superior and District Courts states that 'if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong

to him.' " *State v. Skipper*, 337 N.C. 1, 31, 446 S.E.2d 252, 268 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). In *State v. Hall*, 57 N.C. App. 561, 291 S.E.2d 812 (1982), Judge (now Justice) Webb noted:

> [W]e believe the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness.

Id. at 564, 291 S.E.2d at 814.

In the instant case, Officer Mickey Denny of the Archdale Police Department testified on direct examination by the State as to the sequence of the investigation of the victim's death, including testimony about the crime scene and a search of defendant's home. Officer Denny also testified about letters found during a search of defendant's home. The letters, which were subsequently identified as being authored by defendant, tended to show that defendant planned to kill the victim. Officer Denny read these letters to the jury.

On cross-examination, defense counsel questioned Officer Denny about the complete details of the investigation. Defense counsel asked Denny if he and another officer spoke with defendant on 11 April 1994 shortly after the shooting and if the other officer had made notes of the interview. After Officer Denny indicated that the other officer had taken notes of that interview, defense counsel asked Officer Denny to read those notes to the jury. The State objected to the reading of the notes to the jury on the grounds that defendant had not testified and the statement was "self-serving." The trial court overruled the State's objection and allowed defense counsel to question Officer Denny regarding the statement defendant gave to the police during the interview. Officer Denny testified from the notes of another officer, who actually conducted the interrogation. The notes were marked as an exhibit but were not offered into evidence and were not published to the jury.

At the conclusion of the State's case-in-chief, defense counsel notified the trial court that defendant would not be offering any evidence. The trial court ruled that when Officer Denny read the notes to the jury, defendant had offered evidence, and therefore, defendant could not have the final argument to the jury. Defendant excepted to the court's ruling and then requested that he be allowed to "put forth

further evidence." The trial court granted defendant's request and allowed him to present additional evidence.

Defendant argues that, based on the court's erroneous conclusion that he had offered evidence through the testimony of Officer Denny, he was deprived of his substantial legal right to make the final argument to the jury. Defendant argues that the statement simply gave more information about the investigation and that it neither impeached Officer Denny's veracity nor illustrated or corroborated his testimony. Thus, defendant argues that he had not "offered" evidence at that point. We conclude, however, that the testimony of Officer Denny regarding the notes taken during the interview of defendant following the shooting was actually offered into evidence; thus, defendant lost his right to open and close jury argument. *See Skipper*, 337 N.C. at 31, 446 S.E.2d at 269; *State v. Reeb*, 331 N.C. 159, 180, 415 S.E.2d 362, 374 (1992); *State v. Hinson*, 310 N.C. 245, 257, 311 S.E.2d 256, 264, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984); *State v. Knight*, 261 N.C. 17, 30, 134 S.E.2d 101, 109 (1964).

During defendant's cross-examination of Officer Denny, and before the State had presented any evidence regarding defendant's postarrest statement to police, defense counsel asked Officer Denny to read notes of defendant's statement to the police given shortly after the shooting. Although the writing was not itself introduced into evidence by defendant, Officer Denny's reading of its contents to the jury satisfies the requirement in Rule 10 of the General Rules of Practice for the Superior and District Courts that evidence has to be introduced by defendant in order to deprive him of the opening and closing arguments to the jury. The jury received the contents of defendant's statement as substantive evidence without any limiting instruction, not for corroborative or impeachment purposes, as defendant did not testify at trial and the statement did not relate in any way to Officer Denny. Therefore, we reject defendant's assignment of error.

[2] By another assignment of error, defendant contends that the trial court deprived him of his federal and state constitutional rights to present a defense when it excluded evidence of alleged threats and misconduct directed toward him by the victim, her family members, and a friend. The court excluded this evidence on the ground that it was irrelevant.

Defendant argues that this evidence was relevant to show why defendant felt that he needed to carry a gun with him when he was

going to see the victim and to show defendant's state of mind as it related to premeditation and deliberation. We agree.

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). We have said 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). This Court has also said that

> it is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.

State v. Stanley, 310 N.C. 353, 365, 312 S.E.2d 482, 490 (1984).

In the instant case, defendant sought to introduce evidence that the victim, her family members, and a friend had threatened defendant's life and that, for this reason, he carried a gun with him when he went to see the victim on the night of the shooting. We conclude that the evidence was relevant to explain defendant's conduct on the night of the shooting. The evidence was also relevant to rebut the State's contention that the fact that defendant carried a gun with him on the night of the shooting was evidence of premeditation and deliberation and of lying in wait. We therefore conclude that the evidence was competent and relevant to show the circumstances surrounding the parties, that it may have been helpful to properly understand the parties' conduct or motives, and that it would have been helpful to the jury in weighing the reasonableness of defendant's contentions.

However, the trial court may exclude relevant evidence "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 excluding evidence of the

alleged threats in this case. Since defendant was not relying upon self-defense or other legal provocation as a defense, the trial court reasonably could have concluded that the admission of the proffered evidence would have substantially prejudiced the State and would have served only to delay the proceedings, to inflame the jury, or to confuse the issues. Accordingly, the trial court did not abuse its discretion in excluding this evidence, and we reject this assignment of error.

[3] By another assignment of error, defendant contends that the trial court committed prejudicial error in admitting statements of the victim regarding her fear of defendant. Over defendant's objection, the trial court allowed two witnesses to testify that the victim said she thought defendant had made some "hang up" calls and that she was afraid. Defendant argues that "[t]here was no evidence that the defendant made the calls, and in any event, the victim's fear was not relevant to any issue in this particular case." Also, defendant argues that the evidence was improperly used to show his state of mind.

"Hearsay testimony is not admissible except as provided by statute or by the North Carolina Rules of Evidence." *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 597 (1988). In the instant case, the trial court found the statements admissible under Rule 803(3) of the North Carolina Rules of Evidence. Rule 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is not excluded by the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1992). Thus, evidence tending to show a declarant's then-existing state of mind is an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3); *State v. Burke*, 343 N.C. 129, 142, 469 S.E.2d 901, 907, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 409 (1996).

"[E]vidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant to the case." *State v. Jones*, 337 N.C. 198, 209, 446 S.E.2d 32, 38 (1994). "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. Scott*, 343 N.C. 313, 335, 471 S.E.2d 605, 618 (1996); *see State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996) (conversations relating directly to victim's fear of defendant admissible under the state-of-mind exception to show the nature of

victim's relationship with defendant and the impact of defendant's behavior on victim's state of mind prior to her murder); *State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between victim and defendant prior to the murder), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818-19 (1990) (defendant's threats to victim shortly before the murder admissible to show victim's then-existing state of mind).

Assuming, as defendant contends, that neither the victim's state of mind nor the relationship of the victim and defendant is relevant to the shooting in this case, we nevertheless conclude that the admission of evidence that defendant may have made "hang up" calls to the victim was not prejudicial error. The failure of a trial court to admit or exclude evidence will not result in the granting of a new trial absent a showing by the defendant that a reasonable possibility exists that a different result would have been reached absent the error. *Burke*, 343 N.C. at 142-43, 469 S.E.2d at 907; *see* N.C.G.S. § 15A-1443(a) (1988). In the instant case, defendant has failed to make such a showing. The State introduced at trial overwhelming evidence of defendant's guilt. The evidence clearly showed that when Mr. Inman arrived at the nursing home to pick up his wife and daughter from work, neither defendant nor defendant's automobile was anywhere in sight. Indeed, defendant's automobile was found in a nearby wooded area. Defendant suddenly appeared with a handgun and grabbed the victim by the neck, pointing the gun at her head. After shooting the victim, defendant fled towards the road where his automobile was found. The jury returned a verdict of guilty of first-degree murder based on the theory of lying in wait and rejected verdicts of guilty of first-degree murder based on theories of premeditation and deliberation and of felony murder. Defendant has not met his burden of showing that a reasonable possibility exists that a different result would have been reached absent the alleged error. Accordingly, we reject this assignment of error.

[4] By his final assignment of error, defendant contends that the trial court erred in failing to sustain an objection to the prosecutor's argument. We disagree.

Defendant objected to portions of the prosecutor's argument which he contends demeaned defense counsel and the defense. Defendant argues that the trial court erred when it overruled defendant's objection to these arguments. The prosecutor argued that it was

not likely that defendant's automobile just happened to run out of gas in a wooded area near the place where he would soon kill his estranged wife. The prosecutor also argued that self-defense was not a defense in this case. Defendant argues on appeal that "[t]he prosecutor's argument was a sarcastic swipe at [defense counsel] and the defense."

We conclude, however, that defendant has not shown error in this instance. "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. Ocasio*, 344 N.C. 568, 579, 476 S.E.2d 281, 287 (1996). "Counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts of their own knowledge or other facts not included in the evidence." *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Applying these principles, the prosecutor's argument was well within the wide latitude allowed counsel in stating contentions and drawing inferences from the evidence. Further, the trial court instructed the jurors that if their recollection of the evidence differed from that of the court, the district attorney, or the defense attorney, they were to rely solely upon their recollection of the evidence in their deliberations. We conclude that the trial court did not err in overruling defendant's objections to the prosecutor's argument. Accordingly, we reject defendant's final assignment of error.

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

NO ERROR.

STATE OF NORTH CAROLINA v. REGINALD VAN JOHNSON

No. 434A96

(Filed 9 May 1997)

Criminal Law § 503 (NCI4th Rev.)— review of testimony—denial of jury request—failure to exercise discretion

The trial court in a prosecution for first-degree statutory rape and taking indecent liberties with a child improperly failed to exercise its discretion, as required by N.C.G.S. § 15A-1233(a), in denying the jury's request to review the testimony of the victim and her aunt where the trial court's statement, "I'll need to instruct you that we will not be able to replay or review the testimony for you," and the trial court's statement immediately thereafter that it "can review further instructions" indicate that the trial court believed it did not have discretion to grant the jury's request. Moreover, this error was prejudicial where the testimonies sought to be reviewed were central to the case and involved issues of some confusion and contradiction.

Am Jur 2d, Trial §§ 1647 et seq.

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 123 N.C. App. 790, 476 S.E.2d 148 (1996), granting the defendant a new trial. Heard in the Supreme Court 17 March 1997.

Michael F. Easley, Attorney General, by Jane Rankin Thompson, Assistant Attorney General, for the State-appellant.

Terry W. Alford for defendant-appellee.

LAKE, Justice.

The defendant was indicted on 28 February 1994 for first-degree statutory rape and taking indecent liberties with a child. The defendant was tried before a jury, and the jury found the defendant guilty of both offenses. Judge W. Osmond Smith III consolidated the offenses for judgment and sentenced defendant to a term of life imprisonment. The Court of Appeals determined that the trial court committed prejudicial error and that defendant is entitled to a new trial. The State appeals from that decision. For the reasons stated herein, we agree with the Court of Appeals and conclude that the defendant is entitled to a new trial.

At trial, evidence was presented tending to show that on Saturday, 9 October 1993, the defendant, seventeen-year-old Reginald Van Johnson, was spending the weekend at the home of his aunt and uncle. Present in the home that evening were seven children: three were the children of defendant's aunt and uncle (defendant's cousins); three were the children of his aunt's cousin Barbara; and the last was Barbara's five-year-old niece, "J". Defendant agreed to baby-sit the children while his aunt and Barbara went out that night. Defendant often baby-sat Barbara's three children, but had never seen J prior to that night. Defendant's uncle did not go with the women and was present in the home all night.

Defendant's aunt and Barbara left the house at approximately 1:20 a.m. Defendant's three cousins were asleep in a bedroom at that time, and the remaining four children, including J, were asleep in the living room. As the women were leaving, defendant's uncle walked to the front door to tell them something and inadvertently stepped on J, who was lying on the floor. J woke up immediately and began to cry. She then moved to the mattress beside her cousin Jerome and went back to sleep.

Defendant's uncle testified that he dozed off and on in his bedroom while the women were gone, but that he did not hear any unusual noises from the living room where the defendant and J were. The children present saw nothing unusual, nor did they hear any moaning, crying or screaming that night. The defendant testified that he spent most of his time baby-sitting lying on the floor near the kitchen and talking to a girlfriend on the telephone. He also testified that J was asleep the entire time and that he never touched her in any manner.

Defendant's aunt and Barbara returned home at approximately 2:45 a.m. Barbara testified that the defendant was on the phone when they entered the house. J was "hard asleep," and Barbara had difficulty getting J to wake up. J's clothes were in the same condition as when Barbara left, and the only thing that was different was that J was on a mattress instead of lying on the floor. Barbara took her three children and J back to her house. Later, on Sunday, 10 October 1993, Barbara overheard J and her son Jerome talking about telling Barbara something. When Barbara asked J what they were talking about, J told her that the defendant had "rocked" her the night before. Barbara took this to mean some type of sexual contact. J also told Barbara that the defendant had taken her pants off but that he had

not taken off her panties. Barbara stated that J never used the term "walked" in describing the alleged incident and that the term usually came from her own child.

J's mother, Charlene, picked J up later that day. J told her mother that defendant had "walked on her." Charlene asked J to explain what she meant, and J "did a back and forth rocking motion." Charlene was familiar with this "walked on her" expression because J had used it previously to describe the same back and forth rocking motion while playing "mamma and daddy" with her cousin Jerome. Later that day, J complained to her mother "that her privates were hurting." Her mother examined J's genital area and described it as swollen and irritated.

The next day, 11 October 1993, Charlene took J to the emergency room at Granville Medical Center where she was examined by Dr. Robert Wallison. Dr. Wallison's examination revealed that J's "external genitalia showed some mild redness, indicating irritation of sorts," and that a portion of the interior of her vagina also appeared irritated. J's vaginal opening was enlarged beyond that expected of a five year old, and there was "a small amount of a whitish, mucoid kind of discharge" inside her vagina. The discharge was explained as either a "benign discharge . . . caused by normal bacteria that grows in the vagina" or a minor infection unrelated to any sexual activity. Dr. Wallison testified there was no trace of blood in the vaginal area, no abnormal vaginal tearing and no evidence of "male sexual hormones or semen."

The Franklin County Department of Social Services and the Louisburg Police Department were informed of the incident. Detective Ralph Brown of the Louisburg Police Department interviewed J, and J related essentially the same story she had told her mother. On 20 October 1993, Gladys Alston of the Franklin County Department of Social Services conducted an interview with J using anatomical dolls. The interview was videotaped, was introduced into evidence and was shown to the jury.

Upon referral to the Child Medical Evaluation Clinic of the University of North Carolina Hospitals ("clinic"), J was interviewed on 19 November 1993 by mental health consultant Janet Hadler. Ms. Hadler testified that when she asked J who touched her genitals, J first responded it was a woman named "Nici." When Ms. Hadler later asked, "Was there something you told your mom? Was there something [that] happened at your house or at someone else's house?" J

responded by telling her about an incident at defendant's house. J told her that defendant had taken both of their clothes off and had touched her with "his pee pee thing." J also told Ms. Hadler that defendant had touched her more than once and on different days.

Dr. Michael Knudsen, a pediatrician, examined J while she was at the clinic on 19 November 1993. During his examination, Dr. Knudsen observed no abnormalities of the external vaginal features, and J's labia major appeared normal. There was a small amount of discharge and a "very small amount of actual erythema, or reddening, to the edges of her labia minora." A culture of the discharge revealed it to be the result of an overgrowth of bacteria flora, common for children of J's age. J's hymen was intact, and there was no tenderness. Dr. Knudsen compared his notes with Dr. Wallison's notes and opined, "I think that the difference in findings from my examination and from his examination make it highly, highly probable that penetration by a male penis could have occurred." However, on cross-examination, Dr. Knudsen stated that all of the results of his examination were normal, with the exception of the small amounts of redness that could have been caused by any number of things, including trauma, pressure, irritation and infection.

J testified at trial. Her testimony, however, was frequently self-contradictory. She initially stated that she did not know the difference between the truth and a falsehood, but later appeared to demonstrate an understanding of the terms when asked a series of short questions by the prosecutor. When asked to identify the defendant, J could not do so; she stated that she did not know the defendant and that she had not seen him during the weekend of 9 October 1993. However, she later stated that she did see the defendant and that he "walked" on her and "put [his penis] inside my pee pee thing." When asked whether she "[woke] up when [defendant] put his pee pee thing in [her] pee pee thing," J responded "no." When asked how long she had been on the living room floor when defendant touched her, J answered "four days." When asked about the "walked on" expression, J stated she had just thought of the term.

Tiffany Johnson, the eleven-year-old daughter of defendant's aunt, was present on the night of 9 October 1993 and also testified at the trial. She stated that she did not hear or see anything unusual that night, even though she got up once to get some water and even though she was awake when her mother and Barbara returned home. However, she testified that earlier that day, J had told her that J's

cousin Jerome had "done it to her" at her Aunt Barbara's house. Tiffany did not tell anyone about this.

At the close of all the evidence, defendant renewed his motion to dismiss, which was denied. The trial court instructed the jurors and sent them to the jury room for deliberations.

The specific events giving rise to this appeal occurred during jury deliberations. Sometime after retiring to the jury room for deliberations, the jurors indicated that they had a question. The jury returned to the courtroom, and the following exchange occurred:

> COURT: Do I understand the jury has a question?
>
> FOREPERSON: We would like to hear Barbara's testimony, if possible, and—and, ah, [J's] testimony as far as the—that was the next, ah—
>
> ANOTHER JUROR: It was the first.
>
> FOREPERSON: —The very first.
>
> COURT: I'll need to instruct you that we will not be able to replay or review the testimony for you. I can review further instructions, and try to read them a little better than I did, but that of course is not a summary of the evidence. But I will instruct you that it's your duty to consider the evidence as you recall it, and consider the view of other jurors, again, reaching in your minds as to what that testimony is.

The jury then resumed deliberations. Subsequently, the jury returned verdicts of guilty on both the counts of first-degree statutory rape and taking indecent liberties with a child.

The sole issue to be addressed is whether the trial court exercised discretion, as required by N.C.G.S. § 15A-1233(a), in its decision not to let the jurors review the testimony of J and her Aunt Barbara. The defendant contends that the language used by the trial court in its denial of the jurors' request indicates that the trial court did not believe it was statutorily permitted to let the jurors review the testimony. Thus, defendant maintains the trial court failed to consider the request under the statutorily required discretionary standard. We find defendant's argument to be persuasive.

N.C.G.S. § 15A-1233(a) governs the trial court's duty regarding jury requests to review trial testimony:

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

N.C.G.S. § 15A-1233(a) (1988). It is a well-established rule in North Carolina that the decision whether to grant or refuse a request by the jury for a restatement of the evidence after jury deliberations have begun lies within the discretion of the trial court. *State v. Hough*, 299 N.C. 245, 262 S.E.2d 268 (1980); *State v. Ford*, 297 N.C. 28, 252 S.E.2d 717 (1979); *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). The statutory requirement of N.C.G.S. 15A-1233(a) that the trial court exercise its discretion is a codification of this common-law rule. *State v. Fullwood*, 343 N.C. 725, 742, 472 S.E.2d 883, 892 (1996), *cert. denied*, — U.S. —, 137 L. Ed. 2d 339 (1997); *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). When a motion addressed to the discretion of the trial court is denied upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490-91 (1972). "In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter." *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980) (citing, e.g., *Ford*, 297 N.C. 28, 252 S.E.2d 717; *Ford Motor Co.*, 281 N.C. 496, 189 S.E.2d 484; *Tickle v. Hobgood*, 212 N.C. 762, 194 S.E. 461 (1938)).

We hold that the trial court's response to the jury's request in this case must be interpreted as a statement that the trial court believed it did not have discretion to consider the request. First, the precise words chosen by the trial court strongly indicate that it did not believe it had the discretion to grant the jurors' request. The trial court told the jury, "I'll *need* to instruct you that we *will not be able* to replay or review the testimony for you." (Emphasis added.) Among other things, a "need" is defined as "a requirement, necessary duty, or obligation," a "necessity arising from existing circumstances." *Random House Webster's College Dictionary* 904 (1991). "Able" is

defined as "having the necessary power, skill, resources, or qualifications to do something." *Id.* at 3. Taken together, the trial court's denial, in these words as defined, can be rephrased as, "I am required to instruct you that we do not have the power or qualifications to review the testimony for you." Examined in this light, the trial court's words clearly indicate it did not exercise discretion in denying the request. Second, the context of the trial court's denial indicates it did not believe it had discretion to grant the request. The trial court first tells the jury that it "will not be able to replay or review the testimony." The trial court then immediately goes on to tell the jury that it "*can* review further instructions." (Emphasis added.) This juxtaposition of determinations—what it cannot do set off against what it can do—is telling. Combined with the subsequent admonishment that it is the jurors' "duty to consider the evidence as [they] recall it," the trial court's comments are indicative of its understanding that it was not empowered to let the jurors review the testimony at issue.

The State argues that the language used by the trial court in this case is substantially the same as that held not to be erroneous in *Fulcher*, 294 N.C. at 514, 243 S.E.2d at 346 ("I am not going to be able to allow the testimony of these various witnesses to be read back to you . . . ."). However, a careful reading of *Fulcher* reveals that the discretion issue was not addressed on appeal. *Id.* The basis of this Court's decision, as framed by the defendant, was that the trial court had not expressed an improper *opinion* about the value of the testimony in question by virtue of its refusal to let the jury review it. *Id.* As a result, the decision in *Fulcher* is inapposite to the resolution of the issue at bar. Even if discretion had been at issue, the language used by the trial court in *Fulcher* is markedly different from that used in this case when viewed in the context of the trial court's entire statement. The entire sentence of the trial court's denial in *Fulcher* reads, "I am not going to be able to allow the testimony of these various witnesses to be read back to you, for if you emphasize certain portions of it out of context it might tend to exaggerate it." *Id.* As can be seen, the trial court gave a reason for its denial, the prevention of improper emphasis. Such reasoning indicates exercise of discretion. In the present case, no such reason is given for the denial *except* the erroneous statement that the trial court is not able to let the jury review the testimony.

The State also contends that the Court of Appeals failed to give the trial court the presumption of discretion to which it is entitled under *Brittain v. Piedmont Aviation, Inc.*, 254 N.C. 697, 120 S.E.2d

72 (1961). Such is not the case. "When no reason is assigned by the court for a ruling which may be made as a matter of discretion . . . , the presumption on appeal is that the court made the ruling in the exercise of its discretion." *Id.* at 703, 120 S.E.2d at 76. However, where the statements of the trial court show that the trial court did not exercise discretion, as is evident in the present case, the presumption is overcome, and the denial is deemed erroneous.

Having determined that the trial court erred in not exercising its discretion in determining whether to permit the jury to review some of the testimony, we now consider whether these errors were so prejudicial as to entitle defendant to a new trial. We conclude they were. The evidence requested for review by the jury in this case was clearly "material to the determination of defendant's guilt or innocence." *Lang*, 301 N.C. at 511, 272 S.E.2d at 125. The testimonies of both J, the victim, and her Aunt Barbara were central to this case, and both testimonies involved issues of some confusion and contradiction. The medical evidence was inconclusive as to whether J had been raped, and there was no medical proof linking the defendant to the alleged crimes. Further, there were no eyewitnesses to the alleged crimes and no witnesses who heard or saw anything unusual. Thus, J's testimony was crucial because it was the only evidence directly linking defendant to the alleged crimes. As such, J's credibility was the key to the case. J's testimony was likely difficult for the jury to follow or assess due to its often confusing and self-contradictory nature. Barbara's testimony was also important because she was the first person J told about the alleged incident, and she also had information about the incident with J's cousin Jerome, about which J and Tiffany testified. "Thus, whether the jury fully understood the [witnesses' testimony] was material to the determination of defendant's guilt or innocence. Defendant was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so." *Id.*

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

IN THE MATTER OF: THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY C AND M INVESTMENTS OF HIGH POINT, INC. TO RAYMOND D. THOMAS, TRUSTEE RECORDED IN BOOK 3846 AT PAGE 1446 GUILFORD COUNTY REGISTRY

No. 366PA96

(Filed 9 May 1997)

1. Mortgages and Deeds of Trust § 51 (NCI4th)— purchase money deed of trust—credit for unreleased property—not payment on note—default

A purchaser defaulted on a promissory note secured by a purchase money deed of trust when it failed to make a semiannual payment of principal and interest due on 1 November 1993, although the purchaser had a property release credit in excess of the principal payment then due, where the semiannual payments were due on 1 May and 1 November, and the purchaser had not made release payments in an amount sufficient to cover both the 1 May and 1 November 1993 payments due under the note. The release agreement did not allow the purchaser to make a semiannual payment in May, fail to obtain a release of a corresponding amount of property, and then submit the unreleased property in lieu of making the November semiannual payment.

Am Jur 2d, Mortgages §§ 412 et seq.

2. Mortgages and Deeds of Trust § 46 (NCI4th)— purchase money deed of trust—release of property—condition precedent—default

A purchaser was not entitled to release of a 28.68-acre tract of property from a purchase money deed of trust in October 1993 because it had not complied with an express condition precedent that parts of the property sought to be released must be set forth on a duly recorded plat prior to release of the property. Nor was the purchaser entitled to a release of the 28.68-acre tract in April 1994, even though it had then recorded a plat of the tract, because the purchaser was in default on the note after it failed to make the 1 November 1993 semiannual payment due on the note, and a condition in the deed of trust prohibited release in the event of default. Allowing the vendor to foreclose on the property, including the 28.68-acre tract the purchaser sought to have released, will not amount to a windfall or double recovery to the vendor because the purchaser is entitled to any surplus proceeds

from the foreclosure sale after payment of the vendor as the note holder. N.C.G.S. § 45-21.31.

Am Jur 2d, Mortgages §§ 1195 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 123 N.C. App. 52, 472 S.E.2d 341 (1996), modifying and affirming the order and judgment entered by Albright, J., on 3 May 1996 in the Superior Court, Guilford County. Heard in the Supreme Court 19 March 1997.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by M. Jay DeVaney and David S. Pokela, for petitioner-appellant Walker Heirs, Inc.

Elrod Lawing & Sharpless, P.A., by Frederick K. Sharpless, for respondent-appellee Browns Summit Development Company.

FRYE, Justice.

This appeal involves a foreclosure petition filed by Walker Heirs, Inc. regarding property in Guilford County.

The relevant facts and circumstances are as follows: On 13 November 1990, C & M Investments of High Point, Inc. (C & M), purchased 280 acres of land in Guilford County from Walker Heirs, Inc. (Walker). A purchase price of $1,258,740 was paid, $338,685 in cash and the balance financed by Walker through a promissory note in the amount of $920,055. The note provides for semiannual payments due the first day of May and November. The promissory note is secured by a purchase money deed of trust. In January 1991, respondent C & M transferred its interest in the property to respondent Browns Summit Development Corporation (BSDC).

A release agreement was executed by the parties and was incorporated by reference into the deed of trust. The agreement allowed BSDC to seek a release of property from the deed of trust upon BSDC's compliance with conditions set forth in the note and the release agreement. The release agreement permitted BSDC to seek a release of property when payment was made in the amount of $4,500 per acre, contingent upon compliance with the conditions in the release agreement.

In consideration of the down payment of $338,685, C & M was entitled to a release of certain lots totaling 61.7 acres, contingent

upon compliance with the conditions in the release agreement. The initial release did not occur until 4 November 1991, when 52.267 acres were released. This left 9.433 acres which were paid for and not released. The parties agreed by letter dated 4 August 1993 that BSDC was entitled to a release of 9.433 acres on any lot in Phase II after Phase II had been platted and as long as the conditions precedent to release set forth in the original release agreement were met.

On 28 October 1993, BSDC requested release of 28.68 acres based on the existing 9.433-acre credit, the May 1993 semiannual installment payment made in the amount of $76,761.26, and a cashier's check in the amount of $10,750.50 for the balance. As of 28 October 1993, a plat of the 28.68 acres had not been recorded. Walker denied BSDC's request for release of the property because BSDC had not complied with the condition precedent in the release agreement that required a plat to be recorded prior to release.

On 1 November 1993, a semiannual payment of principal and interest was due, and BSDC failed to make the payment. On 15 November 1993, Raymond D. Thomas, as trustee, notified BSDC of the default under the note.

On 22 April 1994, BSDC recorded a plat of the 28.68-acre tract and requested a release of the property on 28 April 1994. Walker denied the request for release on the basis that BSDC was in default.

On 20 May 1994, Walker initiated foreclosure proceedings. Sharon R. Williams, Assistant Clerk of Superior Court, Guilford County, entered an order on 21 September 1994, authorizing the trustee to conduct a foreclosure sale. BSDC gave notice of appeal to the Superior Court, Guilford County. Walker subsequently filed a motion for summary judgment. The case was heard before Judge W. Douglas Albright on 10 April 1995. Judge Albright entered an order and judgment on 3 May 1995 reversing the decision of the clerk, denying the petition for foreclosure and Walker's motion for summary judgment, and making the following pertinent conclusions of law:

4. Because [BSDC] had paid $119,209.76 for releases of property in excess of the property that had been released, [BSDC's] failure to make the November 1, 1993 payment on the note did not constitute a default.

5. [Walker's] failure to release property in response to the demand of April 28, 1994, was wrongful and a breach of the release agreement.

6. [BSDC's] failure to make the payment of May 1, 1994, on or before May 10, 1994, constituted a default under the promissory note.

7. [BSDC] has a legal defense to foreclosure upon the 28.68 acres of property for which it has demanded release, to wit, that [Walker] breached the agreement by failing to release the property when a release was properly demanded.

8. While [Walker] may have a right to foreclose upon some portion of the property that is the subject of the petition, [Walker] does not have a right to foreclose upon the entire parcel that is the subject of the petition.

From the trial court's order, Walker appealed to the Court of Appeals. In a unanimous opinion, the Court of Appeals affirmed the trial court's conclusion that BSDC was entitled to a release of the 28.68-acre tract and modified the trial court's conclusion as to when default under the note occurred. The Court of Appeals held that default occurred in November 1993, not May 1994, because BSDC was not entitled to apply release credits to the November principal payment, and thus, failure to make the November 1993 payment constituted default under the note. On 10 October 1996, this Court allowed Walker's petition for discretionary review.

[1] The first issue on this appeal is whether BSDC defaulted under the promissory note in November 1993.

Walker contends that BSDC did not make the semiannual payment due under the note in November 1993, and therefore, BSDC was in default in November 1993. We agree.

A semiannual payment of principal of $76,761.26 plus interest was due under the note on 1 November 1993. The parties stipulated and the trial court found as fact that BSDC "made no payments, in cash or in kind, to [Walker] since September, 1993." It is uncontested that the payment made in September 1993 was for the semiannual installment due on 1 May 1993. Thus, the 1 November 1993 payment was not made. Nonetheless, BSDC contends and the trial court held that there was not a default in November 1993 because the existing "release credit" was sufficient to cover the payment of principal. The Court of Appeals held to the contrary. We agree with this holding of the Court of Appeals.

The promissory note states that principal and interest are payable as follows:

> Principal due in Eleven (11) semi-annual installments of Seventy Six Thousand Six Hundred Seventy One [sic] and 26/100 Dollars ($76,761.26) each plus accrued interest commencing on May 1, 1991 and continuing on the first day of November, 1991 and continuing on the first day of each May and November thereafter until November 1, 1996 when the balance of principal and accrued interest shall be due and payable in full.

The release agreement executed on the same date provides that "subject to the conditions herein set forth, a release payment of $4,500.00 per acre shall be paid." Paragraph five of the release agreement provides as follows:

> All payments herein made for releases shall be applied toward the next payment of principal and interest due on the NOTE, and if the amount of the same shall be equal to or greater than the next semi-annual payment called for in the NOTE when added to any prior release payment being applied to the same semi-annual payment, then said semi-annual payment will have been considered paid. Any excess shall be applied to next semi-annual payment.

BSDC contends that the foregoing provisions of the note and the release agreement allow it to apply credit for unreleased property to the semiannual payments due under the note. We disagree.

BSDC had a contractual obligation to make semiannual payments under the promissory note. Whether BSDC sought to have corresponding property released, or did not seek to do so successfully, does not relieve BSDC of the contractual obligation to make semiannual payments under the note. Paragraph five of the release agreement outlines how payments for releases were to be applied to the semiannual payments due under the note. Under the language of the release agreement, a semiannual payment is considered paid when the release payments "applied to the same semi-annual payment" are "equal to or greater than" the next payment due under the note. This language does not allow BSDC to make a semiannual payment in May, fail to obtain a release of a corresponding amount of property, and then submit the unreleased property in lieu of making the November semiannual payment. Regardless of whether property is released under the release agreement, semiannual payments become due under the note in May and November. Since BSDC did not make release payments in an amount sufficient to cover both the 1 May and 1 November 1993 payments due under the note, a default occurred in

November 1993. Accordingly, we affirm the holding of the Court of Appeals as to this issue.

[2] The next issue on this appeal is whether BSDC was entitled to a release of the 28.68-acre tract of property in October 1993. We hold that BSDC was not entitled to a release of the property in October 1993 because it had not complied with a condition precedent to release.

The release agreement entered into by the parties on 13 November 1990 set forth the following "CONDITION PRECEDENT TO RELEASE":

> It is understood and agreed that the DEBTOR shall not be entitled to any release of any of the REAL ESTATE until that part which is sought to be released is set forth on a duly recorded plat as a designated lot thereon, and said plat is in conformity with the ORDINANCE and approved by the appropriate agency in Guilford County which shall administer the ORDINANCE. It is further agreed that no release of the REAL ESTATE will be made until any streets or roads on any recorded plat shall have been built or bonded to be built in accordance with the ORDINANCE and the rules and regulations of the Department of Transportation of North Carolina, if the latter approval be required. No partial platted lot shall be released, but only a total platted lot. In addition, any remaining portion of the REAL ESTATE not released shall have access to public roads or streets.

"A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993). " 'Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability.' " *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 117, 123 S.E.2d 590, 595 (1962) (quoting 3 Samuel Williston, *A Treatise on the Law of Contracts* § 665 (rev. ed. 1936)).

It is clear from the language of the release agreement that the parties agreed that there were conditions precedent to the release of any property, including that parts of the property would be duly recorded before they would be released. It is uncontested that BSDC did not record a plat of the 28.68-acre tract until 22 April 1994. Thus, in October 1993, BSDC was not in compliance with the express con-

dition precedent requiring "that part which is sought to be released [to be] set forth on a duly recorded plat" prior to a release of the property.

Walker contends that BSDC was not entitled to a release in April 1994 because the roads were not properly bonded in accordance with the condition precedent to release and because BSDC was in default on the note. We conclude that BSDC was not entitled to a release of the property in April 1994 because BSDC was in default on the note, having failed to make the 1 November 1993 payment. Therefore, it is unnecessary to reach the roads issue.

Paragraph four of the deed of trust provides in pertinent part: "Grantor shall not be entitled to any release of property unless Grantor is not in default and is in full compliance with all of the terms and provisions of the Note, this Deed of Trust, and any other instrument that may be securing said Note." Thus, BSDC was not entitled to a release since it was in default under the note because the 1 November 1993 payment had not been made. Therefore, despite the fact that on 22 April 1994 BSDC recorded the plat in compliance with the condition precedent outlined in the release agreement, BSDC was not entitled to a release of the tract at that time because BSDC was not in compliance with the condition in the deed of trust that prohibited releases in the event of default.

The Court of Appeals relied on this Court's decision in *In re Foreclosure of Michael Weinman Assocs.*, 333 N.C. 221, 424 S.E.2d 385 (1993), for its conclusion that "BSDC is entitled to have such property released from the deed of trust as was paid for prior to their default 1 November 1993." *In re Foreclosure of C & M Investments*, 123 N.C. App. 52, 60, 472 S.E.2d 341, 345 (1996). We disagree with this conclusion of the Court of Appeals.

In *Weinman*, the parties contracted for the purchase of property with a down payment of twenty-five percent of the purchase price, a release of one-fourth of the acreage, and three successive payments of twenty-five percent plus interest with corresponding releases of property. *Weinman*, 333 N.C. at 224, 424 S.E.2d at 386. Since the description and measurement of the remaining three-fourths acreage was approximate, a survey was necessary to obtain an exact legal description for the documents releasing the remaining acreage. *Id.* at 225, 424 S.E.2d at 387. At the time the buyer made the second full payment, the requisite survey work to obtain a legal description had not been completed. *Id.* The seller acknowledged receipt of the payment

by letter and stated that "[w]e agree to execute a Release containing such a proper legal description promptly upon presentation to us." *Id.* at 229, 424 S.E.2d at 389. The buyer failed to make the third payment when due, and the seller instituted foreclosure proceedings. *Id.* at 225, 424 S.E.2d at 387. Prior to the foreclosure hearing, the buyer presented a release containing a proper legal description for the second tract, but the seller refused to execute the release. *Id.* at 225-26, 424 S.E.2d at 387.

On appeal, this Court held that a default on the third and fourth tracts of property did not authorize the seller to refuse to release the second tract and include it in the foreclosure. *Id.* at 229, 424 S.E.2d at 389. The instant case, however, is distinguishable from *Weinman*. In *Weinman*, the buyer had made full payment for the second tract and, as acknowledged by the seller, was entitled to a release of the property upon presenting a release containing a proper legal description. Because the buyer provided a document for the release of the second tract, including the proper legal description, to the seller prior to the foreclosure hearing, the seller was not entitled to refuse the release and foreclose on the second tract of property. *See id.*

In contrast, the parties in the instant case agreed to an express condition precedent that the parts of the property sought to be released must be set forth on a duly recorded plat prior to release of the property. This express condition precedent is materially different from the ancillary requirement of completing the survey in order to provide a legal description in *Weinman*. We further note that Walker contends that it bargained for this substantive condition in the instant case in order to protect it from a release of property that could violate subdivision laws.

In October 1993, the 28.68-acre tract for which BSDC sought a release was not shown on a duly recorded plat. Therefore, since an express condition precedent to release was not satisfied, BSDC was not entitled to a release of the 28.68-acre tract in October 1993. In addition, as noted above, BSDC was in default under the note when it sought a release in April 1994, and therefore, a release of the property at that time was prohibited by the deed of trust.

The Court of Appeals held that

> to allow [Walker] to retain the principal payments paid by BSDC as per the requirements of the note, and to allow [Walker] to foreclose on the property that BSDC has paid to have released would

amount to a windfall. While BSDC did not strictly comply with the conditions precedent in the release agreement, public policy dictates that [Walker] should not be allowed to receive a double recovery.

In re Foreclosure of C & M Investments, 123 N.C. App. at 59, 472 S.E.2d at 345. We disagree. To allow Walker to foreclose on the property including the 28.68-acre tract that BSDC sought to have released will not amount to a windfall or double recovery to Walker because, under the foreclosure statutes, BSDC is entitled to any surplus proceeds from the foreclosure sale after payment to Walker as the note holder. *See* N.C.G.S. § 45-21.31 (1996). Accordingly, we reverse the Court of Appeals on this issue.

In conclusion, we affirm the Court of Appeals' holding that BSDC was in default under the note in November 1993. However, we hold that BSDC was not entitled to a release of the property in October 1993 or April 1994. Accordingly, we reverse the Court of Appeals on this issue and remand the case for further remand to the Superior Court, Guilford County, for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

STATE OF NORTH CAROLINA v. JESSE LEE THOMAS

No. 218A90-2

(Filed 9 May 1997)

Criminal Law § 206 (NCI4th Rev.); Constitutional Law § 280 (NCI4th)— pro se defendant—mental capacity to waive counsel—standby counsel's motion for limited appointment—statutory and constitutional violations

The trial court erred by allowing the motion of standby counsel, filed over the *pro se* defendant's objection, to appoint standby counsel to represent defendant for the limited purpose of litigating his capacity to knowingly and intelligently waive his right to counsel and proceed *pro se* since the court's ruling allowing standby counsel to intervene and advocate a position over defendant's objection exceeded the authority granted by N.C.G.S.

§ 15A-1243, violated defendant's right to represent himself guaranteed by the Sixth Amendment to the U.S. Constitution and Art. I, § 23 of the N.C. Constitution, and violated the rule against a defendant proceeding both *pro se* and by counsel.

Am Jur 2d, Criminal Law §§ 764 et seq., 993-995.

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

Justice WHICHARD dissenting.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Butterfield, J., on 20 July 1995 in Superior Court, Nash County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 December 1996.

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

Glenn A. Barfield for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was indicted on 20 February 1989 for first-degree murder. In 1990, he was tried capitally, found guilty, and sentenced to death. On appeal, this Court found error and ordered a new trial. *State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (1992). On 18 November 1992, before Judge Thomas S. Watts, Jr., defendant requested that he be allowed to proceed *pro se*. Judge Watts thoroughly questioned defendant in accordance with N.C.G.S. § 15A-1242 before he was allowed to execute a waiver of counsel form indicating his desire to appear on his own behalf. The waiver form included the specific request that the court appoint standby counsel pursuant to N.C.G.S. § 15A-1243. Defendant appeared again before Judge Watts on 7 December 1992. Following an additional inquiry concerning defendant's request to represent himself, Judge Watts entered an order authorizing defendant to proceed *pro se* and appointing Nile Falk as standby counsel. Judge Watts also ordered the Office of the Appellate Defender to designate another attorney to serve as standby counsel. In compliance with Judge Watts' order, the Office of the Appellate Defender designated Staples S. Hughes.

On 18 March 1993, standby counsel Hughes, acting without defendant's consent, filed a motion requesting that he and attorney

Falk be appointed as counsel to represent defendant for the limited purpose of litigating his capacity to knowingly and intelligently waive his right to counsel and proceed *pro se* and for authorization for the defense to obtain a professional evaluation of defendant's mental health. The motion was considered *ex parte* by Judge Quentin T. Sumner at the 21 April 1993 Criminal Session of Superior Court, Nash County. On 16 June 1993, *nunc pro tunc* 21 April 1993, Judge Sumner entered an order over defendant's objection appointing Hughes and Falk as counsel to represent defendant solely for the purpose of litigating issues related to defendant's mental status. In a separate order, Judge Sumner authorized the employment of an expert defense witness to assist in the investigation and litigation of defendant's mental status.

An evidentiary hearing was held on 24 January 1994 before Judge Sumner on a motion filed by Hughes questioning defendant's mental competence to execute a waiver of counsel. On 25 February 1994, *nunc pro tunc* 28 January 1994, Judge Sumner entered an order setting forth findings and conclusions in support of his decision to deny defendant's motion for self-representation and to appoint the formerly designated standby counsel to represent defendant as his trial counsel. In that order, Judge Sumner made no finding or conclusion that defendant was or ever had been unable to properly waive his right to counsel under N.C.G.S. § 15A-1242. In a separate order filed on or about 8 February 1994, Judge Sumner found that the State's sole proposed aggravating circumstance was insufficient to support a sentence of death and directed that the case be tried noncapitally.

Defendant was tried noncapitally to a jury at the 17 July 1995 Criminal Session of Superior Court, Nash County, Judge G.K. Butterfield presiding, and was found guilty. Judge Butterfield sentenced defendant to a mandatory term of life imprisonment.

Defendant contends *inter alia* that the trial court erred by allowing Hughes' motion, filed over defendant's objection, that Hughes and Falk be appointed as counsel to represent defendant for the limited purpose of litigating his capacity to knowingly and intelligently waive his right to counsel. We agree.

At the time the motion was filed, defendant had been found by the trial court to have knowingly and voluntarily waived his right to counsel and was representing himself. Hughes and Falk were serving as standby counsel pursuant to N.C.G.S. § 15A-1243. The duties of standby counsel are limited by statute to assisting the defendant

"when called upon" and to bringing to the judge's attention "matters favorable to the defendant upon which the judge should rule upon his own motion." N.C.G.S. § 15A-1243 (1988). When the trial court allowed attorney Hughes, in his capacity as standby counsel, to intervene by motion in this case, over defendant's objection, it exceeded the authority granted by statute.

Allowing standby counsel to advocate any position over a *pro se* defendant's objection also interferes with his exercise of his right to represent himself. A defendant's right to represent himself is guaranteed by the Sixth Amendment to the United States Constitution, *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975), and by Article I, Section 23 of the North Carolina Constitution, *State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473. A defendant appearing *pro se* "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). Defendant objected to the appointment of Hughes and Falk as counsel for the limited purpose set forth in the motion. At the time the trial court allowed the motion and appointed Hughes and Falk to represent defendant on the issue of whether he was competent to proceed *pro se*, no finding had been made that defendant had not been or was no longer competent to waive counsel. Finally, appointing counsel for a limited purpose violated the rule against a defendant proceeding both *pro se* and by counsel. In *Thomas*, this Court held that a defendant has only two choices: " 'to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel.' " 331 N.C. at 677, 417 S.E.2d at 477 (quoting *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *disavowed on other grounds by State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985)). Due to this prohibition against hybrid representation, a court cannot allow defendant to proceed *pro se* while also appointing counsel to represent him, even for a limited purpose.

For the reasons stated herein, the trial court erred by allowing standby counsel to advocate a position over defendant's objection, and defendant is entitled to a new trial.

NEW TRIAL.

Justice WHICHARD dissenting.

The majority holds that the trial court erred in allowing standby counsel to intervene by motion and, upon appointment for that lim-

ited purpose, to advocate over defendant's objection that defendant lacked the mental capacity to knowingly and intelligently waive his right to counsel. It is my view that standby counsel's actions were proper and, indeed, precisely the type of actions contemplated by the statute authorizing the appointment of standby counsel for defendants electing to proceed *pro se*. I would therefore hold that the trial court did not err.

This defendant's desire to represent himself has been troublesome from the outset. In his first trial, he repeatedly asserted that he wanted to represent himself but that he would need an "assistant." Defendant's lengthy and incoherent monologues on this subject were of sufficient concern to the trial court that it ordered defendant committed to Dorothea Dix Hospital for evaluation of his competency to stand trial and ultimately denied defendant's motion to appear as co-counsel. In subsequent proceedings, a different superior court judge listened as defendant made another rambling statement in which he referred to his lawyers as "assistants" and to himself as "leading attorney." The judge interpreted these statements as a request to proceed *pro se*, which he allowed. We held that this was error and ordered a new trial because defendant's repeated assertion that he required a licensed attorney to serve as his "assistant" did not amount to a clear and unequivocal expression of a desire to proceed *pro se*. *State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (1992).

In the proceedings now at issue, defendant asked to be permitted to proceed *pro se* and also requested the appointment of standby counsel. Judge Watts allowed both requests and entered orders accordingly. Over the course of the next few months, standby counsel observed that defendant appeared to be less focused and less able to process information than he had been in the past. They became concerned that defendant lacked the capacity to waive counsel and therefore filed the motion at issue.

N.C.G.S. § 15A-1243 provides:

> When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may appoint standby counsel to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion.

By its plain language, this statute contemplates a dual role for standby counsel. First, standby counsel has a duty to serve the

defendant by assisting him when called upon. Second, standby counsel has a duty to serve the trial court by "bring[ing] to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion." That the legislature intended standby counsel to serve the court, as well as the defendant, is evidenced in two ways. First, the statute refers to matters the court should address upon its *own* motion, not the *defendant's* motion. Second, the statute makes the appointment of standby counsel discretionary with the trial court. If the legislature intended standby counsel to serve the defendant only, presumably it would have required the court to appoint standby counsel only upon the defendant's request.

By holding that the trial court erred in allowing standby counsel to intervene and advocate a position over defendant's objection, the majority essentially nullifies standby counsel's statutory duty to the court. It concludes that the trial court thereby interfered with defendant's exercise of his constitutional right to represent himself. I disagree. I believe standby counsel's motion was a proper attempt to bring to the judge's attention the question of defendant's mental capacity to waive counsel. This is a matter of importance to defendant's right to *knowingly and intelligently* defend himself; it is precisely the type of "matter[] favorable to the defendant upon which the judge should rule" that the statute contemplates and one that may well not come to the judge's attention otherwise. That the matter was brought to the judge's attention by way of a motion to which defendant objected should be irrelevant. The statute does not specify the precise means by which the judge's attention should be engaged.

The majority is correct that a criminal defendant has a state and federal constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 818, 45 L. Ed. 2d 562, 572 (1975); *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475. Exercise of this right presupposes a mentally competent defendant, however. Thus, trial courts must make thorough inquiry to ensure that a defendant's waiver of his right to counsel is knowingly and intelligently made. *Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 581; *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476; *see also* N.C.G.S. § 15A-1242 (1988). In my view, when faced with a substantial question as to defendant's mental capacity to knowingly and intelligently waive his right to counsel and proceed *pro se*, standby counsel had not only the statutory authority, but also a professional duty, to call this matter to the judge's attention. The effect of the majority opinion is to hold the statute unconstitutional, at least

as applied. Because the right to self-representation presupposes a mentally competent defendant, it is inconceivable to me that the statute is unconstitutional as applied to these discrete facts.

The majority also holds that by allowing standby counsel to represent defendant for the limited purpose of determining defendant's mental capacity, the trial court erroneously permitted hybrid representation. I disagree. In presenting evidence relevant to defendant's mental capacity, standby counsel were fulfilling their duties as such and as officers of the court. It may have been a mistake to characterize their actions as "limited representation" of the defendant; if so, however, it was not prejudicial error requiring a new trial.

For these reasons, and perceiving no other error warranting a new trial, I would hold that defendant received a fair trial, free of prejudicial error. I therefore respectfully dissent.

STATE OF NORTH CAROLINA v. DAVID ALTON LEWIS

No. 444A96

(Filed 9 May 1997)

Homicide § 482 (NCI4th)— deliberation—supplemental instruction

The trial court's supplemental instruction in a first-degree murder case, given in response to the jury's request for a clearer definition of deliberation, that deliberation means (1) that the killing was considered or planned in advance, (2) that no particular length of time was required for such advance planning, and (3) that the killing was different from one done in response to a suddenly aroused passion was a correct statement of the law and substantially conformed with defendant's requested instruction that deliberation requires the "weighing in the mind of consequences of a course of conduct, as distinguished from acting upon a sudden impulse without exercise of reasoning power."

Am Jur 2d, Homicide § 501.

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., on 3 July 1995 in Superior Court, Orange County, upon a jury verdict

of guilty of first-degree murder. Heard in the Supreme Court 18 March 1997.

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

Nora Henry Hargrove for defendant-appellant.

ORR, Justice.

This case arises out of the shooting death of James "Buck" Copeland on 14 September 1994 at the McDonald's restaurant on Franklin Street in Chapel Hill, North Carolina. Defendant was indicted for this crime on 10 October 1994 and was tried noncapitally before a jury. The jury returned a verdict finding defendant guilty of first-degree murder. The trial court imposed a mandatory sentence of life imprisonment for this conviction.

After consideration of the one assignment of error brought forward on appeal by defendant and a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we conclude that defendant received a fair trial, free from prejudicial error. For the reasons set forth below, we affirm his conviction and sentence.

At trial, the State's evidence tended to show the following: Frank McKnight testified that on 14 September 1994, he arrived at McDonald's at approximately 8:45 a.m. While waiting for a friend to arrive, McKnight noticed that defendant was sitting in the back of the restaurant. A few minutes after his friend arrived, McKnight observed Buck Copeland come into the restaurant and sit down approximately eight feet away from defendant. McKnight testified that just before 9:30 a.m., he saw defendant walk up to Copeland with a sawed-off shotgun, put it to Copeland's head, and fire the weapon.

Barbara Turner testified that she saw defendant get up from the back booth and speak with Copeland briefly before exiting the restaurant. Turner further stated that she observed defendant come back into the restaurant, walk up to Copeland, and say something like, "I guess you remember me now." Turner then heard a loud noise, turned around, and saw defendant leave through the side door as Copeland slumped down in his seat. Turner then looked out the window and saw defendant backing out of the parking lot in a Mazda truck.

Kirk Schablik testified that he observed defendant slowly raise the shotgun, "very calm, very steady"; put it to Copeland's head; and pull the trigger. After the shot, he heard defendant say something like, "That will teach you to talk to me that way." Schablik further testified that he did not think anything violent was going to happen because defendant "seemed very calculated."

Valerie Foushee, an employee of the Chapel Hill Police Department, testified that on 14 September 1994, defendant entered the building and laid a weapon on the counter. Foushee testified that after laying the weapon down, defendant said, "I'm the one that was at McDonald's."

William Frick, an investigator with the Chapel Hill Police Department, established that defendant's 1984 Mazda truck was parked in front of the police station and that he saw a spent shotgun shell on the floorboard of the passenger's side. After obtaining defendant's consent to search the vehicle, the police retrieved the shotgun shell from the truck, and defendant indicated that it was the shell which he had removed from the gun that he had fired at McDonald's. Special Agent Michael Gavin, an expert in the field of firearm identification, testified that the shotgun shell retrieved from defendant's truck had been fired from the gun that defendant placed on the counter at the Chapel Hill police station.

Dr. Thomas Sporn, the assistant chief medical examiner for the State of North Carolina, testified that the cause of the victim's death was a shotgun wound to the head fired from five to six inches away.

Defendant also presented testimony during the trial. John Austin, an employee of the Orange County Sheriff's Department, testified that defendant's behavior was very unusual when he was brought to jail on 14 September 1994. Austin stated that defendant appeared to be very depressed, was placed on suicide watch, and refused to eat anything for three days.

Naomi Lewis, defendant's mother, and Dennis Lewis, defendant's brother, testified about several incidents of strange behavior that resulted in defendant injuring himself.

Dr. John Warren, who was qualified as an expert in medical and forensic psychology, evaluated defendant. Dr. Warren testified that, in his opinion, defendant was suffering from residual schizophrenia at the time of the offense such that his mental state was impaired. Dr.

Warren further stated that it was his opinion that defendant's mental illness caused him to develop recurrent, obsessive, and paranoid thoughts about Copeland, which resulted in the psychotic belief that Copeland was controlling him and affecting his life in many ways.

In the only assignment of error brought forward by defendant on appeal, defendant contends that the trial court committed prejudicial error when it "reinstructed" the jury on the required element of "deliberation." Defendant notes that a critical part of the defense was his inability, caused by his schizophrenia, to adequately weigh the consequences of his acts. Defendant argues that the definition he tendered would have clarified the weighing process required for deliberation. Defendant contends that the trial court's actions, as set forth below, impaired the pursuit of his defense of lack of mental capacity and violated his state and federal constitutional rights. We disagree.

In the present case, the trial court instructed the jury on the elements of first-degree murder. The instructions which were given comported with the appropriate pattern jury instructions on first-degree murder. As to deliberation, the trial court instructed that the State must prove

> that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or [was] excited when the intent was carried into effect.

Defense counsel did not except to these initial instructions given by the trial court.

After deliberations had begun, the jury submitted a note to the court, asking, "Could we get a clearer definition of what deliberation means, what constitutes a 'cool state of mind.' " Defense counsel then requested the trial court to use "at least in whole or in part" the following language defining "deliberation" as

> the act of weighing and examining the reasons for and against a contemplative act or course of conduct, or a choice of act or means. As used in the context of first[-]degree murder, it is weighing—a weighing in the mind of the consequences of a course of conduct, as distinguished from acting upon a sudden impulse without exercise of reasoning power.

After hearing the objections of the prosecutor, Judge Battle had defense counsel re-read the requested language and then decided to use the language which he had previously prepared instead of defendant's tendered instruction.

When the jury returned to the courtroom for the additional instructions, Judge Battle stated:

> Members of the jury, I received your note, and I'm not really sure that I can be of too much help to you, but I will say this, in addition to the instructions that I've already given you, of course: Deliberation means that the killing was considered or planned in advance—no particular length of time is required—as opposed to something done as a response to some suddenly aroused violent passion.

Following the jury's return to the jury room, defense counsel noted an exception to the instruction and argued that the reinstruction went to the issue of premeditation. Defense counsel tendered *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975), as support for the requested instruction.

N.C.G.S. § 15A-1234(a)(1) provides that "[a]fter the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court." N.C.G.S. § 15A-1234(a)(1) (1988). "When the trial court gives such additional instructions, it may also give or repeat other instructions to avoid giving undue prominence to the additional instructions." *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). Further, "[w]hether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988). As this Court has previously stated, "[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.

In *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80, the case relied on by defendant, this Court discussed the concepts of premeditation and deliberation and stated that

> "[i]n order to constitute deliberation and premeditation, something more must appear than the prior existence of actual malice

> or the presumption of malice which arises from the use of a deadly weapon. Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt, that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill in furtherance of such purpose or motive."

Id. at 417, 215 S.E.2d at 85 (quoting *State v. Thomas*, 118 N.C. 1113, 1123, 24 S.E. 431, 434 (1896)).

In defining deliberation, this Court has held that "[d]eliberation 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. Crawford*, 344 N.C. 65, 74, 472 S.E.2d 920, 926 (1996) (quoting *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 842-43 (1984)). Further, in *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), this Court stated that "[d]eliberation does not require brooding or reflection for any applicable length of time but connotes the execution of an intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design." *Id.* at 344, 279 S.E.2d at 802.

In considering the instruction at issue here, we conclude that the trial court properly instructed the jury. First, the primary instructions on deliberation were proper and comported with the pattern jury instructions on first-degree murder. Second, the record shows that the jury had the benefit of a written copy of the trial court's instructions because Judge Battle had the bailiff give each juror a copy so that he or she could follow along with his charge. Third, the trial judge explicitly qualified his response to the jury's question with the statement that his answer was "in addition to the instructions that I've already given you." Finally, the trial court's additional instructions to the jury did not misstate the law and sufficiently complied with defendant's requested instruction. This Court has previously stated that

> [a]s 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. Harden, 344 N.C. 542, 555, 476 S.E.2d 658, 664 (1996), *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— , 65 U.S.L.W. 3647 (1997).

Here, the substance of the instruction requested by defendant was that deliberation requires the "weighing in the mind of consequences of a course of conduct, as distinguished from acting upon a sudden impulse without exercise of reasoning power." The language used by Judge Battle in response to the jury's question concerning "deliberation" included three concepts for the jury to consider: (1) that the killing was considered or planned in advance, (2) that no particular length of time was required for such advance planning, and (3) that a killing done with deliberation is different from one done in response to a suddenly aroused violent passion. These concepts substantially conformed with defendant's requested instruction and are a correct statement of the law.

The supplemental instructions of Judge Battle, coupled with the principal instructions he first gave, correctly informed the jury as to the applicable law and in no way prejudiced defendant's right to a fair trial. Accordingly, this assignment of error is overruled.

NO ERROR.

STATE OF NORTH CAROLINA v. MICHAEL RAY SKEELS

No. 498A95

(Filed 9 May 1997)

1. Kidnapping and Felonious Restraint § 16 (NCI4th)— kidnapping—confinement, restraint, removal of victim—insufficiency of evidence

The trial court erred in a prosecution for armed robbery, kidnapping, and first-degree murder by not dismissing the kidnapping charge where the evidence was not sufficient to show that defendant unlawfully confined, restrained, or removed the victim from one place to another without his consent. There was no evidence regarding the circumstances under which the defendant entered the victim's truck or under what circumstances the victim drove to the area where he was killed. N.C.G.S. § 14-39.

Am Jur 2d, Abduction and Kidnapping § 49.

2. Appeal and Error § 506 (NCI4th)— first-degree murder—instruction on involuntary manslaughter not given—conviction for premeditated murder—no prejudice

There was no plain error in a first-degree murder prosecution in the refusal to give an instruction on involuntary manslaughter where defendant argued that his admissions through his attorneys prior to the start of trial clearly supported the lesser included offense because they raised the issue of diminished capacity. The trial court instructed the jury that it could consider verdicts of guilty of first-degree murder, guilty of second-degree murder, and not guilty, and any error in not instructing on involuntary manslaughter would be harmless in light of the jury's verdict of guilty of first-degree murder based on premeditation and deliberation.

Am Jur 2d, Appellate Review § 743.

3. Homicide § 727 (NCI4th)— first-degree murder—armed robbery—guilty verdicts—murder by premeditation and deliberation but not felony murder—not inconsistent

There was no error in a prosecution for armed robbery, kidnapping, and first-degree murder where defendant contended that judgment should have been arrested on the armed robbery conviction because the jury found him guilty of murder by premeditation and deliberation but not by felony murder. The verdicts in this case were not necessarily inconsistent (assuming they must be consistent) because the jury could have found that the robbery was completed before the murder occurred.

Am Jur 2d, Homicide §§ 549 et seq.

4. Robbery § 70 (NCI4th)— armed robbery—evidence sufficient

The trial court did not err by not dismissing an armed robbery charge where a witness saw a man wearing gauze around his head and a blue cap driving the victim's truck in the vicinity of a bank; the testimony of several witnesses established that defendant was outside the bank with his head wrapped in gauze and wearing a blue cap, which the victim's wife said was like the hat that the victim kept in his truck; the victim's truck was located near the bank; contents of a bag found inside the truck included a box of stretch sterile gauze, envelopes, and a pad of paper, all

of which linked defendant to the truck; various witnesses' testimony established that defendant possessed the pistol used to kill the victim when he was arrested; and considerable circumstantial evidence raised a reasonable inference that the victim did not consent to the defendant's driving of his truck to the area of the bank.

Am Jur 2d, Robbery §§ 62 et seq.

5. Criminal Law § 429 (NCI4th Rev.)— prosecutor's argument—defendant's failure to present evidence—no error

The trial court did not err in a prosecution for armed robbery, kidnapping, and first-degree murder by overruling objections to comments made by the prosecutor during closing arguments where defendant claims that the prosecutor impliedly commented on his failure to testify, but the prosecutor merely commented on the defendant's failure to present any evidence in his defense. None of the language used was intended to be or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.

Am Jur 2d, Trial § 605.

6. Criminal Law § 660 (NCI4th Rev.)— attempted armed robbery—motion to dismiss—no ruling before trial

The trial court did not abuse its discretion in refusing to dismiss a charge of attempted armed robbery before trial where the court heard defendant's rendition of the facts as well as the State's and declined to rule on the motion before the evidence was presented at trial. Furthermore, the evidence of the attempted armed robbery of the bank was admissible for the purpose of linking the defendant with the murder, kidnapping, and armed robbery offenses.

Am Jur 2d, Trial §§ 1059, 1068.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a sentence of life imprisonment entered by Ragan, J., at the 19 June 1995 Criminal Session of Superior Court, Craven County, upon a jury verdict of guilty of first-degree murder based on premeditation and deliberation. The defendant's motion to bypass the Court of Appeals as to additional judgments was allowed 21 May 1996. Heard in the Supreme Court 17 October 1996.

The defendant was indicted for attempted armed robbery, robbery with a dangerous weapon, first-degree kidnapping, and first-degree murder. He was tried capitally to a jury. The State's evidence tended to show that on 4 March 1994, the defendant shot the victim in the head, neck, and back and stole his pickup truck. The body of the victim, sixty-year-old Elbert Roosevelt Stokes, was found six days later in an area off of Highway 70. The defendant was arrested the afternoon of 4 March when he was observed sitting with his head wrapped in gauze across the street from First Citizens' Bank in New Bern. He had a .25-caliber pistol with him, and a note indicating his intent to rob the bank was in an envelope by his side. He was also wearing a cap and jacket that may have belonged to the victim. Earlier that day, a witness saw a man with his head wrapped in gauze driving the victim's truck. The truck was located with keys in its ignition in a mall parking lot near the bank.

The jury returned a verdict of guilty of first-degree murder under the theory of premeditation and deliberation, guilty of second-degree kidnapping, and guilty of armed robbery. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment, and such sentence was imposed. The defendant was also sentenced to a consecutive term of forty years' imprisonment for the armed robbery conviction and another consecutive term of thirty years' imprisonment for the second-degree kidnapping conviction.

The defendant appealed.

Michael F. Easley, Attorney General, by Edwin W. Welch, Associate Attorney General, for the State.

Rudolph A. Ashton, III, and Scott C. Hart for the defendant-appellant.

WEBB, Justice.

[1] In his first assignment of error, the defendant contends that the trial court erred in denying the defendant's motion to dismiss the kidnapping charge. We believe this assignment of error has merit.

N.C.G.S. § 14-39 provides, in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty

of kidnapping if such confinement, restraint or removal is for the purpose of:

. . . .

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony

. . . .

The evidence in this case is not sufficient to show that the defendant unlawfully confined, restrained, or removed the victim from one place to another without his consent. There was no evidence regarding the circumstances under which the defendant entered the victim's truck or under what circumstances the victim drove to the area where he was killed. Without such evidence, it was error to submit to the jury kidnapping as a possible verdict. *See State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We arrest judgment on the charge of kidnapping.

[2] In his next assignment of error, the defendant contends that the trial court committed plain error by refusing to give an instruction on involuntary manslaughter. The defendant argues that his admissions through his attorneys prior to the start of trial clearly supported a lesser included offense of involuntary manslaughter because the admissions raised the issue of diminished capacity.

In this case, the trial court instructed the jury that it could consider verdicts of guilty of first-degree murder, guilty of second-degree murder, and not guilty. Any error committed by the trial court in failing to instruct on involuntary manslaughter would be harmless in light of the jury's verdict of guilty of first-degree murder based on premeditation and deliberation. *State v. Jones*, 339 N.C. 114, 148-49, 451 S.E.2d 826, 844-45 (1994), *cert. denied*, —— U.S.——, 132 L. Ed. 2d 873 (1995).

This assignment of error is overruled.

[3] The defendant next contends it was error not to arrest judgment on the armed robbery conviction. He bases this argument on the jury verdict which found him guilty of murder by premeditation and deliberation but did not find him guilty of felony murder. The jury nevertheless found the defendant guilty of armed robbery. The defendant says these two verdicts are inconsistent.

Assuming the verdicts must be consistent, we do not believe they were necessarily inconsistent in this case. The jury could have found

that the robbery was completed before the murder occurred, in which case the defendant would not be guilty of felony murder but would be guilty of murder based on premeditation and deliberation.

This assignment of error is overruled.

[4] The defendant next assigns error to the trial court's failure to dismiss the armed robbery charge. The defendant contends there was insufficient evidence that he took the victim's truck and that he took it from the victim by force and without the victim's consent. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). We disagree.

There was substantial circumstantial evidence of armed robbery in this case. The State's evidence tended to show that on 4 March, a witness saw a man wearing gauze around his head and a blue cap driving the victim's truck in the vicinity of the bank. The testimony of several witnesses established that shortly after 3:00 p.m. on 4 March, the defendant was outside the bank with his head wrapped in gauze and wearing a blue cap, which the victim's wife said was like the hat that the victim kept in his truck. In addition, the victim's truck was located parked near the bank at 4:00 p.m. that day. Contents of a bag found inside the truck included a box of stretch sterile gauze, envelopes, and a pad of paper, all of which linked the defendant to the truck. Furthermore, various witnesses' testimony established that when the defendant was arrested, he possessed the pistol used to kill the victim. Finally, considerable circumstantial evidence raised a reasonable inference that the victim did not consent to the defendant's driving his truck to the area of the bank. We conclude that this evidence was sufficient to raise the inference that an armed robbery was committed and that the defendant was the perpetrator.

This assignment of error is overruled.

[5] In his next assignment of error, the defendant contends that the trial court erred on three occasions by overruling objections to comments made by the prosecutor during closing arguments and by failing to give a curative instruction. The defendant claims that the prosecutor "impliedly commented" on his failure to testify, in violation of his right against self-incrimination. *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965).

The defendant's objections to the following statements were overruled:

> Do y'all know anything about his educational background? Has he ever been to school? Does he know how to read and write? Did they put up any witnesses about that?
>
> . . . .
>
> . . . Did any witness, period, in this case, ever provide you with any testimony or evidence that this defendant suffered from any mental or emotional disturbance? No. If that evidence existed, don't you think you would have heard it?
>
> . . . .
>
> When these lawyers stand up here and argue to you about diminished capacity in this case . . . let them tell you what evidence they presented or elicited in any form.

While a prosecutor may not comment on the failure of the accused to testify, he may "comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993). We conclude that none of the language used was intended to be or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974). The prosecutor merely commented on the defendant's failure to present any evidence in his defense. As such, the prosecutor's comments were proper, and no curative instruction was required.

This assignment of error is overruled.

[6] In his last assignment of error, the defendant contends that the trial court abused its discretion by refusing to dismiss the charge of attempted armed robbery of the bank before trial. The defendant argues that although the charge was ultimately dismissed, the trial court's failure to rule on the motion prior to the presentation of evidence prejudiced him.

Whether to hear and rule on a motion before or during trial is within the discretion of the trial court. N.C.G.S. § 15A-952(f) (Supp. 1996). The defendant in this case has failed to show that the court abused its discretion by declining to rule on the motion before all of the evidence was presented at trial. A review of the record reveals that before trial, the trial court heard the defendant's rendition of the facts as well as the State's. After consideration of both, the court

declined to rule on the motion before the evidence was presented at trial. The defendant cannot show any abuse of discretion in this regard. Furthermore, the defendant cannot show prejudice because the evidence of attempted armed robbery of the bank was admissible for the purpose of linking the defendant with the murder, kidnapping, and armed robbery offenses.

This assignment of error is overruled.

No. 94CRS2864, SECOND-DEGREE KIDNAPPING: JUDGMENT ARRESTED;

No. 94CRS2865, FIRST-DEGREE MURDER: NO ERROR;

No. 94CRS2863, ROBBERY WITH A DANGEROUS WEAPON: NO ERROR.

IN RE: ALBERT DOUGLAS STONE, EMPLOYEE v. G & G BUILDERS, EMPLOYER, EMPLOYERS MUTUAL INSURANCE CO., CARRIER

No. 161PA96

(Filed 9 May 1997)

Workers' Compensation § 259 (NCI4th)— temporary total disability—permanent partial disability—plaintiff not entitled—supporting evidence

The Industrial Commission's determination that plaintiff is not entitled to temporary total disability compensation for a back injury after a certain date and that plaintiff is not entitled to permanent partial disability compensation was supported by the evidence where an investigator testified that she videotaped plaintiff performing various physical activities, and an orthopedic surgeon who examined plaintiff opined that plaintiff could return to regular employment with certain restrictions, testified that plaintiff's responses during the examination caused him to question plaintiff's credibility regarding his statements of pain, and stated that plaintiff did not have any objective findings on which to base a permanent partial disability rating.

Am Jur 2d, Workers' Compensation §§ 381, 382.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 121 N.C. App. 671, 468 S.E.2d 510 (1996), reversing an opinion and award of the Industrial Commission entered 19 December 1994. Heard in the Supreme Court 14 November 1996.

Brenton D. Adams for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens and James E.R. Ratledge, for defendant-appellants.

PARKER, Justice.

Plaintiff-employee, Albert Douglas Stone, suffered a compensable back injury on 5 March 1992. On 14 March 1994 Deputy Commissioner Gregory M. Willis filed an opinion and award denying plaintiff's claims for temporary total and permanent partial disability. The Industrial Commission affirmed the deputy commissioner's opinion and award. Plaintiff appealed to the Court of Appeals, which, in a unanimous opinion, reversed the Commission. On 30 July 1996 this Court allowed defendants' petition for discretionary review.

On 5 March 1992 plaintiff suffered a compensable back injury which prohibited plaintiff from working immediately after the accident. On 8 April 1992 plaintiff and G & G Builders and Employers Mutual Insurance Company (defendants) entered an Industrial Commission Form 21 "Agreement for Compensation for Disability" (Agreement), which was approved by the Commission on 24 April 1992. Pursuant to the Agreement defendants agreed to pay to plaintiff the sum of $210.01 per week for an "undetermined" number of weeks.

On 12 October 1992 plaintiff was seen by Dr. Lee A. Whitehurst, an orthopaedic surgeon and spine specialist, for an independent medical examination. Dr. Whitehurst noted in his medical records that plaintiff's hands were "well textured" and grease stained, "indicating some labor." Dr. Whitehurst opined in his medical records that plaintiff did "not have any objective findings on which to base a permanent partial disability rating" and further opined that plaintiff could return to regular employment with the "routine weight lifting guidelines" that he have assistance when lifting more than 50 to 70 pounds. On 29 October 1992 defendants stopped payment of temporary total disability compensation. Defendants' Industrial Commission Form 24

"Application of Employer or Insurance Carrier to Stop Payment of Compensation" was approved on 13 November 1992.

Plaintiff requested a hearing to contest defendants' termination of plaintiff's disability payments, and a hearing was held on 13 July 1993. Defendants introduced evidence that plaintiff was able to perform various physical activities including painting overhead with a roller, lifting and carrying plywood, trimming overhead branches, and throwing horseshoes. In addition, defendants introduced medical evidence that as of 12 October 1992, plaintiff retained no permanent partial impairment to his back and that plaintiff could return to regular employment with certain restrictions. Furthermore, Dr. Whitehurst testified that plaintiff's responses during the medical examination were "nonphysiologic" and "atypical" for the expected pain response.

After the hearing the deputy commissioner made the following findings:

> 8. Based on the examination and opinions of Dr. Whitehurst, the undersigned finds that plaintiff's testimony was not credible.
>
> 9. From 29 October 1992 and continuing plaintiff has been capable of returning to work at his regular job with [G & G Builders], and any inability of plaintiff to be gainfully employed was not caused by the injury to his back of 5 March 1992. Since 29 October 1992 plaintiff has not made a reasonable effort under the circumstances to obtain gainful employment.
>
> 10. As a result of the accident on 5 March 1992, plaintiff retains no permanent partial impairment to the use of his back.

Based upon these findings the Commissioner concluded that plaintiff is not entitled to any temporary total disability compensation after 20 October 1992 and that plaintiff is not entitled to any permanent partial disability compensation.

The opinion and award was reviewed by the full commission on 11 July 1994. The full commission reached "the same facts and conclusions as those reached by the Deputy Commissioner." In addition, the full commission found the following:

> 8. Based on the examination and opinions of Dr. Whitehurst, the undersigned find that plaintiff's testimony was not credible or convincing as to his inability to engage in the same or any other employment at the same wages.

In workers' compensation cases the Industrial Commission is the fact-finding body. *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976). On appeal from an order of the Industrial Commission, "[t]he reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). In the instant case we conclude that the Commission's findings of fact are supported by competent evidence and that the conclusions of law are justified by these findings.

In order to qualify for compensation under the Workers' Compensation Act, a claimant must prove both the existence and the extent of disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). In the context of a claim for workers' compensation, disability refers to the impairment of the injured employee's earning capacity. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). "If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work . . . ." *Watkins v. Central Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). However, as stated in Rule 404(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission, this presumption of continued disability is rebuttable. In the instant case the parties entered into a Form 21 Agreement which was approved by the Commission on 24 April 1992. On 13 November 1992 defendants' Form 24 application to stop payment was approved by the Commission. Any presumptions existing in favor of the employee were rebutted by defendants in this case through medical and other evidence.

Teresa Jean Atkins, an investigator with DATA Adjusters, Inc., testified that she videotaped plaintiff performing various physical activities in September of 1992. Defendants also introduced medical evidence that plaintiff retained no permanent partial impairment to his back as of 12 October 1992 and that plaintiff could return to regular employment with certain restrictions. In addition, Dr. Whitehurst testified that plaintiff's responses during the medical examination gave him cause to question plaintiff's credibility regarding his statements of pain. Defendants' evidence led the Commission to find that "plaintiff's testimony was not credible or convincing as to his inability to engage in the same or any other employment at the same wages." This finding is supported by competent evidence in the record.

The Commission also found that "[a]s a result of the accident on 5 March 1992, plaintiff retains no permanent partial impairment to the use of his back." Dr. Whitehurst stated in his deposition testimony that as a result of his examination he determined that plaintiff "did not have any objective findings on which to base a permanent partial disability rating." Thus, this finding is supported by competent evidence in the record.

Finally, the Commission found that "any inability of plaintiff to be gainfully employed was not caused by the injury to his back of 5 March 1992. Since 29 October 1992 plaintiff has not made a reasonable effort under the circumstances to obtain gainful employment." This finding is similarly supported by the testimony of Dr. Whitehurst and other competent evidence in the record.

The above findings of fact support the Commission's conclusions that plaintiff is not entitled to any temporary total disability compensation after 20 October 1992 and that plaintiff is not entitled to any permanent partial disability compensation.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Industrial Commission for reinstatement of its opinion and award.

REVERSED.

STATE OF NORTH CAROLINA v. CARLTON EUGENE ANDERSON

No. 129A96

(Filed 9 May 1997)

Homicide § 261.1 (NCI4th)— first-degree murder by torture— sufficiency of evidence

The State's evidence was sufficient to show that defendant's actions of torture of the victim were part of a course of conduct that resulted in the victim's death so as to support defendant's conviction of first-degree murder by torture where it tended to show that a group of persons living in a trailer began to beat and torture the victim; after defendant arrived at the trailer several days later, he beat the victim, used a soldering iron on the victim's arm in an attempt to burn off a tattoo, used an aerosol torch on

the victim's genital area, carved a derogatory term on the victim's arm with a knife, and otherwise participated in the torture of the victim; defendant and members of the group living in the trailer discussed possible ways to kill the victim; and after defendant left the trailer, the torture continued for a few more days until the victim ultimately died after being bound, gagged, and locked in a closet while the others went out for pizza.

Am Jur 2d, Homicide § 48.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hyatt, J., at the 21 August 1995 Criminal Session of Superior Court, Jackson County, upon a verdict of guilty of first-degree murder. Heard in the Supreme Court 19 March 1997.

The defendant was indicted for first-degree murder and was tried noncapitally to a jury. The State's evidence tended to show that in March of 1994, Vickie Fox, Thomas York, Michelle Vinson, Mike Hagedorn, Robert Trantham, and the victim lived together in Vickie's trailer. On or about 17 or 18 March 1994, the group turned against the victim, who had allegedly molested Vickie's daughter and given Michelle's son a soapy bottle. The group beat and kicked the victim, cut his hair to his scalp, and otherwise physically degraded the victim.

On 20 March 1994, Thomas, Robert, Mike, and Michelle went to a game room in Sylva to get the defendant, who had lived with the group in the past and was familiar with them. When the defendant arrived at the trailer, the victim had his head wrapped in a towel, and his face was black and blue. After Vickie told the defendant what had happened, the defendant asked the victim why he had done what he did. The defendant, Robert, and Thomas then began beating the victim in the face and chest. Vickie later noticed that her name was tattooed on the victim's arm and said she wanted it removed. After unsuccessful attempts to scrape the tattoo off with a knife, the defendant used a heated soldering iron to burn off the tattoo. Later, the defendant and Thomas used a knife to carve "fag" on the victim's arm. The victim was also made to ingest his own urine and ejaculate and was forced to sleep in the bathroom.

The defendant spent the night at the trailer, and he and the others discussed killing the victim. The next day, the defendant used an "aerosol torch" to burn the victim's upper leg and genital area. The

defendant left the trailer at approximately 4:00 or 4:30 that afternoon and did not return. The others continued to beat the victim for a few days. The beatings stopped for two days so that the victim's face could heal enough to allow him to cash his unemployment check. The victim died on 26 March 1994, after having been bound, gagged, and locked in a small closet while the group used the money from the victim's check to purchase pizza. The group discovered that the victim was dead when they returned from their outing. The following morning, the entire group drove the victim's body to Toccoa, Georgia, and dumped his body in the woods. Robert Trantham led police to the body.

A forensic pathologist testified that the cause of the victim's death was gagging and positional asphyxia as a result of being placed in a position in which "the mechanics of his breathing would have been interfered with." The pathologist also testified that pneumonia in the victim's left lung could have contributed to his death.

The jury found the defendant guilty of first-degree murder on the basis of murder by torture, assault with a deadly weapon inflicting serious injury, and misdemeanor assault inflicting serious injury. The trial judge sentenced the defendant to the mandatory term of life imprisonment for the murder conviction and arrested judgment on the assault convictions.

The defendant appealed.

Michael F. Easley, Attorney General, by Melanie L. Vtipil, Associate Attorney General, for the State.

Frank G. Queen for the defendant-appellant.

WEBB, Justice.

The defendant contends that the evidence in this case was insufficient to submit to the jury the charge of first-degree murder on the basis of murder by torture. He argues that because he left the residence several days before the victim died, there is no causal link between his actions and the death of the victim. He also argues that the victim died from an intervening cause of death when the others involved bound and gagged him and confined him in the closet. This assignment of error has no merit.

The elements of the offense of murder by torture are that the defendant intentionally tortured the victim and that the torture was a

proximate cause of the victim's death. *State v. Crawford*, 329 N.C. 466, 479, 406 S.E.2d 579, 587 (1991). The trial judge in *Crawford* defined torture as "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." *Id.* at 484, 406 S.E.2d at 589. He defined course of conduct as "the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another." *Id.* This Court found no error. *Id.* Where a murder is accomplished by torture, "the presence or absence of premeditation, deliberation and specific intent to kill is irrelevant." *State v. Evangelista*, 319 N.C. 152, 158, 353 S.E.2d 375, 380 (1987). In determining whether there was sufficient evidence to support the charge of first-degree murder by torture, we must view the evidence in the light most favorable to the State and with all reasonable inferences to be drawn from the evidence. *State v. Scott*, 323 N.C. 350, 372 S.E.2d 572 (1988).

The defendant contends that the victim died as the result of being locked in the closet and that the defendant had not been in the trailer for six days when this happened. For that reason, the defendant says, he is not responsible for the killing. We disagree. It is true that the immediate cause of death came as a result of being locked in the closet, but that was part of the torture in which the defendant actively participated.

The evidence in this case showed that during the time the defendant was at the trailer, he beat the victim, used a soldering iron on the victim's arm, used an aerosol torch on the victim's genital area, carved a derogatory term into the victim's arm, and otherwise participated in the torture of the victim that had begun a few days before the defendant arrived. The group, including the defendant, also discussed possible ways to kill the victim. After the defendant left the trailer, the torture continued for a few more days until the victim ultimately died after being bound, gagged, and locked in a closet while the others went out for pizza. The defendant's actions were thus part of a course of conduct that resulted in the victim's death. As such, it was not error for the court to submit torture as the theory supporting the defendant's first-degree murder charge.

NO ERROR.

STATE OF NORTH CAROLINA v. TED ANTHONY PREVATTE

No. 126A95

(Filed 9 May 1997)

Evidence and Witnesses § 2956 (NCI4th); Constitutional Law § 349 (NCI4th)— principal witness—pending criminal charges—concessions by prosecutor—right of cross-examination

The trial court denied defendant the right of effective cross-examination in a prosecution for first-degree murder and kidnapping by refusing to permit defendant to cross-examine the State's principal witness as to whether he had been promised or expected anything with regard to forgery and uttering charges pending against him, which had been continued by the district attorney for eighteen months at the time of this trial, in exchange for his testimony in this case. Even though the witness and his attorney testified at a *voir dire* hearing that there was no agreement as to the forgery and uttering charges in exchange for the witness's testimony in this case, this error was not harmless because the effect of the handling of the pending charges on the witness was for the jury to determine.

Am Jur 2d, Witnesses § 802.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Gray, J., at the 9 January 1995 Special Criminal Session of Superior Court, Anson County, upon a jury verdict of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals as to additional sentences was allowed 18 June 1996. Heard in the Supreme Court 14 February 1997.

The defendant was tried for first-degree murder and two charges of kidnapping. The evidence showed that on 1 June 1993, the defendant went to the home of Cynthia McIntyre, whom he had been dating but who had recently returned to her husband.

When the defendant entered Mrs. McIntyre's home, he forced her and her nine-year-old son into her bedroom at gunpoint. The defendant then beat Mrs. McIntyre and locked her son in a bathroom. The defendant next forced Mrs. McIntyre out of her home and into the front yard, where he shot her to death. Jeffrey Burr, Mrs. McIntyre's neighbor, saw the defendant shoot her.

The jury found defendant guilty of first-degree murder and recommended the death penalty. It also found the defendant guilty of two charges of second-degree kidnapping. The court sentenced the defendant to death for the murder conviction and to two consecutive sentences of thirty years' imprisonment for the kidnapping convictions.

The defendant appealed.

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

Center for Death Penalty Litigation, by Kenneth J. Rose, for the defendant-appellant.

WEBB, Justice.

We shall discuss only one of the defendant's assignments of error which we hold entitles him to a new trial. The State's principal witness was Jeffrey Burr, who was an eyewitness to the shooting. At the time of the trial in this case, Mr. Burr was under indictment in another county on nine charges of forgery and uttering forged checks. The other county, however, was under the same district attorney. The trials on these charges had been continued for eighteen months at the time of the trial in this case. The defendant wanted to cross-examine Mr. Burr about these charges and whether Mr. Burr had been promised or expected anything in regard to the charges in exchange for his testimony in this case. The court refused to let the defendant ask these questions.

We believe we are bound by *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974), to order a new trial. In *Davis*, the principal witness against the defendant was on probation. The defendant was not allowed to cross-examine the witness about his probationary status, and the United States Supreme Court held this violated the defendant's Sixth Amendment right "to be confronted with the witnesses against him." *Id.* at 315, 39 L. Ed. 2d at 353. The Supreme Court said that the defendant had the right to show that the witness was afraid he would be charged with the crime because he was on probation and the right to show that the fact he was on probation gave the State of Alaska some power over him. The Supreme Court said, "Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*,

384 U.S. 1, 3, [16 L. Ed. 2d 314, 316-17 (1966)]." *Id.* at 318, 39 L. Ed. 2d at 355 (quoting *Smith v. Illinois*, 390 U.S. 129, 131, 19 L. Ed. 2d 956, 959 (1968)).

The defendant in this case had a stronger argument than the defendant in *Davis*. Mr. Burr was facing criminal charges. The witness in *Davis* was on probation. The State in this case had a stronger weapon to control the witness. The fact that the trial of Mr. Burr on the forgery and uttering charges had been continued for eighteen months might have led the jury to believe the State was holding those charges in abeyance pending the witness' testimony in this case. Mr. Burr was the principal witness against the defendant. We believe *Davis* requires us to hold it was constitutional error not to allow the questions on cross-examination that the defendant proposed to put to the witness. We also believe *Davis* requires us to hold that the error was not harmless.

The State argues that there was no showing that Mr. Burr was prejudiced against the defendant because of the pending forgery and uttering charges against him. A *voir dire* hearing out of the presence of the jury was held before the court ruled on the objection to the questions posed by the defendant. Mr. Burr testified that there was no agreement in regard to the forgery and uttering charges in exchange for his testimony in this case. Mr. Burr's attorney testified to the same effect. The State argues that this testimony shows that Mr. Burr expected nothing from the State for his testimony against the defendant. The effect of the handling of the pending forgery and uttering charges on the witness was for the jury to determine. Not letting the jury do so was error.

We do not consider the defendant's other assignments of error, as the questions they pose may not recur at a new trial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. RAYMOND CHARLES CREASON

No. 364A96

(Filed 9 May 1997)

On appeal of a constitutional question pursuant to N.C.G.S. § 7A-30(1) from a decision of the Court of Appeals, 123 N.C. App. 495, 473 S.E.2d 771 (1996), finding no error in the judgment entered by Wood, J., at the 24 January 1995 Criminal Session of Superior Court, Rowan County. Submitted to the Supreme Court 16 April 1997 without oral argument pursuant to Rule 30(d) of the Rules of Appellate Procedure.

Michael F. Easley, Attorney General, by Christopher E. Allen, Assistant Attorney General, for the State.

Carlyle Sherrill for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. RODNEY DARYL SQUIRES

No. 484A96

(Filed 9 May 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 124 N.C. App. 231, 477 S.E.2d 97 (1996), affirming the judgment entered by Eagles, J., on 29 June 1995 in Superior Court, Guilford County. Heard in the Supreme Court 14 April 1997.

Michael F. Easley, Attorney General, by J. Philip Allen, Assistant Attorney General, for the State.

Richard M. Dailey, Jr., and A. Wayland Cooke for defendant-appellant.

PER CURIAM.

AFFIRMED.

YOUNG v. MASTROM, INC.

[346 N.C. 167 (1997)]

DAVID A. YOUNG v. MASTROM, INC.

JOHN R. BEITH v. MASTROM, INC.

MASTROM, INC. v. C. DAVID CARPENTER

No. 365PA96

(Filed 9 May 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 123 N.C. App. 162, 472 S.E.2d 610 (1996), dismissing Mastrom, Inc.'s appeal from orders entered by Burris, J., in District and Superior Courts, Moore County. Heard in the Supreme Court 16 April 1997.

Brown & Robbins, L.L.P., by P. Wayne Robbins and Carol M. White, for Mastrom, Inc. (plaintiff and defendant), appellant.

Bruce T. Cunningham, Jr., for David A. Young (plaintiff), John R. Beith (plaintiff), and C. David Carpenter (defendant), appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

SEUFERT v. SEVEN LAKE DEVELOPMENT CO.

[346 N.C. 168 (1997)]

FRED R. SEUFERT AND DOROTHY M. SEUFERT, HIS WIFE; ARTHUR J. PASSMAN AND ROSEMARY F. PASSMAN, HIS WIFE; JAMES A. MONCURE AND JANE B. MONCURE, HIS WIFE; WILLIAM L. REEVES, AND SUE C. REEVES, HIS WIFE; LEO D. BURRELL AND MOLLIE S. BURRELL, HIS WIFE; ROBERT E. STRAUSS AND DORIS P. STRAUSS, HIS WIFE; WILLIAM M. CHRISCOE, JR. AND MARY L. CHRISCOE, HIS WIFE; JACK E. GARRETT AND LEORA P. GARRETT, HIS WIFE; RICHARD STEINER AND DOROTHY L. STEINER, HIS WIFE; AND GEORGE E. BRESLIN AND SUSANNA M. BRESLIN, HIS WIFE v. SEVEN LAKES DEVELOPMENT CO.

No. 346PA96

(Filed 9 May 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 123 N.C. App. 161, 472 S.E.2d 611 (1996), affirming an order entered by Mills, J., on 18 May 1995 in Superior Court, Moore County. Heard in the Supreme Court 15 April 1997.

Evans & Riffle Law Offices, P.L.L.C., by Richard J. Costanza, for plaintiff-appellees.

Everett, Gaskins, Hancock & Stevens, by E.D. Gaskins, Jr., and C. Amanda Martin, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

SOUTHERN FURNITURE COMPANY OF CONOVER, INC. v. DEPARTMENT OF TRANSPORTATION

No. 175PA96

(Filed 9 May 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 113, 468 S.E.2d 523 (1996), affirming an order denying defendant's motion to dismiss pursuant to Rule 12(b)(1), (2), and (6) entered by Wood, J., on 2 March 1995 in Superior Court, Guilford County. Heard in the Supreme Court 15 April 1997.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General, and David R. Minges, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

RICHLAND RUN HOMEOWNERS ASSOCIATION, INC. v. CHC DURHAM CORPORATION, F/K/A TIMCO, INC., F/K/A DURHAM CORPORATION, F/K/A RICHLAND PROPERTIES INC. AND CAPITAL HOLDING CORPORATION

No. 391A96

(Filed 9 May 1997)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 345, 473 S.E.2d 649 (1996), affirming an order allowing defendants' motion to dismiss entered by Hight, J., on 9 September 1994, in Superior Court, Wake County. Heard in the Supreme Court 17 April 1997.

Wyrick, Robbins, Yates & Ponton L.L.P., by Samuel T. Wyrick, III, and Lee M. Whitman, for plaintiff-appellant.

Wyche & Story, L.L.P., by N. Hunter Wyche, Jr., and Philip R. Isley, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Greene, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for remand to the Superior Court, Wake County, for further proceedings not inconsistent with Judge Greene's dissenting opinion.

REVERSED AND REMANDED.

PEGGY SMALLWOOD AND CRAIG MORNING v. CURTIS ANTHONY EASON, PERDUE FARMS, INC., DWAYNE MORNING AND LAURA ANN GRANT

No. 388A96

(Filed 9 May 1997)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 661, 474 S.E.2d 411 (1996), affirming an order allowing defendants' (Eason and Perdue Farms) motion for directed verdict entered by Duke, J., on 29 March 1995, in Superior Court, Bertie County. Heard in the Supreme Court 17 April 1997.

Gray, Newell and Johnson, L.L.P., by Angela Newell Gray and Mark Gray, for plaintiff-appellants.

Haynsworth, Baldwin, Johnson and Greaves, P.A., by Charles P. Roberts III, for defendant-appellees Eason and Perdue Farms.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Greene, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, Bertie County, for proceedings not inconsistent with Judge Greene's dissenting opinion.

REVERSED AND REMANDED.

MICHAEL PAGE TELLEKAMP v. GUILFORD COUNTY, NORTH CAROLINA; WALTER A. BURCH, IN HIS OFFICIAL CAPACITY AND IN HIS INDIVIDUAL CAPACITY, JOHN SHORE, IN HIS OFFICIAL CAPACITY AND IN HIS INDIVIDUAL CAPACITY

No. 387PA96

(Filed 9 May 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) and N.C. R. App. P. 21(a)(2) of a unanimous decision of the Court of Appeals, 123 N.C. App. 360, 473 S.E.2d 695 (1996), dismissing plaintiff's appeal from order entered 7 July 1994 and defendants' appeal from order entered 27 October 1995 by Allen (W. Steven, Sr.), J., in Superior Court, Guilford County. This Court allowed defendants' petition for discretionary review and petition for writ of certiorari on 7 November 1996. Heard in the Supreme Court 16 April 1997.

J. Michael McGuinness for plaintiff-appellee.

Guilford County Attorney's Office, by Jonathan V. Maxwell, County Attorney, and J. Edwin Pons, Deputy County Attorney, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED; CERTIORARI IMPROVIDENTLY ALLOWED.

ROBERT E. TIMMONS, JR., EMPLOYEE v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EMPLOYER; SELF-INSURER

No. 377PA96

(Filed 9 May 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 123 N.C. App. 456, 473 S.E.2d 356 (1996), affirming in part an opinion and award of the North Carolina Industrial Commission, filed 26 May 1995, and remanding to the Industrial Commission the matter of costs for clarification and such further orders with respect thereto as may be proper. This Court allowed defendant's petition for discretionary review on 7 November 1996. Heard in the Supreme Court 16 April 1997.

Folger and Folger, by Fred Folger, Jr., for plaintiff-appellee.

Michael F. Easley, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, for defendant-appellant.

Smith Helms Mulliss & Moore, L.L.P., by George D. Kimberly, Jr., on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

AFFIRMED.

CAROLINA CABLE & CONNECTOR v. R&E ELECTRONICS, INC., A NORTH CAROLINA CORPORATION AND TELECOMMUNICATIONS AND ENVIRONMENTAL SUPPORT CORPORATION

No. 406A96

(Filed 9 May 1997)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 123 N.C. App. 519, 473 S.E.2d 376 (1996), reversing a judgment entered by Renfer, J., on 20 December 1994 in District Court, Wake County. Heard in the Supreme Court 17 April 1997.

Burns, Day & Presnell, P.A., by Susan F. Vick, for plaintiff-appellant.

Farris & Farris, P.A., by Thomas J. Farris, and Laura C. Brennan for defendant-appellee.

PER CURIAM.

AFFIRMED.

SHIRLEY SMITH v. JACK ECKERD CORPORATION

No. 417A96

(Filed 9 May 1997)

Appeal by plaintiff, Shirley Smith, pursuant to N.C.G.S. § 7A-30(2), from an unpublished decision of a divided panel of the Court of Appeals, 123 N.C. App. 785, 474 S.E.2d 418 (1996), affirming the judgment entered by Freeman, J., on 26 April 1995 in Superior Court, Forsyth County. Heard in the Supreme Court 14 April 1997.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by J. Dennis Bailey, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Forsyth County, for a new trial which shall be limited solely to the issue of plaintiff's damages in connection with her claim for relief for battery.

REVERSED AND REMANDED.

KEVIN LEE JUSTICE v. CONSTANCE LEE JUSTICE

No. 449A96

(Filed 9 May 1997)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 733, 475 S.E.2d 225 (1996), vacating an order entered by Washburn, J., on 4 January 1995, in District Court, Alamance County and remanding for entry of an order allowing defendant's motion to dismiss. Heard in the Supreme Court 15 April 1997.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell and Cary E. Close, for defendant-appellee.

PER CURIAM.

AFFIRMED.

BEVERIDGE v. BI-LO, INC.

No. 82P97

Case below: 125 N.C.App. 214

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

CREECH v. MELNIK

No. 539A96

Case below: 124 N.C.App. 502

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 8 May 1997.

DARDEN v. SOULES

No. 554P96

Case below: 124 N.C.App. 666

Petition by Soules, Poland, Irby & It's Prime, in their respective capacities as plaintiffs and defendants, for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

EVANS v. YOUNG-HINKLE CORP.

No. 439P96

Case below: 123 N.C.App. 693

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

HARRELL v. DARDEN

No. 555P96

Case below: 124 N.C.App. 666

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

HOCKADAY v. LEE

No. 530P96

Case below: 124 N.C.App. 425

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

HOLT v. WILLIAMSON

No. 134P97

Case below: 125 N.C.App. 305

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

JONES v. ROCHELLE

No. 37P97

Case below: 125 N.C.App. 82

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

LAURENT v. USAIR, INC.

No. 468P96

Case below: 124 N.C.App. 208

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

LOWERY v. PHILLIPS

No. 150P97

Case below: 125 N.C.App. 743

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

MARTIN v. BENSON

No. 119A97

Case below: 125 N.C.App. 330

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 dismissed 8 May 1997. Motion by defendants to dismiss plaintiff's appeal allowed 8 May 1997.

PETERSON v. HOOPER

No. 216P97

Case below: 126 N.C.App. 221

Motion by defendant for temporary stay allowed 2 May 1997.

PHILLIPS v. FOOD LION

No. 65P97

Case below: 125 N.C.App. 212

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

PLUMMER v. KEARNEY

No. 34P97

Case below: 124 N.C.App. 786

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

RATLEY CONSTRUCTION CO. v. RICHMOND COUNTY BD. OF EDUC.

No. 170P97

Case below: 125 N.C.App. 421

Motion by defendant (Richmond Co.) for temporary stay allowed 28 April 1997. Temporary stay dissolved and petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

RICHARDSON v. BP OIL CO.

No. 557P96

Case below: 124 N.C.App. 509

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.
Justice Whichard recused.

SANDERS v. BROYHILL FURNITURE INDUSTRIES

No. 38P97

Case below: 124 N.C.App. 637

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

SHARP v. TEAGUE

No. 90P97

Case below: 125 N.C.App. 215

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

SHAW v. SMITH

No. 151P97

Case below: 125 N.C.App. 616

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997. Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 May 1997.

SMITH v. N.C. DEPT. OF CORRECTION

No. 18P97

Case below: 124 N.C.App. 670

Notice of appeal by plaintiff (substantial constitutional question) dismissed 8 May 1997. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

SMITH v. N.C. DEPT. OF TRANSPORTATION

No. 102P97

Case below: 125 N.C.App. 212

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STATE v. ALEXANDER

No. 92P97

Case below: 125 N.C.App. 419

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STATE v. BARNES

No. 66A97

Case below: 125 N.C.App. 75

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 8 May 1997. Notice of appeal by defendants (substantial constitutional question) retained 8 May 1997.

STATE v. BRUNSON

No. 86P97

Case below: 120 N.C.App. 571

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 May 97.

STATE v. BURNS

No. 118A97

Case below: 125 N.C.App. 616

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 8 May 1997. Motion by Attorney General to dismiss defendant's appeal allowed 8 May 1997.

STATE v. CLIFTON

No. 133P97

Case below: 125 N.C.App. 471

Petition by defendant for writ of supersedeas allowed 22 April 1997 subject to a reasonable bond to be set by the Superior Court, Franklin County. Petition by Attorney General for writ of supersedeas allowed 22 April 1997. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 22 April 1997.

STATE v. DAVIS

No. 85A97

Case below: 121 N.C.App. 627

Notice of appeal by defendant (substantial constitutional question) dismissed 8 May 1997.

STATE v. MARTIN

No. 17P97

Case below: 124 N.C.App. 672

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 May 1997. Petition by defendant (Gary Martin) for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STATE v. OLIVER

No. 100P97

Case below: 125 N.C.App. 420

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STATE v. PEARSON

No. 165PA97

Case below: 125 N.C.App. 676

Notice of appeal by defendant (substantial constitutional question) retained 8 May 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 May 1997.

STATE v. PREVATTE

No. 126A95

Case below: Anson County Superior Court

Motion by defendant (Prevatte) for appropriate relief denied 8 May 1997.

STATE v. ROBINSON

No. 135P97

Case below: 125 N.C.App. 422

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STATE v. STEELE

No. 184P97

Case below: 125 N.C.App. 746

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STATE v. WETZEL

No. 96P97

Case below: Richmond County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Richmond County denied 8 May 1997.

STATE v. WHITEHEAD

No. 125P97

Case below: 125 N.C.App. 422

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU

No. 35P97

Case below: 124 N.C.App. 674

Petition by petitioner (NC Rate Bureau) for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STEELY v. 4C'S FOOD SERVICES/FLAGSTAR

No. 101P97

Case below: 125 N.C.App. 214

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 May 1997.

STEVENS v. GAB BUSINESS SERVICES

No. 560P96

Case below: 124 N.C.App. 461

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

STORY v. CENTRAL CAROLINA CLEANING CORP.

No. 53P97

Case below: 125 N.C.App. 214

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

THARP v. SOUTHERN GABLES, INC.

No. 140P97

Case below: 125 N.C.App. 364

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

TOWN OF SEVEN DEVILS v. VILLAGE OF SUGAR MOUNTAIN

No. 189P97

Case below: 125 N.C.App. 692

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

T&T DEVELOPMENT CO. v. SOUTHERN NAT. BANK OF S.C.

No. 155P97

Case below: 125 N.C.App. 600

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

U.S. FIDELITY AND GUARANTY CO. v. SCOTT

No. 6P97

Case below: 124 N.C.App. 224

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

WALKER v. N.C. COASTAL RESOURCES COMM.

No. 464P96

Case below: 124 N.C.App. 1

Petition by respondent (NC Coastal Resources Commission) for discretionary review pursuant to G.S. 7A-31 denied 8 May 1997.

WILMINGTON STAR-NEWS v. NEW HANOVER REGIONAL MEDICAL CENTER

No. 54PA97

Case below: 125 N.C.App. 174

Petition by respondent (New Hanover Regional) for discretionary review pursuant to G.S. 7A-31 allowed 8 May 1997. Petition by third party respondent (PHP, Inc.) for writ of supersedeas allowed 8 May 1997. Petition by third party respondent (PHP, Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 8 May 1997.

PETITION TO REHEAR

N.C. CENTRAL UNIVERSITY v. TAYLOR

No. 282PA96

Case below: 345 N.C. 630

Petition by Attorney General to rehear pursuant to Rule 31 denied 8 May 1997.

STATE OF NORTH CAROLINA v. STACEY ANTHONY TYLER

No. 11A96

(Filed 6 June 1997)

1. Evidence and Witnesses § 1009 (NCI4th)— capital murder—victim's statements—guarantees of trustworthiness

The trial court did not err in a capital prosecution for first-degree murder by admitting testimony from a nurse under N.C.G.S. § 8C-1, Rule 804(b)(5) regarding the victim's statements that defendant had poured gasoline on her and set her on fire. Although defendant contended that the court erred in concluding that the victim's statements possessed the requisite circumstantial guarantees of trustworthiness, the victim had personal knowledge of the circumstances in which she was burned; there was no indication that she had any reason to tell anything other than the truth after she learned that defendant was in jail and could no longer hurt her or her children, there is no indication that the victim ever recanted this statement, and she was unavailable.

Am Jur 2d, Evidence §§ 701, 702.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.

2. Evidence and Witnesses § 1009 (NCI4th)— capital murder—victim's statements—residual hearsay exception—Confrontation Clause violation—not prejudicial

There was no prejudicial error in a capital prosecution for first-degree murder in the admission of testimony from a nurse regarding the victim's statements that defendant had poured gasoline on her and set her on fire where defendant contended that the Confrontation Clause of the Sixth Amendment was implicated. Although the trial court relied upon corroborating evidence in concluding that the victim's out-of-court hearsay statements possessed the requisite degree of trustworthiness and hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness and not by reference to other evidence at trial to be admissible under the Confrontation Clause, the trial court did not err in concluding that the victim's statements were inherently trustworthy. The

error was in relying in part upon the corroborating evidence and the conclusion is correct.

Am Jur 2d, Evidence §§ 701, 702.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.

3. Evidence and Witnesses §§ 2159, 2271 (NCI4th)— capital murder—treating nurse—opinion concerning cause of death and effect of sedative

The trial court did not err in a capital prosecution for first-degree murder by permitting a nurse to give an opinion about the cause of the victim's death and about the effects of a sedative medication administered to the victim. Defendant made only general objections to the nurse rendering her opinions and failed to make a specific objection about her expertise in diagnosing the victim's cause of death. In any event, it is clear that the witness was properly qualified to state an opinion as to whether the burns she observed on the victim were similar to other burns of this type which she had seen before and the evidence clearly indicates that, through study and experience, she was better qualified than the jury to form an opinion on the cause of death and the effect of the sedative medication. Her position as a nurse was merely a factor to be considered by the jury in evaluating the weight and credibility of her testimony.

Am Jur 2d, Expert and Opinion Evidence §§ 60-62, 248.

Admissibility of opinion evidence as to cause of death, disease, or injury. 66 ALR2d 1082.

4. Evidence and Witnesses § 2242 (NCI4th)— capital murder—testimony of treating nurse—partial reliance on hospital records

The trial court did not err in a capital prosecution for first-degree murder by allowing a nurse who treated the victim before she died and who testified as to the victim's cause of death to base her opinion in part on the notes made by other medical personnel in the hospital records. The records detailed the victim's treatment, progress, deterioration, and death, the witness testified that she was a registered nurse working in the burn trauma unit and familiar with the victim's medical records, the records were made during the victim's stay at the hospital and were kept

contemporaneously with the victim's care, and the records were kept by the hospital in the regular course of the hospital's business. Thus, the State laid a proper foundation for the introduction into evidence of the victim's medical records.

Am Jur 2d, Expert and Opinion Evidence §§ 237, 238.

5. Criminal Law § 475 (NCI4th Rev.)— capital murder—prosecutor's argument—no error

There was no error requiring intervention *ex mero motu* in a capital prosecution for first-degree murder where the prosecutor argued that the victim had concealed her face from her children to prevent a scene in which defendant might assault her children.

Am Jur 2d, Trial § 631.

6. Criminal Law § 438 (NCI4th Rev.)— capital murder—prosecutor's argument—defendant as batterer

There was no error requiring intervention *ex mero motu* in a capital prosecution for first-degree murder where defendant contended that the prosecutor's argument sought to use public sentiment against domestic abuse to enlist jurors' help in a general effort to deter abusive spouses and boyfriends from escalating the level of abuse to murder. The guilt-phase evidence of defendant's abuse of the victim, both physical and emotional, was clear and uncontradicted and the prosecutor never suggested that the jury should convict defendant in order to prevent him from killing or battering again or that the jury should convict him because other batterers kill their victims.

Am Jur 2d, Trial §§ 648, 649, 655.

7. Constitutional Law § 342 (NCI4th)— capital murder—unrecorded bench conferences—defendant in courtroom—no objection

The trial court did not err in a capital prosecution for first degree murder by conducting unrecorded bench conferences with defense counsel and counsel for the State where defendant was present in the courtroom but made no request to be present at the bench and made no objection to his absence.

Am Jur 2d, Criminal Law §§ 695, 698, 699, 905, 925.

8. Criminal Law § 444 (NCI4th Rev.)— capital murder—prosecutor's argument—defendant's truthfulness

The trial court did not err by failing to intervene *ex mero motu* during the penalty phase closing argument in a first-degree murder prosecution where the prosecutor said, "Well, putting the hand on the Bible and told about 35,000 whoppers and then he walked on it and did it." This comment, standing alone, does not equate to the type of specific, objectionable language referring to defendant as a liar that would require that defendant be granted a new capital sentencing proceeding. Many eyewitnesses described the defendant's physical and emotional abuse of the victim, which defendant denied. The prosecutor's argument was no more than an argument that the jury should reject defendant's testimony because his version of events was unbelievable.

Am Jur 2d, Trial § 632.

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.

9. Criminal Law § 466 (NCI4th Rev.)— capital murder—penalty phase—closing arguments—parole eligibility

The trial court did not err during a capital first-degree murder prosecution by granting the State's motion to prohibit defense counsel from discussing parole eligibility for a life sentence during penalty-phase closing argument.

Am Jur 2d, Trial § 575.

10. Criminal Law § 1370 (NCI4th Rev.)— capital sentencing—especially heinous, atrocious or cruel aggravating circumstance—instructions

The trial court in a first-degree murder prosecution did not allow the jury to find the especially heinous, atrocious, or cruel aggravating circumstance based on an unconstitutionally vague instruction.

Am Jur 2d, Criminal Law §§ 598, 599.

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

11. Criminal Law § 1352 (NCI4th Rev.)— capital sentencing—instructions—mitigating circumstances—burden of persuasion

The trial court did not err in its instructions defining defendant's burden of persuasion to prove mitigating circumstances in a capital prosecution for first-degree murder.

Am Jur 2d, Trial §§ 1120, 1121.

12. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—mitigating evidence—mitigating value

The trial court did not commit plain error that violated the Eighth and Fourteenth Amendments in a capital prosecution for first-degree murder by allowing the jurors not to give effect to mitigating evidence if the jury deemed the evidence not to have mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599.

13. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—mitigating circumstances given no effect

The trial court did not commit plain error in a capital prosecution for first-degree murder by allowing jurors not to give effect to mitigating circumstances found by the jurors.

Am Jur 2d, Criminal Law §§ 598, 599.

14. Constitutional Law § 371 (NCI4th)— death penalty—not unconstitutional

The death penalty is not inherently cruel and unusual and the North Carolina capital sentencing scheme is not unconstitutionally vague and overbroad.

Am Jur 2d, Crimimal Law §§ 625, 628.

15. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A sentence of death was not disproportionate where the record fully supports the sole aggravating circumstance found by the jury, there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration, this case was not substantially similar to any case in which a death sentence was found disproportionate, and it is more similar to certain cases in which the death sentence was found to be proportionate. Distinguishing features of

this case are that defendant was convicted of first-degree murder under the theory of premeditation and deliberation; the first-degree murder was preceded by prior physical and mental abuse of the victim; the aggravating circumstance submitted to and found by the jury was "that the killing was especially heinous, atrocious, or cruel"; defendant killed the victim by setting her on fire and watched her burn; defendant showed no remorse; and the jury only found seven of twenty-five mitigating circumstances and only one of those was statutory, that defendant had no significant history of prior criminal activity.

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 Grant (Cy A.), J., at the 16 October 1995 Special Criminal Session of Superior Court, Hertford County. Heard in the Supreme Court 16 April 1997.

Michael F. Easley, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

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

FRYE, Justice.

In a capital trial, defendant, Stacey Anthony Tyler, was convicted by a jury of the first-degree murder of Mary Jennings Fleetwood. In a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed a sentence of death. For the reasons discussed herein, we conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's conviction of first-degree murder and sentence of death.

The State's evidence presented at trial tended to show the following facts and circumstances. On numerous occasions, prior to and on 5 November 1993, defendant physically and emotionally abused and battered his girlfriend, Mary Jennings Fleetwood (Fleetwood). Several witnesses testified that this abuse included defendant's holding Fleetwood by the hair and hitting her in the face with his fist, throwing the full weight of his body on her, kicking her, yelling at her, calling her names, and threatening to kill her. Approximately six months prior to Fleetwood's death-causing injuries, Fleetwood

threatened to call the police and have defendant removed from her home. Defendant told Fleetwood that when she got ready "to go to work in the morning that she better take her clothes and take her children and that they better take their clothes, that he was going to burn the trailer down and said if they are in the trailer, he was going to burn their m---f----- a-- up in the trailer too." On 5 November 1993, defendant carried out his threat when he poured gasoline on Fleetwood, set her on fire with a match, and watched her burn. Seventy-five percent of Fleetwood's skin was burned off her body. She was transported to a burn-trauma center at Sentara Norfolk General Hospital in Norfolk, Virginia, where she died fifteen days later.

Defendant did not testify and did not present any evidence at trial.

The trial court denied defendant's motion to dismiss made at the close of the State's evidence. The jury returned a verdict of guilty of first-degree murder.

At defendant's capital sentencing proceeding, defendant presented evidence tending to show that he had worked for two years unloading produce trucks and that he had been a good employee. Defendant had been a confidential informant on drug activity for the Murfreesboro Police Department and had provided reliable information on four drug cases. Defendant also presented the testimony of Jean Stacy (Stacy), a nurse and a certified emergency medical technician who assisted in taking Fleetwood to the hospital. Stacy testified that Fleetwood did not want to go to the hospital on 5 November 1993 and that she did not mention any pain. She also testified that defendant had been burned on one or both arms. Further, defendant presented testimony tending to show that he had an alcohol-abuse problem.

Defendant testified at the capital sentencing proceeding that he was teased as a child for his stuttering problem and because he was poor. His high-school years were difficult because his mother had died and he had been very close to her. He left high school due to depression over her death. He worked as a laborer and later worked unloading produce trucks. Defendant testified that he had adjusted to incarceration and that he had not been punished for any infractions while in prison. His only prior convictions were for driving while impaired. Defendant also testified that he had become a Christian while in prison.

Defendant denied throwing gasoline on Fleetwood, hitting her, throwing his full body weight on her, calling her names, and threatening to kill her. Defendant testified that he pushed Fleetwood out the back of the trailer when she was on fire and that he helped her inside to the bathtub and turned on the water. Defendant admitted that Fleetwood had attempted to convince him to leave the trailer on several occasions, but he denied threatening to burn the trailer.

At the capital sentencing proceeding, the sole aggravating circumstance submitted to and found by the jury was that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (Supp. 1996). The jury considered the following statutory mitigating circumstances, rejecting all but the first: (1) defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (2) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); (3) defendant's age at the time of this offense is a mitigating circumstance, N.C.G.S. § 15A-2000(f)(7); and (4) the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). The jury also considered twenty-one nonstatutory mitigating circumstances, finding six to exist. The jury unanimously found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstances found by one or more of the jurors. Accordingly, the jury unanimously recommended and the trial court imposed a sentence of death. Defendant appeals to this Court as of right from the sentence of death, making twelve arguments based on twenty-one assignments of error.

[1] Defendant's most serious challenge to his conviction relates to the admission of evidence under the residual or "catchall" exception to the hearsay rule. By six assignments of error, defendant contends that the trial court violated his rights under the Confrontation Clause of the Sixth and Fourteenth Amendments to the United States Constitution and under North Carolina law by admitting, under the residual exception to the hearsay rule, evidence concerning the victim's incriminating responses to questions asked by a nurse, Donna Rosenfeld. Defendant argues that the trial court erred in admitting Rosenfeld's testimony regarding out-of-court statements made by the victim prior to her death in which she identified defendant as the person who poured gasoline on her and set her on fire. Defendant claims that the circumstances surrounding the statements did not have suf-

ficient guarantees of trustworthiness and that the trial court made improper findings in its determination of trustworthiness. Defendant contends that the trial court relied upon testimony by other witnesses about events leading up to the burning and about previous alleged wrongdoing by defendant in order to find circumstantial guarantees of trustworthiness, rather than on the inherent trustworthiness of the victim's nonverbal responses to questions.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. N.C.G.S. § 8C-1, Rule 801(c) (1992). "Hearsay testimony is not admissible except as provided by statute or by the North Carolina Rules of Evidence." *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 597 (1988). Rule 804(b)(5) of the North Carolina Rules of Evidence provides for the admission of a hearsay statement when the declarant is unavailable and the statement is not covered by any specific exception but is determined to have "equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rule 804(b)(5) (1992); *see State v. Chapman*, 342 N.C. 330, 341-42, 464 S.E.2d 661, 667 (1995) (trial court properly admitted statement under Rule 804(b)(5)), *cert. denied*, —— U.S. ——, 135 L. Ed. 2d 1077 (1996); *State v. Daughtry*, 340 N.C. 488, 513-14, 459 S.E.2d 747, 759-60 (1995) (the trial court did not err by allowing, under Rule 804(b)(5), testimony about statements the victim made and a letter she purportedly wrote to defendant), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 739 (1996); *State v. Brown*, 339 N.C. 426, 435-39, 451 S.E.2d 181, 187-89 (1994) (trial court did not err by admitting two out-of-court statements of the victim's wife under Rule 804(b)(5)), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 46 (1995).

"In *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), this Court articulated the guidelines for admission of hearsay testimony under Rule 804(b)(5)." *State v. Peterson*, 337 N.C. 384, 391, 446 S.E.2d 43, 48 (1994). In *Triplett*, this Court said that a trial court must consider the following factors in determining whether a hearsay statement sought to be admitted under Rule 804(b)(5) is trustworthy: (1) whether the declarant had personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination. *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742.

In the instant case, before witnesses were allowed to testify as to the victim's statements that defendant poured gasoline on her and set

her on fire with a match, the trial court conducted a hearing on the admissibility of the statements. Following that hearing, the trial court concluded that this evidence fell within the residual hearsay exception of Rule 804(b)(5). In determining that the victim's hearsay statements possessed the necessary circumstantial guarantees of trustworthiness to allow their admission, the trial court made the following pertinent findings of fact:

> 1. That the declarant, Mary Jennings Fleetwood, is unavailable as defined in N.C.G.S. section 804(A)4. And that the declarant is now deceased.
>
> 2. That the State of North Carolina has provided the defendant with written notice of the State's intention to offer the declarant's statements sufficiently in advance of offering them to provide the defendant with a fair opportunity to prepare to meet the statements.
>
> 3. That the hearsay statements are not specifically covered under the other exceptions of the hearsay rule.
>
> 4. That the hearsay statements of the victim, Mary Jennings Fleetwood, possess circumstantial guarantees of trustworthiness to wit:
>
> . . . .
>
> L. On November 18, 1993, at 4:30 a.m. the victim awoke from a surgical procedure and became reoriented to space and time and that she could follow commands like nod your head and wiggle your toes.
>
> M. That the victim's attending physicians . . . and her nurses . . . noted in the medical records that the victim's mental and physical status had dramatically improved, to wit:
>
> 1. On November 18, 1993, the victim became more alert and would nod her head appropriately to yes and no questions and follow commands. She appeared to have no post-operative anesthesia complications and her vital signs were stable.
>
> 2. The victim continued to show significant neurological improvement and became more stable as the day passed.
>
> 3. On November 19, 1993, the victim continued to remain neurologically intact. She was alert and answered ques-

tions appropriately by mouthing words in a soft whisper and by shaking or nodding her head.

4. The victim could also move all extremities appropriately to commands.

N. The victim's nurse, Donna Rosenfeld, R.N., who had observed the victim's progress and worked with the victim closely, felt that the victim was physically and mentally able to speak to law enforcement officers; therefore, when Ernest Sharpe from the Hertford County Sheriff's Department had come to interview the victim or [when] Chief Deputy Sharpe and Special Agent Kent Parrish of the SBI went to Sentara on November 19, 1993, that Nurse Donna Rosenfeld had been working with the victim all morning.

[NO SECTION "O"]

P. That Nurse Donna Rosenfeld assisted the officers in asking the following questions of the victim:

1. The victim was told by Nurse Rosenfeld that police officers were here to speak to her and if it was okay for them to come in and the victim nodded her head, yes.

2. The victim was asked if [defendant] had done this to her and after a 15-second hesitation the victim nodded her head, no.

3. The victim was told that [defendant] was in jail and could not hurt her any longer and she was asked if she understood this and the victim nodded her head, yes.

[4.] The victim was asked if [defendant] and she had been fighting and the victim nodded her head, yes.

[5.] The victim was asked if [defendant] had thrown gasoline on her and the victim did not give any response. The victim was then told by Nurse Rosenfeld that they, meaning the police officers, had the clothes that she and [defendant] had been wearing. The victim was then asked did [defendant] throw gasoline on [her] and the victim nodded her head, yes.

[6.] The victim was then asked if [defendant] had thrown a match on her after pouring gasoline on her and the victim nodded her head, yes.

Q. That after learning the defendant no longer posed a threat to herself or her children, the victim was motivated to speak the truth about how she was burned.

R. That the victim ha[d] personal knowledge of circumstances under which she was burned.

5. That the victim's statements identifying the defendant as the perpetrator of the burning occurred on November 5, 1993, are evidence of material facts. [The s]tatements are evidence of identity, malice, premeditation, and deliberation, and lack of accident.

6. That the victim's statements are more probative on the issues of identity, malice, premeditation, and deliberation, and lack of accident, [than] any other evidence which the State can produce through reasonable efforts.

7. That the general purposes of the Rules of Evidence in interest of justice will best be served by admission of these statements into evidence.

Based upon its findings of fact, the trial court concluded that the declarant was unavailable because she is deceased; that the State provided timely written notice of its intention to offer the statements; that the hearsay statements were not specifically covered under the other hearsay exceptions; that the hearsay statements possessed circumstantial guarantees of trustworthiness; that the statements were material and more probative on the issues of identity, malice, premeditation, deliberation, and lack of accident than any other evidence which the prosecution could secure through reasonable efforts; and that justice would be served by admission of the statements into evidence.

Defendant argues that the trial court erred in concluding that the victim's statements possessed the requisite circumstantial guarantees of trustworthiness to be admissible. In making this argument, defendant relies primarily upon this Court's decision in *State v. Swindler*, 339 N.C. 469, 450 S.E.2d 907 (1994). In *Swindler*, the trial court erred by admitting into evidence under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5) a jail inmate's letter to a detective concerning statements allegedly made by the defendant about the murder. In that case, we noted that: (1) the trial court failed to make any particularized findings of fact or conclusions of law regarding

whether the letter possessed "equivalent guarantees of trustworthiness"; (2) the inmate had no personal knowledge of the events to which he referred in the letter; (3) the inmate was not motivated to speak the truth but rather to say what the police wanted to hear in order to make a deal; (4) while the inmate never recanted his statement, he refused to acknowledge at trial that he wrote the letter, that the letter was in his handwriting, or that he wrote the address on the envelope; (5) the inmate was unavailable because he refused to testify; (6) the letter contained many inaccuracies; (7) the inmate had the opportunity to obtain specific facts about the murder without actually talking with defendant because he was in the courtroom during defendant's probable cause hearing; and (8) the trial court improperly considered corroborating evidence to support the letter's trustworthiness. *Id.* at 475, 450 S.E.2d at 911. Since the author of the letter was not subject to full and effective cross-examination by the defendant, the defendant's rights under the Confrontation Clause were violated by its admission, and the State failed to show that this error was harmless beyond a reasonable doubt since the letter contained the only evidence of the defendant's motive to kill the victim, the letter provided the greatest evidence of premeditation and deliberation, and the letter contained the most specific admission of the defendant's guilt. *Id.* at 476, 450 S.E.2d at 912. The instant case is clearly distinguishable from *Swindler*.

In the instant case, the trial court found that Fleetwood's statements contained sufficient indicia of reliability to be admissible. Fleetwood had personal knowledge of the circumstances under which she was burned. There was no indication that she had any reason to tell anything other than the truth about this matter after learning that defendant was in jail and could no longer hurt her or her children. Nor is there any indication that Fleetwood ever recanted this statement. Finally, the trial court determined that Fleetwood was unavailable because she was deceased at the time of trial. We conclude that the trial court did not err in concluding that the victim's statements possessed circumstantial guarantees of trustworthiness. Accordingly, we find no error in the admission of the victim's hearsay statements under Rule 804(b)(5).

[2] We next consider whether admitting the statements implicated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Defendant contends, as did the defendant in *Swindler*, that the trial court erred in relying upon corroborative evidence in admitting the victim's statements at trial. We agree with

defendant's contention, but we nevertheless conclude that the error was harmless beyond a reasonable doubt.

The United States Supreme Court has stated that an evidentiary rule such as 804(b)(5) is a "residual" hearsay exception, rather than a "firmly rooted" one, and that statements admitted under such a rule do not inherently possess indicia of reliability. *Idaho v. Wright*, 497 U.S. 805, 817, 111 L. Ed. 2d 638, 653-54 (1990). However, a statement which falls under the residual hearsay exception can meet Confrontation Clause standards if it is supported by particularized guarantees of trustworthiness based on the totality of the circumstances surrounding the making of the statement. *Id.* at 817, 820, 111 L. Ed. 2d at 653, 655-56. "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822, 111 L. Ed. 2d at 657; *see also Brown*, 339 N.C. at 438-39, 451 S.E.2d at 189 (the residual hearsay exception does not qualify as firmly rooted for Confrontation Clause purposes, so the trial court must search for circumstantial guarantees of trustworthiness). Further, hearsay evidence that does not fall within a firmly rooted exception is deemed "presumptively unreliable and inadmissible for Confrontation Clause purposes." *Lee v. Illinois*, 476 U.S. 530, 543, 90 L. Ed. 2d 514, 528 (1986). Accordingly, "[c]orroborating evidence should not be used to support a hearsay statement's particularized guarantee of trustworthiness." *Swindler*, 339 N.C. at 475, 450 S.E.2d at 911.

In determining that the victim's out-of-court hearsay statements in the instant case possessed the requisite degree of trustworthiness, the trial court made the following findings of fact in addition to those set out earlier in this opinion:

> 4. That the hearsay statements of the victim, Mary Jennings Fleetwood, possess circumstantial guarantees of trustworthiness[,] to wit:
>
> A. The defendant beat the victim, Ms. Fleetwood, repeatedly with his fist and jumped on her on November 5, 1993, as witnessed by James Shearn and Ernest Beale, Jr. and that this occurred approximately one hour prior to the victim being burned over 70 percent of her body.
>
> B. That the defendant told the victim, "I'll kill you b----" on November 5, 1993, as witnessed by James Shearn and

Ernest Beale, Jr., and this also occurred approximately one hour before the victim was burned.

C. That the defendant had threatened to burn the victim, her children, and her home on at least two occasions prior to November 5, 1993. And that these statements were witnessed by the victim's 12-year old daughter, Monique Jennings, her 11-year old son, Jermaine Jennings, the victim's friend, Angie Eley, and Ms. Eley's daughter, Monica Eley. And that the last threat of this nature was made approximately six days before the victim was burned.

D. That the defendant told several persons on November 5, 1993, that the victim was burned with a kerosene heater that the victim was refueling and it exploded. The people that [he] told were Roscoe Faison, Roy Robinson, and the Hertford County Sheriff's Deputy, Keith Williams.

E. That Roscoe Faison, Roy Robinson, and Deputy Williams inspected the heater and the premises and found no evidence, in their opinion, of an explosion or fire on or near the heater or in the living room area where the defendant alleged that the explosion occurred.

F. That the defendant also reported to Roscoe Faison, Roy Robinson, and Deputy Williams that the defendant jumped on the victim in an attempt to extinguish her flames and that he pushed her down a hallway. Upon close inspection [by] Hertford County Chief Deputy, Ernest Sharpe, the defendant was found to have suffered minimal burns to his right forearm and the back of his right hand and there were no burns on the palms of his hand.

G. That a green sweater identified by Ernest Beale, Jr., as being worn by the victim on November 5, 1993, was burned and tested by an expert in forensic chemistry from the SBI lab and was determined to have gasoline on it. And that blue jeans owned by the victim and found in the victim's bedroom were also burned and tested and that the jeans also had gasoline on them. Strike that—the victim's bedroom was also burned.

H. That a jug of gasoline with the cap unscrewed was found at the back of the trailer. [Within] a few feet from the gasoline there was found a book of matches.

I. That a few feet from the matches, Chief Deputy Ernest Sharpe located a tree with an area where the leaves were brown unlike the other leaves on the tree and that right below the brown leaves was a spot of burned grass.

J. That the victim was transported to the Roanoke-Chowan Hospital and that nurse Sheri Eubanks asked her what happened and that an EMS person who transported the victim to Roanoke-Chowan answered that the heater exploded causing the victim's burns. That nurse Eubanks asked the victim if that is what happened and that the victim who had been emphatically answering other questions paused for approximately 15 seconds before answering yes.

K. That the victim was transported to Norfolk Sentara Hospital after emergency treatment at Roanoke-Chowan Hospital. And that during the transfer Dr. Hunter of the Roanoke-Chowan Hospital also asked the victim if someone had burned her and the victim again paused for some time before shaking her head no.

We conclude that the trial court erred in relying upon this corroborating evidence in reaching the conclusion that the statements were trustworthy. These findings of fact did not relate to the inherent trustworthiness of the victim's statements. They detail corroborative evidence that could not be relied upon in finding the circumstantial guarantees of trustworthiness required in order to protect defendant's rights under the Confrontation Clause of the United States Constitution. Thus, we conclude that defendant's rights under the Confrontation Clause were implicated.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (1992); *Swindler*, 339 N.C. at 476, 450 S.E.2d at 912. The State has met its burden in this case. We note first that the trial court did not commit error in concluding that the victim's statements were inherently trustworthy and therefore admissible under the residual hearsay exception. The error was in relying, in part, upon the corroborating evidence in reaching the conclusion of law that the statements were inherently trustworthy. This conclusion of law, which is fully reviewable on appeal, is fully supported by the evidence and the trial court's findings of fact and is clearly cor-

rect. Therefore, we find the error harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). Accordingly, defendant is entitled to no relief on these assignments of error.

[3] By three assignments of error, defendant contends that the trial court erred by permitting a nurse, Donna Rosenfeld, to give an opinion about the cause of the victim's death and about the effects of a sedative medication administered to the victim. Rosenfeld testified that Fleetwood "died as a result of her burns causing overwhelming sepsis," that is, bacteria was allowed to enter Fleetwood's body and cause "massive infection" since her skin had been burned away. Rosenfeld also testified that the dose of the sedative medication Versed given to the victim would have affected the victim's mental condition for about thirty minutes. Defendant argues that Rosenfeld was unqualified to render her opinions as to these matters.

The State notes, however, that defendant made only general objections to Rosenfeld rendering her opinions as to the cause of the victim's death and the effect of the sedative medication. "An objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent appellate review." *State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982). In this case, defendant failed to make a specific objection about Rosenfeld's expertise in diagnosing the victim's cause of death. "Our Court has adhered to the position that, in the absence of a special request by the defense for qualification of a witness as an expert, such a finding will be deemed implicit in the trial court's admission of the challenged opinion testimony." *Id.* "Moreover, since defendant did not object on the grounds that the testifying witnesses were not qualified as experts, he has waived his right to later make the challenge on appeal." *State v. Aguallo*, 322 N.C. 818, 821-22, 370 S.E.2d 676, 677 (1988).

In any event, it is clear in this case that Rosenfeld was, in fact, properly qualified to state an opinion as to whether the burns she observed on the victim were similar to other burns of this type which she had seen before. Prior to stating such an opinion, Rosenfeld testified to the following: (1) she was a registered nurse in the burn-trauma unit at Sentara Norfolk General Hospital; (2) she had been working there for over eight years in November 1993; (3) she had worked one-on-one with Fleetwood while she was in the burn-trauma unit; (4) she was familiar with the medications administered to

Fleetwood, the reasons for their use, and the reasons for any change in medications; and (5) she had administered Versed to patients for over eight years. "The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he was better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973); *see also* N.C.G.S. § 8C-1, Rule 702 (1992). The evidence in the present case clearly indicates that Rosenfeld, through both study and experience, was better qualified than the jury to form an opinion on the cause of Fleetwood's death and on the effect of the sedative medication Versed. Rosenfeld's position as a nurse was merely a factor to be considered by the jury in evaluating the weight and credibility of her testimony.

[4] Defendant also argues that the trial court erred by allowing Rosenfeld to rely upon the hearsay opinions of other medical personnel in rendering her opinion as to the victim's cause of death. Defendant notes that Rosenfeld "testified that she based her opinion on her observations of [the victim] and the notes made by other medical personnel in the hospital records about [the victim]'s death."

"Hospital records, when offered as primary evidence, are hearsay. However, we think they come within one of the well recognized exceptions to the hearsay rule—entries made in the regular course of business." *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 35, 125 S.E.2d 326, 328 (1962). Thus, the hospital records offered at the trial are hearsay, but they fall within an exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 803(6) (1992). Nevertheless,

> [i]n instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam*. The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.

Sims, 257 N.C. at 35, 125 S.E.2d at 328.

In the instant case, the records detailed the victim's treatment, progress, deterioration, and death. Rosenfeld testified that she was a registered nurse working in the burn-trauma unit of Sentara Norfolk General Hospital, that she was familiar with Fleetwood's medical records, that the records were made during Fleetwood's stay at Sentara Norfolk General Hospital, that the records were kept contemporaneously with Fleetwood's care, and that the records were kept by the hospital in the regular course of the hospital's business. Thus, the State laid a proper foundation for the introduction into evidence of Fleetwood's medical records. Accordingly, we reject these assignments of error.

[5] By two assignments of error, defendant argues that the trial court erred by permitting a prosecutor to make grossly improper statements during closing argument. Defendant objected to only one of these allegedly improper statements.

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). Where a defendant does not object at trial, "review is limited to an examination of whether the argument was so grossly improper that the trial judge abused his discretion in failing to intervene *ex mero motu*." *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). 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, this 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 stated, "And I submit to you that if that child had seen her mother's face and start[ed] going off [sic] in there, who knows what would have happened to them. That's what the evidence shows." Defendant did not object to this argument at trial. However, on appeal, defendant maintains that this argument is entirely speculative, with no basis in the record. Defendant further argues that there is no evidence to support an inference that the victim concealed her face from her children to prevent a scene in which defendant might assault her children. 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.

[6] Defendant also argues that the trial court erred in overruling his objection to another portion of the prosecutor's closing argument. The prosecutor said:

> Ladies and gentlemen of the jury, the defendant may come to you and argue that this is a murder trial, that we put on evidence of domestic abuse, but this isn't a domestic abuse trial. Well, I would submit to you, ladies and gentlemen of the jury, that it is always going to be about domestic abuse until they kill them.
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Until they kill them. And that's what he's done. He's killed her.

Defendant contends that the prosecutor's argument sought to use public sentiment against domestic abuse to enlist the jurors help in a general effort to deter abusive spouses and boyfriends from escalating the level of abuse to murder. We find no reversible error.

The prosecutor's argument did not exceed the wide latitude allowed counsel in stating contentions and drawing inferences from the evidence. *Cf. State v. Syriani*, 333 N.C. 350, 398-99, 428 S.E.2d 118, 144 (finding no gross impropriety even though the prosecutor's argument touched upon facts not testified to and finding that the arguments were reasonable inferences based on the evidence and were within the wide latitude properly given counsel in argument), *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). The guilt-phase evidence of defendant's abuse of the victim, both physical and emo-

tional, was clear and uncontradicted. The prosecutor never suggested that the jury should convict defendant in order to prevent him from killing or battering again or that the jury should convict him because other batterers kill their victims. *See State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991) (improper to urge jury to convict defendant in order to prevent him from killing again); *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985) (improper to urge jury to convict defendant because other impaired drivers cause other accidents). Accordingly, we conclude that the trial court did not err in overruling defendant's objection to the prosecutor's argument.

[7] By another assignment of error, defendant contends that the trial court erred by conducting unrecorded bench conferences with defense counsel and counsel for the State. Defendant contends that these unrecorded bench conferences violated his state and federal constitutional rights even though he was present in the courtroom and made no request to be present at the bench and made no objection to his absence. Defendant acknowledges that we have previously rejected similar contentions. *See State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991). Having considered defendant's argument with regard to this issue, we find no compelling reason to depart from our prior holding. Accordingly, we reject this assignment of error.

[8] By an assignment of error, defendant contends that the trial court erred by failing to intervene *ex mero motu* to prevent the prosecutor from claiming during the penalty-phase closing argument that defendant had lied during his testimony. Defendant's assignment of error is directed to the prosecutor's comment, "Well, putting the hand on the Bible and told about 35,000 whoppers and then he walked on it and did it." This comment, standing alone, does not equate to the type of specific, objectionable language referring to defendant as a liar that would require that defendant be granted a new capital sentencing proceeding. *Cf. State v. Locklear*, 294 N.C. 210, 214-18, 241 S.E.2d 65, 68-70 (1978) (prosecutor asserted defendant was "lying through [his] teeth" and "playing with a perjury count"); *State v. Miller*, 271 N.C. 646, 157 S.E.2d 335 (1967) (prosecutor stated he knew defendant "was lying the minute he said that" and referred to defendant as "habitual storebreaker" when nothing in the record supported such reference).

In the instant case, many eyewitnesses described defendant's physical and emotional abuse of the victim. Yet, defendant denied

such abuse. Given this context, the prosecutor's argument was "no more than an argument that the jury should reject the defendant's testimony" because "his version of the events [was] unbelievable." *State v. Solomon*, 340 N.C. 212, 220, 456 S.E.2d 778, 784, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 438 (1995). Clearly, this argument was not so grossly improper as to require the trial court to intervene *ex mero motu*. *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 924 (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990). Accordingly, we reject defendant's final assignment of error.

PRESERVATION ISSUES

[9],[10],[11],[12],[13],[14] Defendant raises six additional arguments which he concedes have been decided against him by this Court: (1) the trial court erred by granting the State's motion to prohibit defense counsel from discussing parole eligibility for a life sentence during penalty-phase closing arguments; (2) the trial court erred by allowing defendant's jury to determine that the murder was "especially heinous, atrocious, or cruel" based upon unconstitutionally vague instructions that failed to distinguish death-eligible murders from murders that are not death-eligible; (3) the trial court's capital sentencing jury instructions that defined defendant's burden of persuasion to prove mitigating circumstances as evidence that "satisfies" each juror constituted plain error and violated due process and the Eighth and Fourteenth Amendments because that definition did not adequately guide the jury's discretion regarding the requisite degree of proof; (4) the trial court committed plain error that violated the Eighth and Fourteenth Amendments by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed the evidence not to have mitigating value; (5) the trial court committed plain error by allowing jurors not to give effect to mitigating circumstances found by the jurors; and (6) the trial court erred by sentencing defendant to death because the death penalty is inherently cruel and unusual, and the North Carolina capital sentencing scheme is unconstitutionally vague and overbroad.

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

[15] Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. It is our duty in this regard to ascertain: (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2).

In this case, the sole aggravating circumstance submitted to and found by the jury was that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the sole aggravating circumstance submitted to and found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. 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*, 512 U.S. 1254, 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), *and 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. Distinguishing features of this case are: (1) defendant was convicted of first-degree murder under the theory of premeditation and deliberation; (2) the first-degree murder was preceded by prior physical and mental abuse of the victim; (3) the aggravating circumstance submit-

ted to and found by the jury was "that the killing was especially heinous, atrocious, or cruel," N.C.G.S. 15A-2000(e)(9); (4) defendant killed the victim by intentionally setting her on fire and watching her burn; and (5) defendant showed no remorse for his actions and appeared in full control of his mental and physical condition. Although the jury considered twenty-five mitigating circumstances, it found only seven. Of these seven, only one was a statutory mitigating circumstance, that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1).

It is also proper to compare this case to those where the death sentence was found proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we have repeatedly stated that we review all of the cases in the pool when engaging in our statutory duty, it is worth noting again that "we will not undertake to discuss or cite all of those cases each time we carry out our duty." *Id.* It suffices to say here that we conclude the present case is more similar to certain cases in which we have found the death sentence proportionate than to those in which we have found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. *See, e.g., State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (1995) (death sentence proportionate for murder of a four-month-old child where the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996); *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994) (death sentence proportionate for murder of an acquaintance where the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 63 (1995); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (death sentence proportionate for murder where the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel and where defendant was convicted solely under the theory of premeditation and deliberation); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984) (death sentence proportionate for murder of elderly female where the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

After comparing this case to other roughly similar cases as to the crime and the defendant, we conclude that this case has the characteristics of first-degree murders for which we have previously upheld the death penalty as proportionate. Accordingly, we cannot conclude

as a matter of law that the death sentence is excessive or disproportionate. Therefore, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

CITY OF CONCORD, A MUNICIPAL CORPORATION v. DUKE POWER COMPANY, A DOMESTIC CORPORATION

No. 196PA96

(Filed 6 June 1997)

1. Energy § 7 (NCI4th)— annexation of lot—annexation of secondary supplier's line—competing electric suppliers—determination date

In resolving the rights of competing electric suppliers to provide customer service within a municipality under the Electric Act of 1965 where the competing interests have been created by multiple annexations, the "determination date" is the annexation date on which there first existed a primary and secondary supplier competing for the right to service premises initially requiring electric service. N.C.G.S. § 160A-332(a)(5).

Am Jur 2d, Energy and Power Sources §§ 208, 209.

2. Energy § 7 (NCI4th)— annexation of lot—annexation of secondary supplier's line—competing electric suppliers—determination date—customer's right to choose supplier

Where an area that included a customer's lot was annexed into plaintiff city, an electric supplier, on 30 June 1986, an area with a power company's electric conductor line was annexed into the city on 30 June 1992, and the customer constructed on the lot an industrial building requiring electric service after the 1992 annexation of the power company's line, the determination date for applying the Electric Act of 1965 was 30 June 1992, the date of annexation of the power company's line on which there first existed a primary and secondary supplier competing for the right to service premises initially requiring service. Since the customer's premises were inside the city limits and located wholly or partially within 300 feet of lines of both the primary and sec-

ondary suppliers on the determination date, the customer was free, pursuant to N.C.G.S. § 160A-332(a)(5), to choose which party would supply the premises with electricity.

Am Jur 2d, Energy and Power Sources §§ 208, 209.

Justice WHICHARD dissenting.

Justice WEBB joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 248, 468 S.E.2d 615 (1996), reversing an order granting defendant the exclusive right to provide electric service to certain commercial premises entered by Stanback, J., on 3 January 1994 in Superior Court, Cabarrus County. Heard in the Supreme Court 12 November 1996.

Poyner & Spruill, L.L.P., by S. Ellis Hankins and Nancy Bentson Essex, for plaintiff-appellee.

Duke Power Company, by Jeff D. Griffith, III; and Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by W. Winburne King, III, and D. Beth Langley, for defendant-appellant.

Thomas K. Austin, Associate General Counsel; and Crisp, Page & Currin, L.L.P., by Robert F. Page, on behalf of North Carolina Electric Membership Corporation, amicus curiae.

Rose, Rand, Orcutt, Cauley, Blake & Ellis, by James P. Cauley, III, on behalf of ElectriCities of North Carolina, Inc., amicus curiae.

Hunton & Williams, by Richard E. Jones and Steven B. Epstein, on behalf of Carolina Power & Light Company, amicus curiae.

LAKE, Justice.

This case is one of first impression with respect to proper application of the Electric Act of 1965. Specifically, the issue presented involves the legislative intent in statutory terminology designed to restrict and resolve the rights of competing electric suppliers to provide customer service within a municipality where the competing interests have been created by annexation.

Plaintiff City of Concord (City) is a municipal corporation located in Cabarrus County. Plaintiff owns and operates an electrical distribution system through which it provides electrical service to

customers located both inside and outside the City's corporate limits. Defendant Duke Power Company (Duke) is a public utility corporation in the business of providing electrical service to customers in an area which includes Cabarrus County.

This action arose out of a dispute between the City and Duke concerning which party has the right to provide electric service to a lot and industrial building owned by David Catchpole. The Catchpole lot was annexed into the City of Concord on 30 June 1986 (the 1986 annexation area) and is located wholly within 300 feet of a City electrical conductor (a line) for the distribution of electricity. The aforementioned conductor was in place prior to the effective date of the 1986 annexation and was annexed into the City along with the Catchpole lot.

The Catchpole lot is also located wholly or partially within 300 feet of a Duke conductor (line) for the distribution of electricity. This Duke conductor was in place but remained outside the City when the Catchpole lot was annexed in 1986. The Duke conductor is located in an area contiguous to the 1986 annexation area and was itself annexed into the City on 30 June 1992 (the 1992 annexation area). The Catchpole lot is not located wholly or partially within 300 feet of any other Duke conductor.

At some time after the 1992 annexation of the area containing the Duke conductor, David Catchpole began constructing an industrial building on his lot. At Catchpole's request, Duke provided temporary electric service to the premises during its construction. Catchpole ultimately requested that Duke provide permanent electric service to his lot and building. The City contends that it has an exclusive statutory right to provide electric service to the Catchpole lot.

Prior to trial, a temporary restraining order and preliminary injunction were entered in favor of the City restraining Duke from serving the Catchpole premises. After trial, Judge Stanback entered an order granting Duke the right to service the Catchpole premises and ordering the City to dismantle its service to the premises.

The City appealed to the Court of Appeals contending that the trial court erred in determining that section 160A-332(a)(5) of the North Carolina General Statutes gave Duke service rights to the Catchpole premises. The Court of Appeals reversed upon concluding the trial court erred in holding that the determination date, for purposes of applying N.C.G.S. §§ 160A-331 through 160A-338, was the

date the Duke Conductor was annexed in 1992. *City of Concord v. Duke Power Co.*, 122 N.C. App. 248, 253-54, 468 S.E.2d 615, 618 (1996). The Court of Appeals instead held that the determination date was 30 June 1986, the date the Catchpole lot was annexed, and that on that date, the City was the only supplier entitled to provide electric service to the lot. *Id.*

[1] In its sole issue on appeal, Duke contends that the Court of Appeals erroneously construed the Electric Act of 1965 with respect to competing electric service lines within a municipality. Specifically, Duke argues that the Court of Appeals erred by holding that the determination date was 30 June 1986, the date upon which the area containing the Catchpole lot was annexed, rather than 30 June 1992, the date upon which the area containing the Duke conductor was annexed. The issue at hand turns on whether the term "determination date," as that term is used in N.C.G.S. § 160A-332(a)(5), means the annexation date of the property or premises to be served or the annexation date of the secondary supplier's electric facilities. For the reasons set forth below, we hold that the defining event creating the "determination date" must be the annexation date of the secondary supplier's electric facilities.

The statutory service rights of electric suppliers within a municipality are set forth in N.C.G.S. §§ 160A-331 through 160A-338. Sections 160A-331 and 160A-332 are the only sections of the Electric Act pertinent to this appeal.

Section 160A-331 of the North Carolina General Statutes, entitled "Definitions," provides in part:

> Unless the context otherwise requires, the following words and phrases shall have the meanings indicated when used in this Part:
>
> (1) The "determination date" is
>
> a. April 20, 1965, with respect to areas within the corporate limits of any city as of April 20, 1965;
>
> b. The effective date of annexation with respect to areas annexed to any city after April 20, 1965;
>
> c. The date a primary supplier comes into being with respect to any city first incorporated after April 20, 1965.

(2) "Line" means any conductor located inside the city for distributing or transmitting electricity . . . .

(3) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished.

N.C.G.S. § 160A-331 (1994). Section 160A-332 of the North Carolina General Statutes, entitled "Electric service within city limits," provides in part:

(a) The suppliers of electric service inside the corporate limits of any city in which a secondary supplier was furnishing electric service on the determination date (as defined in G.S. 160A-331(1)) shall have rights and be subject to restrictions as follows:

. . . .

(5) Any premises initially requiring electric service after the determination date which are located wholly or partially within 300 feet of the primary supplier's lines and are located wholly or partially within 300 feet of the secondary supplier's lines, as such suppliers' lines existed on the determination date, may be served by either the secondary supplier or the primary supplier, whichever the consumer chooses, and no other supplier shall thereafter furnish service to such premises, except with the written consent of the supplier then serving the premises.

. . . .

(7) Except as provided in subdivisions (1), (2), (3), (5), and (6) of this section, a secondary supplier shall not furnish electric service within the corporate limits of any city unless it first obtains the written consent of the city and the primary supplier.

N.C.G.S. § 160A-332 (1994).

It is clear that subsection (b) of N.C.G.S. § 160A-331(1) is the only subsection applicable to the circumstances of this case. In its opinion, the Court of Appeals noted that the language of section 160A-331(1)(b) states that the determination date occurs on the date that the *area* was annexed. The Court of Appeals then cited *Duke*

Power Co. v. City of Morganton, 90 N.C. App. 755, 370 S.E.2d 54, *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988), for the proposition that the determination date is the date upon which the *property or premises* to be served was annexed. In essence, the Court of Appeals relied on *Morganton* as authority to substitute the word "premises" for "area." Based on this definition of "determination date," the Court of Appeals found that the determination date in the instant case was 30 June 1986, the date the Catchpole premises was annexed. This is a misapplication of the term "premises" as defined in the statute. As set forth above, a "premises" is defined as "the building, structure, or facility to which electricity is being or is to be furnished." N.C.G.S. § 160A-331(3). At the time of the 1986 annexation, the Catchpole property was a mere vacant lot. Thus, pursuant to the Act, there was no "premises" annexed or to be annexed on 30 June 1986.

Further, the Court of Appeals' reliance on *Morganton* misconstrues the holding of that case. A careful reading of *Morganton* reveals that it was never intended to establish as a matter of law that the determination date is the date upon which the premises to be serviced is annexed. At issue in *Morganton* was whether an electric line, which was in place at the time of annexation but subsequently removed, created corridor rights for the primary supplier. Unlike the present case, there was only one annexation of an area in *Morganton*. The opinion in that particular case stated that "[t]he parties agree, as the trial judge found, that . . . the determination date is 1 June 1971 when the property was taken into the city." *Morganton*, 90 N.C. App. at 757, 370 S.E.2d at 55. In the case *sub judice*, the Court of Appeals took what was in essence a stipulation to a determination date and applied it here as a rule of law, when in fact, the fixing of the determination date was never at issue in *Morganton*.

Moreover, by focusing on the "premises" as the object of the determination date, the Court of Appeals failed to consider the overall structure of the Act. It is clear from a full reading of the language of both N.C.G.S. §§ 160A-331 and 160A-332 that the focus is on *competing* electric lines and facilities *of two or more suppliers*, and not on premises or areas. The reason for focusing on the electric facilities rather than premises is straightforward. Under the overall scheme of these statutory sections, the only purpose served by the statutorily defined determination date is to fix the location of the primary and secondary suppliers' lines and facilities in order (1) to prevent the secondary supplier from extending its 300-foot corridor

rights with each new building serviced subsequent to the determination date, and (2) to similarly prevent the primary supplier from encroaching by artful annexation upon the secondary supplier's 300-foot corridor rights.

Significantly, N.C.G.S. § 160A-332(a) begins with a plural subject: "[t]he suppliers of electric service." Thus, the determination date becomes relevant only in situations where both a primary and secondary supplier existed. When the City chose to further annex the contiguous area in 1992, and thus bring into the City the Duke Power line, the "determination date" became relevant for the first time. Where only a primary or secondary supplier existed, there is no conceivable purpose for making reference to or considering N.C.G.S. §§ 160A-331 and 160A-332. As stated for the Court by Justice Lake, Sr., "[t]he presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms." *Domestic Elec. Serv., Inc. v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974).

Finally, the Electric Act of 1965 was originally intended to prevent or reduce litigation regarding electric service rights between competing suppliers. *Id.* at 141, 203 S.E.2d at 842. Therefore, consistent with the intent of the Act, we hold that in situations in which multiple annexations have occurred, the determination date is the annexation date in which a primary and secondary supplier competing for the right to service a "premises initially requiring electric service first existed." *See* N.C.G.S. § 160A-332(a)(5). This interpretation best accomplishes the purpose of the Act.

[2] In the case *sub judice*, the Catchpole premises initially required service after the 1992 annexation. Therefore, the relevant determination date was 30 June 1992, the date of annexation in which there first existed a primary and secondary supplier competing for the right to service a premises initially requiring electric service. Since the Catchpole premises was inside the corporate city limits, located wholly or partially within 300 feet of the primary supplier's line and located wholly or partially within 300 feet of the secondary supplier's line on the relevant determination date, Catchpole was free, pursuant to N.C.G.S. § 160A-332(a)(5), to choose which party would supply the premises with electricity, and he chose Duke.

For the reasons stated herein, we reverse the decision of the Court of Appeals and remand this case to that court for further

remand to the Superior Court, Cabarrus County, for reinstatement of its judgment.

REVERSED AND REMANDED.

Justice WHICHARD dissenting.

The sole issue is whether the Court of Appeals erred in concluding that the determination date, as defined by the statute, was 30 June 1986. The majority holds that this was error and that the correct determination date was 30 June 1992. I believe the plain language of the statute establishes that the correct determination date was 30 June 1986, and I therefore dissent.

The statute defines "determination date" as "[t]he effective date of annexation with respect to areas annexed to any city after April 20, 1965." N.C.G.S. § 160A-331(1)(b) (1994). A statute must be applied as written. *In re Claim of Duckett*, 271 N.C. 430, 436, 156 S.E.2d 838, 844 (1967). When the language of a statute is clear and understandable on its face, we must not engage in judicial construction; rather, our task is to give the statute its plain meaning. *State ex rel. Util. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977); *State ex rel. Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). The statutory language here is clear. The determination date is the effective date of the annexation of the area containing the Catchpole lot. That date was 30 June 1986.

The majority recognizes that the statute sets the determination date as the effective date of annexation for areas annexed to the city after 20 April 1965 and that the area containing the Catchpole lot was annexed on 30 June 1986. The majority nevertheless concludes that the determination date was not reached until the Duke Power conductor was annexed six years later.

The majority reasons, first, that the Court of Appeals improperly substituted the statutorily defined term "premises" for "area" and concluded that the determination date was therefore the date that the Catchpole premises were annexed. Because the Catchpole property was a vacant lot at the time of annexation, and thus not "premises" within the meaning of the statute, the majority concludes that there were no "premises" annexed on 30 June 1986.

The absence of premises on 30 June 1986 is irrelevant. As the majority emphasizes, the statute speaks to the *area* annexed, not the

premises. The statute does not define "area." Words not defined by the statute are to be given their ordinary meaning. *See Lafayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). In this context, "area," given its ordinary meaning, would encompass the entire geographic region annexed on 30 June 1986, including all the premises and vacant lots contained therein. It is undisputed that the Catchpole lot was annexed on that date; therefore, 30 June 1986 is the relevant determination date.

The majority then criticizes the Court of Appeals' reliance on *Duke Power Co. v. City of Morganton*, 90 N.C. App. 755, 370 S.E.2d 54, *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988), because that case did not expressly address the meaning of "determination date." *Morganton*'s silence on the subject is irrelevant here, however, because the statute itself plainly establishes that the determination date is the date upon which a particular area is annexed.

Finally, the majority reasons that the Court of Appeals failed to consider the overall structure of the Electric Act of 1965. According to the majority, the Act focuses on competing electric lines and the facilities of two or more suppliers. The determination date thus becomes relevant only when there are at least two suppliers competing to serve a particular area. With this I agree. The majority then concludes, however, that the determination date should be defined as the annexation date on which a primary and secondary supplier competing to serve particular premises first existed. This is contrary to the plain language of the statute, which defines the determination date as the date the *area* was annexed, without regard to whether competing suppliers were available on that date. Obviously, such a determination would not need to be made if the owner of an annexed property sought service *before* a secondary supplier became available. When, as here, a lot does not require service until after a secondary supplier has become available, the determination then needs to be made as to which supplier has the right to serve the property. The statute directs us to resolve this question by reference to a statutorily defined determination date, which it makes clear.

The majority remands the case for reinstatement of the trial court's judgment. The trial court concluded that N.C.G.S. § 160A-332(a)(5) gave Catchpole the right to choose Duke Power as his supplier. Section 160A-332(a)(5) provides:

> (5) Any premises initially requiring electric service after the determination date which are located wholly or partially

> within 300 feet of the primary supplier's lines and are located wholly or partially within 300 feet of the secondary supplier's lines, *as such supplier's lines existed on the determination date*, may be served by either the secondary supplier or the primary supplier, whichever the consumer chooses . . . .

(Emphasis added.) The Act defines a supplier's "line" as "any conductor located *inside the city* for distributing or transmitting electricity." N.C.G.S. § 160A-331(2) (emphasis added). At the time the Catchpole lot was annexed in 1986, Duke Power had a conductor located within 300 feet of the lot. That conductor was not *inside the city*, however; it therefore was not a "line" within the meaning of the statute. When the legislature defines a word in a statute, that definition is controlling, even if it is contrary to the ordinary and accepted meaning of the word. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 130-31, 177 S.E.2d 273, 280 (1970). Thus, N.C.G.S. § 160A-332(a)(5) is not applicable here because Duke Power did not have a "line" within 300 feet of the Catchpole lot on the determination date.

Duke Power and *amici* urge this Court to consider and act upon the policy implications of the statute as written. Specifically, they argue that the statute fails to provide adequate protection for consumer choice and fails to prevent the risk of anticompetitive annexation decisions by municipalities. Assuming *arguendo* that there is merit to these concerns, they are matters for the legislature, not for this Court. As we stated in *State ex rel. Utilities Comm. v. Electric Membership Corp.*:

> It is for the Legislature, not for this Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest.

275 N.C. at 257, 166 S.E.2d at 668. Likewise, it is for the legislature, not for this Court, to determine whether a statute setting bright-line rules establishing suppliers' rights is preferable to a statute that preserves consumer choice in fact situations such as the one presented here.

As the majority recognizes, the purpose of the Act was to prevent or reduce litigation between competing suppliers. *Domestic Elec. Serv. Inc. v. City of Rocky Mount*, 285 N.C. 135, 141, 203 S.E.2d 838, 842 (1974). The General Assembly chose to accomplish this purpose by creating the concept of "determination date" and by clearly defining determination date as the date the area was annexed. It is not for

this Court to redefine this statutory term. When the terms of a statute are clear, it is this Court's duty to apply the statute, "irrespective of any opinion we may have as to its wisdom." *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973).

For these reasons, I respectfully dissent. I would affirm the decision of the Court of Appeals.

Justice WEBB *joins in this dissenting opinion.*

STATE OF NORTH CAROLINA v. KENNETH WADE EVANS AND DEVRONNE J. GILLIS

No. 104A96

(Filed 6 June 1997)

1. Criminal Law § 889 (NCI4th Rev.)— noncapital first-degree murder—jury not reaching verdict—additional instructions

There was no error in a noncapital first-degree murder prosecution in the court's instructions to the jury on failure to reach a verdict where defendant contended that a statement by the court was in violation of N.C.G.S. § 15A-1235, but defendant did not object at trial. Reading the instructions as a whole, the court twice admonished jurors not to compromise their convictions or do violence to their consciences; the substance of the instructions was to ask the jury to continue its deliberations and the instructions were not coercive.

Am Jur 2d, Trial §§ 1580, 1581, 1585, 1588.

2. Criminal Law § 805 (NCI4th Rev.)— noncapital first-degree murder—acting in concert—instructions

The trial court did not err in its instructions on acting in concert in a noncapital first-degree murder prosecution where defendants contended that the instructions permitted the jury to convict defendants without determining that each possessed the requisite *mens rea* to commit premeditated and deliberate murder. Since the crime was committed prior to 29 September 1994, the certification date of *State v. Blankenship*, 337 N.C. 543, the application of acting in concert as enunciated in *State v. Erlewine*, 328 N.C. 626, and reinstated in *State v. Barnes*, 345

N.C. 184 does not violate the constitutional *ex post facto* prohibitions. Moreover, the instructions comport with the *Blankenship* mandate in that the portions of the instructions which contain the phrase "or someone acting in concert with defendant" related only to the general intent elements of first-degree murder and *Blankenship* was inapplicable to general intent crimes. As to the specific intent elements of first-degree murder, the instructions did not permit the jury to convict defendants without determining that each possessed the *mens rea* to commit first-degree murder. Moreover, the use of the conjunctive in referring to defendants on the specific intent elements of the offense did not constitute error.

Am Jur 2d, Trial §§ 1255-1257.

3. Homicide § 478 (NCI4th)— noncapital first-degree murder—instructions—transferred intent

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the trial court's instructions on transferred intent were erroneous in that they permitted the jury to convict him based on the intent of his codefendant, but, viewed as a whole, the transferred intent instruction did not detract from the instructions on the elements of the crime.

Am Jur 2d, Homicide §§ 499, 507.

4. Criminal Law § 826 (NCI4th Rev.)— noncapital first-degree murder—requested instruction—character for peacefulness—not given—no prejudice

There was no prejudicial error in a noncapital first-degree murder prosecution where the trial court denied defendant Gillis's proffered instruction on his character for peacefulness. Given the substantial evidence of his participation in the crime, Gillis cannot show that he was prejudiced by the omission of this instruction.

Am Jur 2d, Homicide § 503; Trial §§ 1338, 1340, 1341, 1344.

5. Homicide § 374 (NCI4th)— noncapital first-degree murder—acting in concert—sufficiency of evidence—defendant not merely present

The trial court did not err in a noncapital first-degree murder prosecution by submitting the case against defendant Gillis to the

jury even though defendant contended there was no evidence beyond mere presence to support a conviction. The trial testimony tended to show that Gillis was robbed of his necklace by three men in the parking lot of a club; Gillis immediately thereafter conferred with Evans, who had a gun and opened fire on the three men; Gillis and Evans followed the three men to another club; Gillis and Evans drove by the club, with Evans hanging out the window and shooting; according to one witness, Gillis was driving the car; and the victim, a bystander, was shot and killed while running toward the doorway of the club. The evidence was sufficient to support a reasonable inference that Gillis and Evans killed the victim pursuant to a common plan to kill the three men who had robbed Gillis and that Gillis was not merely present at the scene.

Am Jur 2d, Homicide §§ 445, 507.

6. Criminal Law § 325 (NCI4th Rev.)— noncapital first-degree murder—multiple defendants—severance of trial denied—no error

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant Evans' motion to sever his trial from that of codefendant Gillis. There was no *Bruton* violation because Gillis took the stand, testified, and was subject to cross-examination. The principles set out in *Bruton* apply only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination; where the declarant takes the stand and is subject to full and effective cross-examination, a codefendant implicated by extrajudicial statements has not been deprived of his right to confrontation. Neither was there a violation of due process and N.C.G.S. § 15A-927 because there was plenary evidence, irrespective of Gillis' statements, that Evans was involved in the shooting. Additionally, any error in the admission of these statements was cured by a limiting instruction.

Am Jur 2d, Trial §§ 157, 158, 172.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 ALR3d 245.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Rousseau, J., at the 18 September 1995 Criminal Session of Superior Court,

Forsyth County, upon jury verdicts of guilty of first-degree murder. Heard in the Supreme Court 12 September 1996.

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

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

J. Clark Fischer for defendant-appellant Gillis.

PARKER, Justice.

Defendants, Kenneth Wade Evans and Devronne Jabbar Gillis, were tried noncapitally upon proper bills of indictment charging defendants with the murder of Willeana Goodman Martin. The jury found defendants guilty of first-degree murder, and the trial court entered judgments sentencing defendants to life imprisonment. Defendants appeal to this Court as a matter of right.

The State's evidence tended to show that on 23 June 1994, Eric Daye, Brad Adams, and Caswell Lindsay went to Club D'Elegance, a nightclub located in Winston-Salem, North Carolina. While Daye was inside the club, defendant Gillis bumped Daye and caused him to spill his drink. Daye told Adams and Lindsay he was going to "get" Gillis when he left the club. The three men discussed robbing Gillis because he had on a "nice gold chain." The club closed at 3:00 a.m., and Daye and his friends went out to the parking lot. The three men approached Gillis; Daye "snatched" Gillis' necklace; and Adams punched Gillis in the face. Gillis ran from the parking lot and joined defendant Evans. Evans was holding a gun and standing at the door of a car. Gunshots were fired, and all the men left the area.

Daye got into a car with Adams and Lindsay and drove from Club D'Elegance to Club 25, another nightclub in Winston-Salem. During the drive Daye noticed that his hand had been injured and was bleeding. The three men got out of the car at Club 25, and Daye asked a group of people gathered in front of the club for something to wipe his hand.

Daye saw a car traveling slowly down the street and saw defendant Evans "hanging out the window with a gun." Defendant Gillis was also in the car. Daye said, "[T]here they go." Evans fired shots toward the club from inside the car. Adams pulled out a gun and started

shooting back at the car. The crowd scattered; however, Willeana Goodman Martin was shot and killed in the cross fire.

Both defendants testified at trial and presented evidence on their own behalf. Defendant Evans testified that he did not know defendant Gillis on 23 June 1994 and that he had never been in a car with Gillis. Evans presented evidence that he was at his girlfriend's home from approximately 2:35 on the morning of the shooting.

Defendant Gillis testified that he did not know defendant Evans on 23 June 1994 and that he had never been in a car with Evans. Gillis denied that he had been robbed on the night of the shooting. Gillis presented evidence that he was at Tangerine Dobson's house on 23 June 1994 from approximately 2:20 a.m. to 4:15 a.m.

Defendant Gillis also testified about a pretrial statement he gave police officers in which he admitted involvement in the shootings at both clubs. Gillis testified that the statement was not true and that he only gave the statement because the officers refused to accept his initial statement that he was not involved and because he was tired and "ready to go." Gillis further testified that he gave the statement after officers had gone over several times what supposedly happened.

On appeal both defendants contend the trial court committed instructional errors. Neither defendant objected at trial to the instructions assigned as error. Therefore, our review as to these instructions is limited to a review for plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Plain error is error in the trial court's instruction which is "so fundamental as to amount to a miscarriage of justice" or which probably resulted in the jury reaching a verdict different from the one 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).

[1] Both defendants first contend the trial court coerced a jury verdict by instructing the jury that its failure to reach a verdict would result in a mistrial and require a retrial of the case. During deliberations the foreperson informed the court that the jury had reached a verdict in one of the cases but that it had not been able to reach a verdict in the remaining case. The trial judge instructed the jury to continue deliberating. The trial judge stated:

> [Y]ou heard a lot of conflicting evidence in this case and I'm sure it's not an easy task; but if you cannot agree, I would have to

declare a mistrial; and I have no reason to believe that any other twelve jurors are more intelligent than you are or they would hear any different evidence than what you've heard in this case. I'm going to ask that you deliberate a little bit longer in hopes that you can agree.

Defendants contend that this statement was made in violation of N.C.G.S. § 15A-1235, which contains guidelines for instructing a deadlocked jury. Not having objected to this instruction at trial, defendants must show that a reasonable probability exists that the result would have been different had this instruction not been given. *Id.* at 213, 362 S.E.2d at 251.

Pursuant to N.C.G.S. § 15A-1235,

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C.G.S. § 15A-1235 (1988). In the instant case the trial judge also instructed the jurors as follows:

I do not ask any juror to compromise his or her convictions or do violence to your conscience, but the purpose of a jury is everybody to have their say, fully discuss it, reexamine your position if you think it might be wrong. However, don't agree just to be getting a verdict. You have to be satisfied about it in your own minds, but I will ask you to discuss it a little bit longer. As I say, six hours is right long, but you've heard four days or more of testimony, a lot of conflicting testimony.

And, again, that's why we have twelve jurors, to sit together, listen to one another's position about it, reevaluate your position on it and see if you can't come to some conclusion. However, again, don't agree just to be agreeing. Don't compromise your convictions or do violence to your conscience, but see if you can't resolve the matter.

The purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision. *State v. Williams*, 339 N.C. 1, 39, 452 S.E.2d 245, 268 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995). In the instant case the trial court twice admonished the jurors not to compromise their convictions or do violence to their consciences in order to reach a verdict. The substance of these instructions was to ask the jury to continue its deliberations, and the instructions were not coercive. "Indeed we note that the effect of the instructions was not so coercive as to impel defendant's trial counsel to object to the instructions." *State v. Peek*, 313 N.C. 266, 272, 328 S.E.2d 249, 253 (1985). Reading the instruction as a whole, we find no error.

[2] Both defendants also contend the trial court's instructions on acting in concert were erroneous. Defendants contend the instructions permitted the jury to convict defendants without determining that each possessed the requisite *mens rea* to commit premeditated and deliberate murder. Portions of the instructions given on first-degree murder were as follows:

So, members of the jury, for you to find each defendant guilty of first degree murder, the State of North Carolina must prove

five things beyond a reasonable doubt and these five things must be proven as to each defendant.

First, that the defendant or someone acting in concert with him intentionally and with malice killed Ms. Martin by shooting at Brad Adams or Eric Day[e].

. . . .

Second, the State must prove beyond a reasonable doubt that the defendant's act—or someone acting in concert with him—was the proximate cause of Ms. Martin's death.

Third, that the Defendant Gillis and the Defendant Evans intended to kill Brad Davis (sic) or Eric Day[e] or both and killed Ms. Martin instead. . . .

Fourth, that the Defendant Gillis and that the Defendant Evans acted with premeditation; that is, that each formed the intent to kill either Brad Adams or Eric Day[e] over some period of time, however short, before he acted.

And, fifth, that the Defendant Gillis and the Defendant Evans each acted with deliberation, which means that he acted while he was in a cool state of mind.

We reject defendants' argument for two reasons. First, in *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), a majority of this Court overruled *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), relied upon by defendants, and held that acting in concert is as follows:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."
>
> [*State v.*] *Erlewine*, 328 N.C. [626,] 637, 403 S.E.2d [280,] 286 [(1991)] (quoting [*State v.*] *Westbrook*, 279 N.C. [18,] 41-42, 181 S.E.2d [572,] 586 [(1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972)] (alterations in original).

Barnes, 345 N.C. at 233, 481 S.E.2d at 71.[1] Since the crime in this case was committed prior to 29 September 1994, the certification date in *Blankenship*, the application of acting in concert as enunciated in *Erlewine* and reinstated in *Barnes* to this case would not violate the constitutional prohibitions against *ex post facto* laws.

Secondly, the instructions as given comport with the *Blankenship* mandate. The instructions informed the jury that, in order to convict each defendant of first-degree murder, it must find that each defendant possessed the intent to kill and that each defendant acted with premeditation and deliberation. The portions of the instructions which contain the phrase "or someone acting in concert with [defendant]" related only to the general intent elements of first-degree murder. *Blankenship* was inapplicable to general intent crimes. *State v. McCoy*, 122 N.C. App. 482, 470 S.E.2d 542, *disc. rev. denied*, 343 N.C. 755, 473 S.E.2d 622 (1996).

As to the specific intent elements of first-degree murder, the trial court instructed that defendant Gillis and that defendant Evans must have acted with premeditation and deliberation and intended to kill Brad Adams or Eric Daye. The trial judge later reemphasized to the jury that it must find that "Defendant Gillis acted with malice, with premeditation and deliberation" in order to return a guilty verdict against Gillis and that it must find that "Defendant Evans acted with malice and with premeditation and deliberation" in order to return a guilty verdict against Evans. These instructions did not permit the jury to convict defendants without determining that each possessed the *mens rea* to commit first-degree murder.

We also reject defendants' contention that the use of the conjunctive in referring to defendants on the specific intent elements of the offense constituted error, and this assignment of error is overruled.

[3] Defendant Gillis further contends the trial court's instructions on transferred intent were erroneous in that they permitted the jury to convict him based on the intent of his codefendant. The victim in the instant case was an innocent bystander. Therefore, the prosecution relied upon the principle of transferred intent in its theory of first-degree murder against Gillis. The trial court stated, "if the defendant intended to shoot Eric Day[e] or Brad Adams but actually shot Ms.

1. Although the author of this opinion joined with the majority in *State v. Blankenship* and with the minority in *State v. Barnes*, she is now bound by *stare decisis* to apply the *Barnes* precedent in the instant case.

Martin, the legal effect would be the same as if the defendants had actually shot Brad Adams or Eric Day[e]." Gillis contends that by the use of the word "defendant" and then the word "defendants," the jury was instructed that it could apply the rule of transferred intent without an individual determination as to each defendant.

Once again our review is limited to a review for plain error. *Odom*, 307 N.C. at 659-60, 300 S.E.2d at 378. When the instructions in the instant case are viewed as a whole, the transferred intent instruction did not detract from the instructions on the elements of the crime, which apprised the jury of the intent which it had to find in order to convict Gillis of first-degree murder. Defendant has failed to carry his burden of showing a reasonable probability that the result in his trial would have been different had this instruction not been given. *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251.

[4] Finally, defendant Gillis contends that the trial court erred in denying his proffered instruction on his character for peacefulness. Defendant sought to bolster his contention that he was not part of the shooting with Evans by presenting witnesses who testified that Gillis was not a violent person. At the charge conference defense counsel requested that the jury be instructed on defendant's character for nonviolence; the trial court declined to give this instruction.

In order to obtain relief on this theory, defendant must not only show that the failure to give the instruction was error, but also that the error was prejudicial. Given the substantial evidence of his participation in the crime, Gillis cannot show that he was prejudiced by the omission of this instruction. Two eyewitnesses identified Gillis as being in the car with Evans when the shooting took place at Club 25; one witness identifed him as the driver. Furthermore, Gillis gave a statement to police officers wherein he admitted his participation in the events on 23 June 1994 up to and including the shooting at Club 25. Hence, assuming *arguendo* that failure to give the instruction was error, Gillis cannot show that a reasonable possibility exists that, had the requested instruction been given, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988).

[5] Each defendant also contends the trial court made other noninstructional errors. Defendant Gillis contends the trial court erred by submitting the case against him to the jury, as there was no evidence beyond mere presence to support a conviction of first-degree murder based on acting in concert.

Under the theory 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). Defendant contends that, in the instant case, there was no evidence presented of a common plan or scheme between the two defendants. We disagree.

The trial testimony tended to show that Gillis was robbed of his necklace by Daye, Adams, and Lindsay on the evening of 23 June 1994 in the parking lot of Club D'Elegance; that immediately thereafter Gillis conferred with Evans, who had a gun and opened fire on the three men; that Gillis and Evans followed the three men from Club D'Elegance to Club 25; that Gillis and Evans drove by Club 25, with Evans hanging out the car window shooting; that Gillis according to one witness was driving the car from which Evans was shooting; and that Willeana Martin was shot and killed while running toward the doorway of Club 25. This evidence is sufficient to support a reasonable inference that Gillis and Evans killed Willeana Martin pursuant to a common plan to kill Eric Daye, Brad Adams, and/or Caswell Lindsay and that Gillis was not merely present at the scene of the crime. This assignment of error is overruled.

[6] Defendant Evans contends the trial court erred by denying his motion to sever his trial from codefendant Gillis' trial. Evans first argues that the denial of this motion resulted in the violation of the principles set out in *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968). In *Bruton* the United States Supreme Court held that at a joint trial, admission of a statement by a nontestifying codefendant that incriminated the other defendant violated that defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. *Id.* at 126, 20 L. Ed. 2d at 479. Evans further argues that the State's impeachment of Gillis by reference to these extrajudicial statements rendered the joinder of these defendants' cases for trial fundamentally unfair and a violation of due process and N.C.G.S. § 15A-927.

Defendant Evans contends that two *Bruton* violations occurred during his trial. First, the State called the police officer who had interrogated Gillis and attempted to introduce a sanitized version of Gillis' confession. On cross-examination the police officer volunteered that Gillis' confession implicated defendant. Second, Gillis testified at

trial on his own behalf to an alibi defense which was inconsistent with his prior confession. The court permitted the State to impeach Gillis with an unsanitized version of Gillis' prior inconsistent police statement and his prior inconsistent testimony at a suppression hearing, both of which implicated defendant.

The principles set out in *Bruton* apply only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination. *Nelson v. O'Neil*, 402 U.S. 622, 29 L. Ed. 2d 222 (1971). Where the declarant takes the stand and is subject to full and effective cross-examination, a codefendant implicated by extrajudicial statements has not been deprived of his right to confrontation. *State v. Rasor*, 319 N.C. 577, 356 S.E.2d 328 (1987). In the instant case Gillis took the stand, testified, and was subject to cross-examination.

There was, likewise, no violation of due process and N.C.G.S. § 15A-927. Joinder of defendants is permitted pursuant to N.C.G.S. § 15A-926(b)(2)(a) where the State seeks to hold each defendant accountable for the same offenses. However, N.C.G.S. § 15A-927(c)(2) requires the court to grant a severance of defendants' cases whenever it is necessary to promote or achieve "a fair determination of the guilt or innocence" of a defendant. The question of whether defendants should be tried jointly or separately is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed on appeal absent a showing that joinder has deprived a defendant of a fair trial. *Rasor*, 319 N.C. at 581, 356 S.E.2d at 331.

In the instant case there was plenary evidence, irrespective of Gillis' statements, that Evans was involved in the shooting death of Willeana Martin. Brad Adams testified that a car drove by Club 25 and that Evans was hanging out the window shooting. Eric Daye similarly testified that a car drove up slowly to Club 25 and that Evans was hanging out the window firing a gun. On this record Evans cannot show that the joinder of these cases deprived him of a fair trial.

In addition, the trial judge gave a limiting instruction as to the statements at issue. The trial judge advised the jury that evidence of prior inconsistent statements was not to be considered as evidence of the truth of what was said at that earlier time, but was only to be considered for the purpose of assessing the credibility of the witness who made the prior statement. Any error in the admission of these

statements was cured by the limiting instruction. *See State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986). "It would be unusual for all evidence at a joint trial to be admissible against both defendants, and we often rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other." *Id.* at 643, 343 S.E.2d at 857. This assignment of error is overruled.

For the foregoing reasons we hold that defendants' trial was free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. JOHN DAVIS McNEILL

No. 484A95

(Filed 6 June 1997)

1. Constitutional Law § 309 (NCI4th)— closing argument—admission defendant guilty of second-degree murder—stipulation by defendant—consent to admission—no denial of effective assistance

A defendant on trial for first-degree murder was not denied the effective assistance of counsel by his attorney's admission during closing argument that defendant was guilty of second-degree murder where defendant stipulated in writing that he stabbed the victim and proximately caused her death; the trial court found that defendant knowingly, voluntarily, and understandingly consented to the stipulation; and the stipulation conceded each of the elements of second-degree murder. Where a defendant stipulates to the elements of an offense, defense counsel may infer defendant's consent to admit defendant's guilt of that offense.

Am Jur 2d, Constitutional Law § 842; Criminal Law §§ 271 et seq., 309 et seq., 318 et seq.; Trial §§ 190, 191.

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

2. Criminal Law § 697 (NCI4th Rev.)— acquittal of burglary—not guilty of felony murder—requested instruction given in substance

The trial court did not err by refusing defendant's written request to instruct the jury that it could not consider the charge of felony murder if it found defendant not guilty of first-degree burglary or guilty of nonfelonious breaking and entering where the court instructed the jury that first-degree burglary was a necessary element of felony murder in this case, and the court thus gave an instruction in substantial conformity with that requested by defendant.

Am Jur 2d, Criminal Law § 291.

3. Criminal Law § 695 (NCI4th Rev.)— request for instruction—necessity for writing

The trial court did not err by denying defendant's oral request to modify the pattern instruction for premeditation and deliberation. A trial court's ruling denying requested instructions is not error where defendant fails to submit his request for instructions in writing.

Am Jur 2d, Trial § 715.

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.

4. Homicide § 482.1 (NCI4th)— premeditation and deliberation—instruction—list of factors

The trial court did not err by giving the jury an instruction which contains a list of suggestions which the jury, in its discretion, may consider in determining whether the murder was committed with premeditation and deliberation.

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.

5. Criminal Law § 1367 (NCI4th Rev.)— capital sentencing—aggravating circumstance—murder during burglary—conviction based on premeditation and felony murder

The trial court did not err by submitting to the jury in a capital sentencing proceeding the (e)(5) aggravating circumstance that the murder was committed during the course of a burglary where the jury convicted defendant of first-degree murder not only on the theory of felony murder based on the underlying felony of first-degree burglary but also on the theory of premeditation and deliberation. N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Criminal Law §§ 609 et seq.

6. Criminal Law § 1402 (NCI4th Rev.)— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not disproportionate to the penalty imposed in similar cases where defendant was convicted on theories of premeditation and deliberation and felony murder; defendant stabbed the victim in her home in front of her children; and the jury found as an aggravating circumstance that the murder was committed during the course of a burglary.

Am Jur 2d, Criminal Law §§ 606, 607.

Appeal 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 23 October 1995 Criminal Session of Superior Court, Cumberland County, on a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment of life imprisonment for first-degree burglary was allowed 10 July 1996. Heard in the Supreme Court 17 March 1997.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

James R. Parish for defendant-appellant.

WHICHARD, Justice.

Defendant was indicted on 15 February 1993 for first-degree burglary and for the first-degree murder of Donna Marie Lipscomb. Defendant was tried capitally, and the jury returned a verdict finding him guilty of first-degree murder on the theories of premeditation

and deliberation and felony murder. Defendant was also convicted of first-degree burglary. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for the first-degree murder. The trial court sentenced defendant accordingly on the murder charge and sentenced him to life imprisonment for the burglary, to run consecutive to the murder sentence. For the reasons set forth herein, we conclude that defendant received a fair trial, free from prejudicial error, and that the sentence of death is not disproportionate.

Evidence presented at trial tended to show that on the night of 17 November 1992, defendant knocked on the door of Melissa Jones' apartment. When Jones opened the door, defendant asked her for the key to the victim's apartment. Jones knew defendant and the victim were dating, and she had frequently seen defendant at the apartment. She therefore gave him the key. She then noticed that defendant had a knife in his hand. After defendant left her apartment, Jones attempted to call the police, but her telephone line had been cut.

After obtaining the key from Jones, defendant walked to the victim's apartment, unlocked the door, and pushed the door open despite the victim's efforts to hold it closed. The victim's two sons, Nat, thirteen, and John, eleven, also lived in the apartment and were present when defendant charged through the door, knife in hand. Nat tried to call the police, but the phone was not working. Defendant stabbed the victim in the chest, back, arms, abdomen, and breast before Nat was able to grab defendant and restrain him from wounding the victim further.

Detective Alex Thompson received a call indicating that there had been a stabbing at the victim's apartment. When he arrived at the apartment, defendant ran to the patrol car. Defendant was covered in blood and appeared intoxicated. He told Thompson that he was the one who had called the police and who had stabbed the victim. Defendant led Thompson to the body and repeatedly asked to be put in handcuffs. He told Thompson that he "didn't mean to do it" but that he stabbed the victim because she was "dissing" him.

At trial, defendant testified that he went to the victim's apartment to attempt to work out their failing relationship. He took a knife because he believed a man was in the apartment, and he was hoping to scare off the man so he could talk to the victim alone. Defendant admitted that he went to the junction box and pulled out all of the telephone wires so he and the victim could talk uninterrupted. When

defendant got inside the apartment, he and the victim began arguing and shoving one another. Defendant then stabbed her. Defendant testified that he did not intend to kill the victim.

[1] Defendant first contends that his federal constitutional right to effective assistance of counsel was violated by his attorney's admission to the jury during closing argument that defendant was guilty of second-degree murder. Prior to trial, defendant introduced to the trial court a written stipulation wherein he admitted that he "did inflict multiple stab wounds" on the victim and that "[t]hese wounds caused her death." Subsequently, during closing remarks, defense counsel argued that "[t]his is not a case of first degree murder; it's a case of second degree murder," and that counsel "[has] the permission of [defendant] to tell you that he's guilty of second degree murder." Defendant now contends that he did not so consent and that the stipulation was not intended to be a concession to second-degree murder. He argues that pursuant to *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), ineffective assistance of counsel is established *per se* because defense counsel admitted defendant's guilt to the jury without defendant's consent.

In *Harbison*, the defendant shot at the victims, seriously injuring one and fatally wounding the other. Throughout his trial, the defendant steadfastly maintained that he acted in self-defense. The defendant's court-appointed attorney adhered to this defense throughout the presentation of evidence. However, during closing remarks, defense counsel argued: "I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." *Id.* at 178, 337 S.E.2d at 506. This Court held that the decision to plead guilty lies solely in the hands of the defendant; when counsel admits his client's guilt without first obtaining the client's consent, the client's constitutional rights to a fair trial and to hold the State to the burden of proof beyond a reasonable doubt are surrendered, and a new trial is required. *Id.* at 180, 337 S.E.2d at 507.

Harbison is distinguishable. Significantly, there the defendant claimed self-defense. By contrast, defendant here stipulated in writing to having stabbed the victim and proximately caused her death. Second-degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*,

— U.S. —, 131 L. Ed. 2d 569 (1995). The intent necessary to support a conviction for second-degree murder is the intent to inflict the wound which produces the homicide. *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). Indeed, malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). The stipulation defendant entered concedes each of these elements and therefore supports a verdict of second-degree murder. In arguing in accord with defendant's stipulation, defense counsel cannot be said to have rendered ineffective legal assistance.

In *State v. House*, 340 N.C. 187, 197, 456 S.E.2d 292, 297 (1995), we cautioned the trial bench to establish a clear record of a defendant's consent when a *Harbison* issue arises at trial. The trial court here adhered to that advice by asking whether defendant signed the stipulation, understood its effect, and realized that the information contained therein could be presented to the jury. Defendant responded "yes" to each of these inquiries. Thereafter, the trial court found that defendant knowingly, voluntarily, and understandingly consented to the stipulation, and nothing in the record indicates otherwise. Where, as here, a defendant stipulates to the elements of an offense, defense counsel may infer consent to admit defendant's guilt of that offense. Accordingly, this assignment of error is overruled.

[2] Defendant next contends that the trial court erred in refusing his written request for specific jury instructions. During the charge conference, defense counsel submitted a written request for an instruction informing the jurors that if they found defendant not guilty of first-degree burglary or guilty of nonfelonious breaking and entering, they could not consider the charge of first-degree murder under the felony murder rule. Defendant asked that the instruction be given subsequent to the first-degree burglary instruction and preceding the instruction on nonfelonious breaking and entering. The trial court denied defendant's request. Defendant argues that the requested instruction was a proper statement of law, was supported by the evidence, and therefore should have been given to the jury. We find no error in the trial court's ruling or in the instructions given.

Rather than grant defendant's request, the trial court instructed as follows:

> So, I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant broke

and entered an occupied dwelling house without the tenant's consent during the night-time and at that time intended to commit murder, and that while committing burglary, the defendant killed the victim and that the defendant's act was a proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first degree murder under the felony murder rule.

However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder under the felony murder rule.

The trial court gave this instruction as part of the jury charge on first-degree murder under the felony murder rule.

"[T]his Court has consistently held that a trial court is not required to repeat verbatim a requested, specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request." *State v. Brown*, 335 N.C. 477, 490, 439 S.E.2d 589, 597 (1994). Here, the instruction given clearly sets forth that first-degree burglary is a necessary element of felony murder in this case. To find defendant guilty of felony murder, the State had to prove each element of first-degree burglary beyond a reasonable doubt. If the jury had a reasonable doubt as to any of the elements, it was to find defendant not guilty of felony murder. This is, in substance, the concept defendant wished to convey to the jury. The trial court therefore gave instructions in substantial conformity with those requested, and this assignment of error is without merit.

[3] In a related assignment, defendant argues that the trial court erred in denying his oral request to modify the pattern instruction for premeditation and deliberation. During the charge conference, defense counsel requested that the trial court delete all of the listed examples of things from which premeditation and deliberation may be inferred. *See, e.g.*, N.C.P.I.—Crim. 206.10, at 7 (1995). The next day, counsel suggested instead that the following language be added to the pattern instruction: "You may consider the foregoing examples in making your determination on these issues; however, you are not limited to these examples, and it is your duty to consider all of the relevant evidence that has been presented to you on those issues." Co-counsel excepted to this modification and offered alternative language as follows: "[T]his may infer premeditation and deliberation or it may be used to infer a lack of premeditation and deliberation. And these are some of the factors you may consider. That there may

be other factors that you find." The trial court denied both of these proposed instructions. Defendant now contends that the requested instructions were proper under the facts of this case and that the trial court committed prejudicial error by failing to so instruct.

We note initially that defendant's proposed instructions were tantamount to a request for special instructions. Section 15A-1231 provides for conferences on jury instructions and states that "any party may tender written instructions." N.C.G.S. § 15A-1231(a) (1988). Rule 21 of the General Rules of Practice for the Superior and District Courts also pertains to jury instruction conferences and directs, "If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference." This Court has held that a trial court's ruling denying requested instructions is not error where the defendant fails to submit his request for instructions in writing. *State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988). Defendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested.

[4] Further, the trial court gave an instruction virtually identical to the pattern instruction on premeditation and deliberation, N.C.P.I.—Crim. 206.10. We recently approved a similar instruction in *State v. Truesdale*, 340 N.C. 229, 235, 456 S.E.2d 299, 301 (1995). We have stated that "[t]he elements listed [there] are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990). More importantly, the instruction "does not indicate to the jury that the trial court is of the opinion that evidence exists which would support each or any of the circumstances listed." *State v. Leach*, 340 N.C. 236, 242, 456 S.E.2d 785, 789 (1995). Reason dictates the conclusion that the jury need not infer premeditation and deliberation from the mere giving of the instruction and that the absence of any or all of the circumstances may indicate a lack of premeditation and deliberation. The instruction is simply a list of suggestions which the jury, in its discretion, may or may not consider in determining whether the murder was committed with premeditation and deliberation. This is precisely as the trial court instructed, and we find no error in that instruction. This assignment of error is overruled.

[5] Defendant next contends that it was error for the trial court to submit the aggravating circumstance that the murder was committed during the course of a burglary, N.C.G.S. § 15A-2000(e)(5). The jury convicted defendant of first-degree murder on the theories of premeditation and deliberation and felony murder, with first-degree burglary serving as the underlying felony for the felony murder conviction. Defendant argues that submission of the (e)(5) aggravating circumstance during the capital sentencing phase resulted in improper duplication of that circumstance.

As defendant concedes, the felony underlying a conviction for felony murder may be submitted as an aggravating circumstance pursuant to N.C.G.S. § 15A-2000(e) if the defendant is also convicted of first-degree murder on the basis of premeditation and deliberation. *State v. Goodman*, 298 N.C. 1, 24, 257 S.E.2d 569, 584 (1979). "The commission of the 'underlying' felony is not an essential element of the crime of premeditated murder, and, thus, is not the 'automatic' aggravating circumstance" we held impermissible in *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). *State v. Rook*, 304 N.C. 201, 230, 283 S.E.2d 732, 750 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). Because defendant was found guilty of first-degree murder under both theories, the trial court did not err in submitting the (e)(5) aggravating circumstance. This assignment of error is overruled.

ADDITIONAL ISSUES

Defendant raises five additional issues which he concedes this Court has decided contrary to his position: (1) Issue Three on the Issues and Recommendation Form unconstitutionally permits the jury to recommend death if it finds that the mitigating circumstances are of equal weight and value to the aggravating circumstances; (2) the trial court erred by using the term "satisfy" in its definition of "preponderance of the evidence"; (3) the trial court improperly permitted the jury to reject nonstatutory mitigating circumstances as having no mitigating value; (4) the trial court erred in instructing on Issues Three and Four that a juror "may" consider the mitigating circumstances that a juror determines to exist by a preponderance of the evidence; and (5) the trial court erred in denying defendant's motion to declare the death penalty unconstitutional.

We have considered defendant's arguments on these issues, and we find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

Having found no error in defendant's trial or separate sentencing proceeding, we are required to review the record and determine (1) whether the evidence supports the aggravating circumstance found by the jury; (2) whether passion, prejudice, or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (Supp. 1996). After reviewing the record, transcripts, and briefs, we conclude that the record fully supports the jury's finding of the aggravating circumstance. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore turn to our final duty of proportionality review.

[6] One purpose of proportionality review is to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury." *State v. Lee*, 335 N.C. 244, 294, 439 S.E.2d 547, 573, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). 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). To determine whether the sentence of death is disproportionate, we compare this case to other cases 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).

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. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). The instant case is distinguishable from each of these. First, defendant was convicted of first-degree murder by premeditation and deliberation and under the felony murder rule. We have consistently 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). Second, defendant stabbed the victim in her home in front of her children. 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). Finally, there are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain a sentence of death; the (e)(5) circumstance, which the jury found here, 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).

Defendant refers us to several 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 a murder committed in the home of the victim. 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." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). 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 or those in which juries have returned recommendations of life imprisonment.

Based on the nature of this crime, particularly the distinguishing features noted above, we conclude that the sentence of death is not disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

IN RE: ERIC YOUNG, MINOR CHILD BORN AUGUST 6, 1992

No. 174A96

(Filed 6 June 1997)

1. Parent and Child § 99 (NCI4th)— termination of parental rights—neglect—time of termination proceeding

A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.

Am Jur 2d, Parent and Child §§ 7, 34, 35, 48.

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.

2. Parent and Child § 100 (NCI4th)— termination of parental rights—neglect—insufficient evidence

The trial court's termination of respondent mother's parental rights on the basis of neglect at the time of the termination proceeding was unsupported by clear, cogent, and convincing evidence where the evidence showed that the cleanliness of the mother's household was questionable prior to the removal of her child nine months prior to the petition to terminate her parental rights and over a year before the termination proceeding; the child had been in the custody of others for over a year; a family therapist employed by the court to conduct a home study prior to the termination hearing testified that the mother's home was then neat and clean and that the mother's treatment for breast cancer had changed her attitude with respect to her willingness to become a better parent; and the record showed that the mother missed only two of twenty-four scheduled one-hour visits with the child after temporary custody was awarded to another woman.

Am Jur 2d, Parent and Child §§ 7, 34, 35, 48.

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.

3. Parent and Child § 100 (NCI4th)— probability of repetition of neglect—giving child up for adoption—insufficient evidence

Evidence that respondent mother had given her first child up for adoption was insufficient to show a probability of repetition of neglect of her second child sufficient to support termination of her parental rights in the second child.

Am Jur 2d, Parent and Child §§ 7, 34, 35, 48.

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.

4. Parent and Child § 102 (NCI4th)— termination of parental rights—abandonment—insufficient findings

The trial court's findings did not support the termination of respondent mother's parental rights on the ground of abandonment where the findings indicate a hostile relationship between the mother and the father's family members who were caring for the child during the six months immediately preceding the filing of the petition; the transcript shows that the mother was diagnosed as having cancer and had surgery, radiation treatment and chemotherapy during this time; the mother's request to see the child before surgery was denied by the father; there was a period of time during which the mother did not know the whereabouts of the child; and the mother began visiting the child when she learned who had custody of the child.

Am Jur 2d, Parent and Child §§ 12, 14.

Abandonment and emergency jurisdiction of court under sec. 3(a)(3) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(c). 5 ALR5th 788.

Appeal by respondent 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. 163, 468 S.E.2d 266 (1996), affirming orders terminating respondent's parental rights entered by Beale, J., on 10 April 1995 *nunc pro tunc* 1 November 1994 and 3 November 1994 in District Court, Moore County. On 10 October 1996, the Supreme Court allowed discretionary review of additional issues. Heard in the Supreme Court 14 April 1997.

Lapping & Lapping, by Stephan Lapping, for petitioner-appellee James Daniel Young.

Brown & Robbins, L.L.P., by Carol M. White, for respondent-appellant Dawn Hayward.

David G. Crockett Law Offices, by Jerry D. Rhoades, Jr., guardian ad litem.

FRYE, Justice.

This case involves proceedings terminating parental rights based on neglect and abandonment. We conclude that the evidence presented at trial was insufficient to support the grounds for termination of the mother's parental rights. Accordingly, we must reverse the Court of Appeals and remand for further proceedings.

The evidence presented at trial tended to show the following facts and circumstances. Petitioner, James Daniel Young, and respondent, Dawn Christian Hayward, are the parents of Eric James Miguel Young (Eric). Eric was born on 6 August 1992. Respondent had previously given birth to a child that she gave up for adoption. Petitioner and respondent never married but lived together for approximately two months following Eric's birth. After petitioner moved out, Eric stayed with respondent in her apartment in Aberdeen, North Carolina, and later in a house in Pinebluff, North Carolina.

On 17 August 1993, respondent gave physical custody of Eric to Kay Harris, petitioner's sister. On 22 September 1993, petitioner went to Harris' home and took custody of Eric. Jamie Bransford (Bransford), petitioner, and various family members of petitioner cared for Eric until February 1994 when petitioner gave physical custody of Eric to Alvina Street (Street).

In October 1993, respondent was diagnosed with breast cancer requiring surgery, radiation treatment, and chemotherapy.

In May 1994, Street told respondent that Eric was living with her, and respondent began to visit Eric. On 13 May 1994, upon a motion filed by Street, an *ex parte* temporary custody order was filed granting custody of Eric to Street and her husband. An order was filed continuing the temporary custody order and granting visitation to respondent on 2 June 1994.

On 6 May 1994, petitioner filed a petition for termination of respondent's parental rights on the basis that respondent neglected

and abandoned Eric. After a trial in District Court, Moore County, Judge Michael E. Beale entered an adjudication order on 10 April 1995 *nunc pro tunc* 1 November 1994, finding grounds to terminate respondent's parental rights pursuant to N.C.G.S. § 7A-289.32(2) and (8) for neglect and abandonment. Judge Beale entered a disposition order on 10 April 1995 *nunc pro tunc* 3 November 1994, finding that it was in the best interest of the child to terminate respondent's parental rights. In addition, the trial court concluded that petitioner's parental rights should be terminated and that a termination proceeding would be instituted if petitioner did not voluntarily release his rights by 5:00 p.m. on 4 November 1994. Petitioner filed a stipulation for termination of his parental rights on 4 November 1994.

Respondent appealed to the Court of Appeals. The Court of Appeals, in a divided panel, affirmed the trial court's termination of respondent's parental rights. Respondent appealed to this Court based on Judge Wynn's dissent, and this Court allowed her petition for discretionary review as to additional issues.

Respondent makes three arguments on appeal. After careful review and consideration of the record, transcript, briefs, and oral arguments of counsel, we reverse the decision of the Court of Appeals.

The termination of parental rights statute provides for a two-stage termination proceeding: N.C.G.S. § 7A-289.30 governs the adjudication stage, and N.C.G.S. § 7A-289.31 governs the disposition stage. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist. N.C.G.S. § 7A-289.30(d), (e) (1995). The grounds for terminating parental rights are listed in N.C.G.S. § 7A-289.32. Upon determining that one or more of the grounds for terminating parental rights exist, the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights. N.C.G.S. § 7A-289.31 (1995).

In her first argument, respondent contends that the finding of neglect or the probability of its repetition at the time of the termination proceeding was not based on clear, cogent, and convincing evidence. We agree.

N.C.G.S. § 7A-289.32 lists neglect as one of the grounds for terminating parental rights, and provides in pertinent part:

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (2) The parent has abused or neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).

N.C.G.S. § 7A-289.32(2) (1995). N.C.G.S. § 7A-517(21) defines neglect in pertinent part as follows:

> Neglected juvenile.—A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C.G.S. § 7A-517(21) (1995).

[1] A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984).

> During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights under N.C.G.S. 7A-289.32(2) and 7A-517(21) is present *at that time.* N.C.G.S. 7A-289.30(d). The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists *at the time of the termination proceeding.* N.C.G.S. 7A-289.30(e).

In re Ballard, 311 N.C. at 716, 319 S.E.2d at 232. (citations omitted) (emphasis added). Termination of parental rights for neglect may not be based solely on past conditions which no longer exist. *Id.* at 714, 319 S.E.2d at 231-32.

In the instant case, Jamie Bransford, a friend of respondent's, testified that on one occasion Eric was lying on the floor and a roach was crawling on his face. Bransford also observed respondent giving

Eric a "milk bottle with contents looking similar to cottage cheese." These incidents occurred when Eric was between two and six months old. Alvina Street, who had custody of Eric at the time of the termination proceeding, testified that she kept Eric for respondent on various occasions when Eric was between two and ten months old. She testified that she had seen cat litter and cat feces scattered on the floor near the litter box and roaches in the lining of Eric's car seat. Sue Stubbs, an acquaintance of respondent's, testified that she visited respondent's home a few weeks before the termination proceedings and found cat urine and cat feces on the kitchen floor.

Kelvin Clark is a family therapist and was employed by the court to conduct a home study prior to the termination proceedings. He testified that respondent's home was neat and clean and that respondent had arranged a bedroom and had purchased carpet on which Eric could play. Clark also testified as follows: "I don't know a cat owner who hasn't had cat feces on their floor; I do think it's a sign of negligence, but again, I don't think—I think if we focus on these sorts of things, all of us could be caught with a problem." More significantly, Clark testified that respondent's breast cancer had changed her attitude with respect to her willingness to become a better parent. He testified as follows:

> I can't predict the future, but I do know that when people face death and trauma they change. I work with a lot of people who are recovering alcoholics, for example, I have worked with [sic]. And sometimes you see a man who has been drinking all his life and then, say, has a bad accident or a doctor says, "You're going to die if you don't stop drinking," and then he stops. And I think there are—pain is life's best teacher, and I think that's happened in Dawn's life.

In addition, the record shows that respondent missed only two of the twenty-four scheduled one-hour visits with her son since Alvina Street received legal custody of him.

[2] We conclude that the evidence in this case is equivocal and, taken as a whole, is not clear, cogent, and convincing evidence of neglect *at the time of the termination proceeding.* We note that the trial court found as fact, *inter alia,* as follows:

> 55. The Court finds overwhelming evidence that *in and around August, 1993* the minor child, Eric Young was neglected in that he [was] not receiving proper care in the custody of the

> Respondent mother and was living in an environment injurious to his welfare.

(Emphasis added.) While the evidence shows that the cleanliness of respondent's household was questionable prior to the removal of her child in August 1993, this was nine months prior to the filing of the petition to terminate respondent's parental rights and over a year before the termination proceeding. Additionally, at the time of the termination proceeding, the child had been in the custody of others for over a year.

We also conclude that the probability of repetition of neglect in this case is not shown by clear, cogent, and convincing evidence. Where evidence of prior neglect is presented, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. The evidence in the instant case shows that a considerable change in conditions had occurred by the time of the termination proceeding, namely, respondent's diagnosis of breast cancer and subsequent changes in lifestyle as testified to by Kelvin Clark.

[3] We also note that "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *Id.* at 713-14, 319 S.E.2d at 231. However, in the instant case, there was no prior adjudication of neglect with respect to respondent's first child. The only evidence in the record shows that respondent gave up the child for adoption. Thus, the evidence does not support the trial court's finding that "neglect is likely to continue in light of Respondent's prior history regarding her first minor child."

Therefore, we conclude that the evidence of neglect at the time of the termination proceeding does not rise to the statutory requirement of being clear, cogent, and convincing. Accordingly, we reverse the decision of the Court of Appeals on this issue.

[4] In her second argument, respondent contends that the trial court's conclusion of law that she abandoned her child and that abandonment was a ground upon which her parental rights could be terminated was not supported by clear, cogent, and convincing evidence. The Court of Appeals did not address abandonment; however, we granted discretionary review as to this issue.

N.C.G.S. § 7A-289.32 lists abandonment as one of the grounds for terminating parental rights, and provides in pertinent part:

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (8) The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition.

N.C.G.S. § 7A-289.32(8). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). In the instant case, since the petition for terminating respondent's parental rights was filed on 6 May 1994, respondent's behavior between 6 November 1993 and 6 May 1994 is determinative.

The trial court's findings of fact with respect to respondent's conduct during this time period are as follows:

> 40. When the minor child was in Glendon, [after 22 September 1993,] Respondent called at times but never went to visit the minor child. [R]espondent testified she had been told to stay away by [petitioner's sister's] husband.
>
> 41. Respondent never came to see Eric while he and Petitioner resided with [petitioner's brother and sister-in-law]. Petitioner did call Respondent to tell her that Eric was there. Petitioner told respondent to call to make arrangements to visit Eric. Respondent made no attempt to schedule such visits.
>
> . . . .
>
> 46. The respondent testified that she was not informed of the child's whereabouts while the child was living with Ms. Bransford and was not told the child was living with Mrs. Street until late April, 1994.
>
> 47. Respondent testified that after she learned the child was staying with Mrs. Street, she asked to take the child and learned that a temporary custody Order had been entered.

Also during this period of time, respondent was diagnosed with breast cancer, had surgery, and began radiation treatment and chemotherapy.

Assuming *arguendo* that the foregoing findings of fact are supported by clear, cogent, and convincing evidence, we nevertheless conclude that these findings do not support the conclusion that respondent willfully abandoned her minor child. It is not clear from the findings of fact that respondent's conduct "manifest[ed] a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. at 275, 346 S.E.2d at 514. The findings of fact indicate the probable hostile relationship between respondent and petitioner's family members who cared for Eric during this period of time. The findings of fact also indicate that there may have been a period of time during which respondent did not know the whereabouts of her child. However, upon learning that Eric was in the custody of Mrs. Street, she began visiting him. The trial court made no findings of fact with respect to respondent's diagnosis of breast cancer during this time, but the transcript shows that the court heard testimony about respondent's cancer during the termination proceeding. For example, the transcript contains petitioner's testimony that respondent had asked to see Eric before her surgery and that petitioner had denied her request. This conduct does not evidence a willful abandonment of her child on the part of respondent.

We conclude that the trial court's findings of fact do not support its conclusion that respondent abandoned her minor child. Accordingly, we reverse the trial court as to this issue.

In her third argument, respondent contends that the trial court erroneously ordered that her parental rights be terminated at the dispositional stage of the termination proceeding. Respondent contends, in the event that her first arguments are resolved against her, that the trial court nevertheless erred in concluding that the child's best interests dictated that her parental rights be terminated. Having resolved the issues of neglect and abandonment in respondent's favor, it is unnecessary for us to address this issue.

We find the instant case similar to *In re Alleghany County Dep't of Social Servs. v. Reber*, 75 N.C. App. 467, 331 S.E.2d 256 (1985), *aff'd per curiam*, 315 N.C. 382, 337 S.E.2d 851 (1986), in which the trial court terminated a mother's parental rights on grounds of abuse. After reviewing the evidence, the Court of Appeals held that the evi-

dence of abuse or the probability of its repetition did not meet the statutory standard of being clear, cogent, and convincing. *Id.* at 471, 331 S.E.2d at 258. Therefore, since the grounds for terminating the mother's parental rights did not exist at the time of the termination proceeding, the order terminating the mother's parental rights in the best interests of the child had to be reversed. *See id.* at 470-72, 331 S.E.2d at 258-59.

In the instant case, having reviewed all of the evidence, we conclude that the evidence is not sufficient to support the grounds for termination found by the trial court. As the Court of Appeals stated in *In re Alleghany County*:

> While we would not hesitate to uphold the "harsh judicial remedy," [*In re*] *Adcock*, 69 N.C. App. [222,] 227, 316 S.E.2d [347,] 350 [(1984)], of terminating parental rights in the best interest of the child if the basis for termination [was] supported by clear, cogent, and convincing evidence, as the statute requires, we conclude that this evidence does not provide such support.

Reber, 75 N.C. App. at 471-72, 331 S.E.2d at 259.

Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ROBERT EARL BUNNING

No. 403A92-2

(Filed 6 June 1997)

1. Jury § 268 (NCI4th)— capital sentencing—alternate juror—substituted after deliberations began—error

A new sentencing hearing was granted to a first-degree murder defendant where the jury began its deliberations after lunch, continued until evening recess, one of the jurors asked to be excused the next morning because she was a manic-depressive and could not continue, the court replaced this juror with an alternate, and the court instructed the jury to begin its delibera-

tions anew. Article I, Section 24 of the North Carolina Constitution guarantees the right to trial by jury and contemplates no more or less than a jury of twelve, but in this case eleven jurors fully participated in reaching the verdict and two participated partially. It cannot be said what influence the juror who was excused had on the other jurors, and the alternate did not have the benefit of the discussion by the other jurors which occurred before he was put on the jury. Furthermore, the statutes dealing with jurors in criminal cases clearly show that the General Assembly did not intend that an alternate be substituted after the jury has begun its deliberations. Finally, a harmless error analysis cannot be applied because, in order to determine prejudice, any hearing would invade the sanctity, confidentiality, and privacy of the jury process. A trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand. N.C.G.S. § 15A-1215(a); N.C.G.S. § 15A-1215(b); N.C.G.S. § 15A-2000(a)(2).

Am Jur 2d, Jury §§ 96 et seq.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial. 84 ALR2d 1288.

Propriety, under state statute or court rule, of substituting state trial juror with alternate after case has been submitted to jury. 88 ALR4th 711.

2. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing— defendant not a danger to himself or others in prison—testimony erroneously excluded

The trial court erred in a first-degree murder resentencing hearing by refusing to allow defendant's expert to testify that defendant would not be a danger in prison to himself or other inmates where the expert's opinion was relevant and would aid the jury in its sentencing recommendation. The issue of prejudice was not reached because a new hearing was granted on another issue.

Am Jur 2d, Criminal Law §§ 598 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Cornelius, J., at the 17 July 1995 Criminal Session of Superior Court, Guilford County, upon

a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 November 1996.

This is the second time this case has been heard in this Court. In *State v. Bunning*, 338 N.C. 483, 450 S.E.2d 462 (1994), we found no error in the defendant's conviction of first-degree murder, but granted the defendant a new sentencing hearing.

At the second sentencing hearing, the State's evidence showed that the defendant shot and killed Mr. Maurice Rupert Brooks with a single shot from a .25-caliber pistol. The shooting occurred at the conclusion of a card game at the boarding house where both men resided. The jury recommended the death penalty, and this sentence was imposed. The defendant appealed.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

Walter L. Jones for the defendant-appellant.

WEBB, Justice.

[1] The defendant has brought forward seven assignments of error. We shall discuss two of them. The defendant first assigns error to the court's substitution of an alternate juror for a juror who was excused after the jury had begun its sentencing deliberations. We believe this assignment of error has merit.

The jury began its deliberations shortly after lunch and continued until the evening recess. The next morning, one of the jurors asked to be excused because she said she was a manic-depressive and could not continue with the trial. The court removed this juror and replaced her with an alternate. The court instructed the jury to begin its deliberations anew. The defendant says this was error.

This case brings to the Court the question of whether an alternate juror may be substituted for a juror after deliberations have begun in a sentencing hearing. It is a question of first impression in this jurisdiction, but we have other cases dealing with the subject of alternate jurors which give us guidance. In *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975), we held that it was error for an alternate juror to be in the room with the jury when the members of the jury were deliberating, and such an error cannot be harmless. We said, relying on *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971); *State v. Dalton*, 206 N.C. 507, 174 S.E. 422 (1934); *Whitehurst v. Davis*, 3 N.C. 113 (1800) (per curiam); *State v. Alston*, 21 N.C. App. 544, 204 S.E.2d 860

(1974), that Article I, Section 24 of the North Carolina Constitution, which guarantees the right to trial by jury, contemplates no more or less than a jury of twelve persons.

In this case, the jury verdict was reached by more than twelve persons. The juror who was excused participated in the deliberations for half a day. We cannot say what influence she had on the other jurors, but we have to assume she made some contribution to the verdict. The alternate juror did not have the benefit of the discussion by the other jurors which occurred before he was put on the jury. We cannot say he fully participated in reaching a verdict. In this case, eleven jurors fully participated in reaching a verdict, and two jurors participated partially in reaching a verdict. This is not the twelve jurors required to reach a valid verdict in a criminal case.

The statutes dealing with jurors in criminal cases do not deal specifically with the question of substituting an alternate for a juror, but we believe they show that it cannot be done after jury deliberation has begun at the sentencing hearing. N.C.G.S. § 15A-1215(a) provides in part: "Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged upon the final submission of the case to the jury." N.C.G.S. § 15A-1215(a) (1988). If alternate jurors must be discharged when the case is submitted to the jury, they cannot be substituted for jurors who subsequently become incapacitated.

N.C.G.S. § 15A-1215(b) provides in part that in capital cases: "The alternate jurors shall be retained during the deliberations of the jury on the issue of guilt or innocence under such restrictions, regulations and instructions as the presiding judge shall direct." N.C.G.S. § 15A-1215(b). If the alternate jurors must be released when the penalty phase begins, as the statute implies must be done, they cannot sit as jurors at the penalty phase of the trial.

N.C.G.S. § 15A-2000(a)(2), which deals with capital trials, provides in part:

> If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel.

N.C.G.S. § 15A-2000(a)(2) (1988) (amended 1994). If an alternate juror can become a part of the jury only before the jury begins its

deliberations on the penalty phase of the trial, the alternate cannot be substituted after the jury begins its deliberations.

These three sections clearly show that the General Assembly did not intend that an alternate can be substituted for a juror after the jury has begun its deliberations.

The State contends these three sections do not proscribe the substitution of an alternate juror during jury deliberations in a capital sentencing hearing. It says that they show that the General Assembly contemplated such a substitution. The State argues first that N.C.G.S. § 15A-1215(a), which provides that alternates "must be discharged" when the case is finally submitted to the jury, does not apply to capital cases. N.C.G.S. § 15A-1215(b) and N.C.G.S. § 15A-2000(a)(2), which deal with capital cases, do not have this provision, and the State contends this makes the legislative intent ambiguous. It says that the ambiguous sections can be construed to authorize the action which was taken in this case. We see no reason why N.C.G.S. § 15A-1215(a) should not apply to capital cases. The section does not so limit itself, and it is not inconsistent with the other two sections, which deal specifically with capital cases. Assuming N.C.G.S. § 15A-1215(a) does not apply to capital cases, the other two sections, for reasons we have set forth in this opinion, show that the legislative intent is that an alternate juror cannot be substituted as was done in this case.

The State contends that if there is error, we should apply a harmless error analysis. This we cannot do. A trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand. In order to determine whether there was prejudice, any hearing would "invade[] the sanctity, confidentiality, and privacy of the jury process," which we should not do. *State v. Bindyke*, 288 N.C. at 627, 220 S.E.2d at 533.

The defendant is entitled to a new sentencing hearing.

[2] Next, we address the defendant's contention that the trial court erred under *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986), when it refused to allow the defendant's expert to testify that, in her opinion, the defendant would not be a danger in prison to himself or other inmates.

The defendant presented the expert testimony of Dr. Claudia Coleman, a psychologist, regarding the defendant's background and behavior, including his mental and physical health. The trial court

had accepted the witness as an expert and allowed her to testify as to these issues. However, the State objected to the question of whether, in the expert's opinion, the defendant would be a danger to himself or others in the structured environment of a prison. The trial court sustained this objection. The expert stated her opinion, for the record and outside the presence of the jury, that she believed the defendant would not be "an imminent danger to himself or to others."

In *Skipper v. South Carolina*, the United States Supreme Court held that this type of testimony should be presented to the jury. The Court reasoned that the defendant's ability to adjust well to life in prison is "by its nature relevant to the sentencing determination." *Id.* at 7 n.2, 90 L. Ed. 2d at 8 n.2. This Court followed the holding of *Skipper* in *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995), and found error in the exclusion of an opinion similar to that of the instant case. We noted that the expert in that case was a qualified expert who had conducted extensive interviews with the defendant and was thereby able to render an expert opinion "that would have assisted the jury in determining whether defendant would adjust well to prison life." *Id.* at 86, 451 S.E.2d at 557.

The State argues that *Skipper* and *Rouse* are satisfied because here the expert did testify that the defendant adjusted well to prison life in the past; he experienced no problems at Central Prison prior to trial; he functioned well in a structured prison environment; and he could be productive in such an environment. Therefore, the trial court did not err in omitting the expert's opinion that the defendant was not dangerous. We disagree.

The expert's opinion is relevant and would aid the jury in its sentencing recommendation. The evidence should have been admitted. Because we have already granted the defendant a new sentencing hearing, we do not reach the issue of whether this error is harmless.

NEW CAPITAL SENTENCING PROCEEDING.

ROGER D. MESSER AND WILLIAM L. HUNT v. TOWN OF CHAPEL HILL

No. 72A97

(Filed 6 June 1997)

Appeal and Error § 175 (NCI4th)— rezoning—constitutional challenge—sale of property—mootness of appeal

A challenge to the constitutionality of a rezoning was dismissed as moot where, of the two plaintiffs, the heirs of one had sold the property to a third party and the complaint of the other did not allege any interest sufficient to allow him to maintain an independent constitutional challenge. Plaintiffs' contention that their claim for damages renders the mootness doctrine inapplicable is without merit; the sale of the property establishes beyond peradventure that the property continued to have a practical use and reasonable value and a mere diminution in value from the rezoning, even a severe one, is not compensable. The contention that the town waived the mootness question when it was not raised in the trial court or the Court of Appeals was also without merit; the Court will dismiss the action *ex mero motu* whenever it appears that no genuine controversy between the parties exists.

Am Jur 2d, Appellate Review §§ 640 et seq.

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 125 N.C. App. 57, 479 S.E.2d 221 (1997), affirming an order entered by Stephens (Donald W.), J., on 2 March 1995 in Superior Court, Orange County, allowing defendant's motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted. Heard in the Supreme Court 15 May 1997.

Robert A. Hassell and Lyman & Ash, by Cletus P. Lyman and Michael S. Fettner, for plaintiff-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for defendant-appellee.

PER CURIAM.

By this action, plaintiffs challenge the constitutionality of the rezoning by defendant-town of an undeveloped tract of land consist-

ing of approximately 150 acres and located in the Laurel Hill area of Chapel Hill, a part of defendant-town's extraterritorial zoning and planning jurisdiction. Plaintiff William L. Hunt, now deceased and represented in this action by the executors of his estate, acquired the tract in 1937. Plaintiff Roger D. Messer is alleged to be an interested party with respect to the property.

The trial court dismissed the complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The Court of Appeals affirmed. *Messer v. Town of Chapel Hill*, 125 N.C. App. 57, 479 S.E.2d 221 (1997). Judge Greene dissented, and plaintiffs exercised their right to appeal on the basis of the dissent. N.C.G.S. § 7A-30(2) (1995).

We need not reach the merits of the appeal. On 4 April 1997 defendant filed with this Court a motion to dismiss the appeal on the grounds of mootness. Documents attached to the motion establish, and plaintiffs do not dispute, that on 4 April 1996, while plaintiffs' appeal was pending in the Court of Appeals, plaintiff William L. Hunt (since deceased) sold the property in question to Marin Development Company for the sum of $1,500,000. Defendant-town contends that this renders plaintiffs' appeal moot. We agree.

"Standing to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement." *Maines v. City of Greensboro*, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980). Standing is initially determined by whether an actual controversy exists between the parties when the action is filed. *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986). However,

> [w]henever during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law. If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action.

Simeon v. Hardin, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citations omitted); *see also 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).

The 4 April 1996 transfer of the property from plaintiff William L. Hunt to Marin Development Company clearly moots any controversy between him (now his executors) and defendant-town as to the constitutionality of the amendment to the zoning ordinance. The complaint does not allege any interest in plaintiff Roger D. Messer sufficient to allow him to maintain a constitutional challenge to the amendment apart from plaintiff Hunt.

Plaintiffs' contention that their claim for damages renders the mootness doctrine inapplicable is without merit. The sale of the property for the sum of $1,500,000 establishes beyond peradventure that the property continued to have "a practical use and a reasonable value" following the amendment to the zoning ordinance. *Finch v. City of Durham*, 325 N.C. 352, 364, 384 S.E.2d 8, 15, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989). A mere diminution in value from the rezoning, even a severe one, is not compensable. *Id.* at 365, 384 S.E.2d at 15.

Plaintiffs' contention that defendant-town has waived the mootness question by failing to raise it in the trial court or the Court of Appeals is also without merit. "Whenever it appears that no genuine controversy between the parties exists, the Court will dismiss the action *ex mero motu*." *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 29, 199 S.E.2d 641, 650 (1973).

For the reasons stated, the appeal is dismissed as moot. "While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals." *State ex rel. Util. Comm'n v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 290, 221 S.E.2d 322, 325 (1976). Accordingly, the opinion of the Court of Appeals is vacated.

APPEAL DISMISSED; COURT OF APPEALS OPINION VACATED.

STATE OF NORTH CAROLINA v. JAMES CURTIS ROGERS

No. 367PA96

(Filed 6 June 1997)

False Pretenses, Cheats, and Related Offenses § 39 (NCI4th)— obtaining property by false pretenses—writing and passing a worthless check in exchange for property—sufficient

An unpublished opinion by the Court of Appeals was reversed where that opinion vacated judgments after concluding as a matter of law that a person cannot be prosecuted on an indictment for obtaining property by false pretenses where the indictment alleges nothing more than the defendant's passing of a worthless check in exchange for property. Writing and passing a worthless check in exchange for property, standing alone, is sufficient to uphold a conviction for obtaining property under false pretenses and language in *State v. Freeman*, 308 N.C. 502, is disavowed and disapproved to the extent it may tend to indicate that an additional misrepresentation beyond the presentation of a worthless check in exchange for property is required to uphold a conviction for obtaining property by false pretenses in violation of N.C.G.S. § 14-100. In addition, *State v. Freeman*, 79 N.C. App. 177 and *State v. Hopkins*, 70 N.C. App. 530, are overruled insofar as they require proof of some additional misrepresentation beyond the presentation of a worthless check in such cases.

Am Jur 2d, Property § 36.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of a unanimous panel of the Court of Appeals, 123 N.C. App. 359, 473 S.E.2d 696 (1996), vacating judgments entered by Cobb, J., on 6 December 1995 in Superior Court, Rowan County. Heard in the Supreme Court 19 March 1997.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State-appellant.

Thomas M. King for defendant-appellee.

MITCHELL, Chief Justice.

Defendant, James Curtis Rogers, was found guilty by a jury of the felony of obtaining property by false pretenses and of being an habit-

ual felon. Judge Cobb sentenced defendant to a minimum term of 100 months and a maximum term of 129 months.

Evidence presented at trial tended to show that defendant paid for a motorcycle and accessories with a check written on an account in his name at the State Employees' Credit Union. The check was returned to the seller because it had been written on a closed account. Defendant admitted that he knew the account was closed at the time he wrote the check. The trial court denied defendant's motion to dismiss the false pretenses charge for insufficiency of the evidence and denied defendant's request that the crime of obtaining property in return for a worthless check be submitted as a lesser-included offense of obtaining property by false pretenses.

In an unpublished opinion, the Court of Appeals vacated the judgments against defendant after concluding as a matter of law that a person cannot be prosecuted on an indictment for obtaining property by false pretenses where the indictment alleges nothing more than the defendant's passing of a worthless check in exchange for property. Because the judgment for obtaining property by false pretenses was vacated, the Court of Appeals also vacated the habitual felon judgment. We allowed the State's petition for discretionary review on 10 October 1996.

The sole issue on appeal is whether the writing and passing of a worthless check in exchange for property, standing alone, is sufficient to uphold a conviction for obtaining property under false pretenses. We conclude that it is and reverse the decision of the Court of Appeals.

In *State v. Freeman*, 59 N.C. App. 84, 295 S.E.2d 619 (1982), *rev'd on other grounds*, 308 N.C. 502, 302 S.E.2d 779 (1983), the defendant argued that he could not be prosecuted under N.C.G.S. § 14-100 (obtaining property under false pretenses) because N.C.G.S. § 14-106 (obtaining property in return for worthless check, draft, or order) or N.C.G.S. § 14-107 (worthless check) more specifically fit his alleged activities. The Court of Appeals disagreed, holding that "[a] single act or transaction may violate different statutes." 59 N.C. App. at 87, 295 S.E.2d at 621. On discretionary review, this Court also rejected the defendant's argument that the trial court erred in denying his motion to dismiss the false pretense charge where the evidence merely showed that the defendant uttered a worthless check in violation of N.C.G.S. § 14-106 or § 14-107. *Freeman*, 308 N.C. at 511, 302 S.E.2d at 784.

This Court's decision in *Freeman* has been misinterpreted by the Court of Appeals as holding that prosecution for false pretense rather than a worthless check offense is permissible only if there is an additional misrepresentation beyond the presentation of a worthless check. We expressly disavow and disapprove any language in this Court's opinion in *Freeman* to the extent it may tend to indicate that an additional misrepresentation beyond the presentation of a worthless check in exchange for property is required to uphold a conviction for obtaining property by false pretenses in violation of N.C.G.S. § 14-100. In addition, we overrule the Court of Appeals' decisions in *State v. Freeman*, 79 N.C. App. 177, 339 S.E.2d 56, *cert. denied*, 317 N.C. 338, 346 S.E.2d 144 (1986), and *State v. Hopkins*, 70 N.C. App. 530, 320 S.E.2d 409 (1984), insofar as they require proof of some additional misrepresentation beyond the presentation of a worthless check in such cases.

In the opinion below, the Court of Appeals relied upon *Hopkins* to vacate defendant's conviction of the felony of obtaining property by false pretenses. Having overruled *Hopkins*, we reverse the unpublished decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Rowan County, for reinstatement of the judgments against defendant both for obtaining property by false pretenses and for being an habitual felon.

REVERSED AND REMANDED.

ONSLOW COUNTY, PLAINTIFF V. GUY J. PHILLIPS, AND WIFE, LYNDA A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS AND WIFE, LYNDA A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER, DEFENDANTS, & BETTY M. RUSSELL, ALEX WARLICK, JR., TRUSTEE, NCNB NATIONAL BANK OF NORTH CAROLINA NOW NATIONSBANK, MARSHALL F. DOTSON, JR., TRUSTEE, LIENHOLDERS.

ONSLOW COUNTY, PLAINTIFF V. GUY J. PHILLIPS, AND WIFE, LYNDA A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS, AND WIFE, LYNDA A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER, DEFENDANTS

ONSLOW COUNTY, PLAINTIFF V. GUY J. PHILLIPS, AND WIFE, LYNDA A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS, AND WIFE, LYNDA A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER, DEFENDANTS, & NCNB NATIONAL BANK OF NORTH CAROLINA NOW NATIONSBANK, MARSHALL F. DOTSON, JR., TRUSTEE, LIENHOLDERS

ONSLOW COUNTY, PLAINTIFF V. GUY J. PHILLIPS AND WIFE, LYNDA A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS, AND WIFE, LYNDA A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER, DEFENDANTS

No. 385A96

(Filed 6 June 1997)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 317, 473 S.E. 2d 643 (1996), which affirmed in part and reversed in part, and remanded an order entered by Wainwright, J., on 9 February 1995 in Superior Court, Onslow County. Heard in the Supreme Court 12 May 1997.

Roger A. Moore for plaintiff-appellant.

Jeffrey S. Miller for defendant-appellees.

North Carolina Association of County Commissioners, by Lesley F. Moxley, Assistant Durham County Attorney; James B. Blackburn, III, General Counsel; and Kimberly M. Grantham, Assistant General Counsel, amicus curiae.

PER CURIAM.

The plaintiff's right of appeal arises from an opinion of Judge Walker concurring in part and dissenting in part from the majority opinion in the Court of Appeals. The sole issue before this Court by virtue of Judge Walker's dissent is whether the majority of the panel

in the Court of Appeals erred in that part of its opinion holding that the plaintiff was not entitled to summary judgment on defendants' counterclaim for violation of defendants' constitutional rights. For the reasons stated in the concurring and dissenting opinion of Judge Walker, we conclude that the majority did err in this regard, and accordingly, we reverse that part of the opinion of the majority below. Judge Walker concurred with the majority as to the other issues in its opinion in the Court of Appeals, and those issues are not before us. Therefore, as to those issues, the decision of the Court of Appeals remains in effect.

For the foregoing reasons, the decision of the Court of Appeals is reversed in part, and this case is remanded to that court for further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

PRESBYTERIAN-ORTHOPAEDIC HOSPITAL, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND MERCY HOSPITAL, INC., INTERVENOR-RESPONDENT, AND STANLY MEMORIAL HOSPITAL, INC., INTERVENOR-RESPONDENT

No. 329PA96

(Filed 6 June 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 529, 470 S.E.2d 831 (1996), reversing and remanding in part and affirming in part a final decision of the North Carolina Department of Human Resources, Division of Facility Services, entered 8 June 1994. Heard in the Supreme Court 13 May 1997.

Parker, Poe, Adams & Bernstein L.L.P., by Renée J. Montgomery and James C. Thornton, for petitioner-appellant and -appellee.

Michael F. Easley, Attorney General, by James A. Wellons, Special Deputy Attorney General, for respondent-appellee.

Poyner & Spruill, L.L.P., by Mary Beth Johnston, for intervenor-respondent-appellant and -appellee Mercy Hospital.

Maupin Taylor Ellis & Adams, P.A., by Robert L. Wilson, Jr., James E. Gates, and Peter D. Holthausen, for intervenor-respondent-appellant and -appellee Stanly Memorial Hospital.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

SHERRY D. THOMAS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFF V. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DEFENDANT, AND SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DAN GLICKMAN, INTERVENOR-DEFENDANT

No. 24A97

(Filed 6 June 1997)

Appeal by defendant North Carolina Department of Human Resources pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 124 N.C. App. 698, 478 S.E.2d 816 (1996), reversing and remanding a judgment that denied plaintiff's motion for summary judgment, granted the federal defendant's motion for judgment on the pleadings, granted the state defendant's motion to dismiss, and dismissed the complaint for failure to state a claim upon which relief can be granted, such judgment entered by Cornelius, J., on 4 October 1995 in Superior Court, Guilford County. Heard in the Supreme Court 15 May 1997.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Jim D. Cooley, and North Carolina Justice & Community Development Center, by William D. Rowe, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Robert J. Blum, Special Deputy Attorney General, and Elizabeth L. Oxley, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

AFFIRMED.

DORIS HUMPHRIES, ADMINISTRATOR OF THE ESTATE OF STACEY HUMPHRIES, DECEASED; AND TYRONE HUMPHRIES v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 549PA96

(Filed 6 June 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 124 N.C. App. 545, 479 S.E.2d 27 (1996), reversing a decision and order entered by the North Carolina Industrial Commission on 28 November 1995. Heard in the Supreme Court 14 May 1997.

Judith G. Behar and Anne A. Isaac for plaintiff-appellants.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, and Don Wright, Assistant Attorney General, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JACKIE L. BIVENS, MARY E. BIVENS AND ELLIS M. COTTLE v. DEBORAH LYNN COTTLE (WESTLAKE)

No. 496PA95

(Filed 6 June 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(1) and on discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 467, 462 S.E.2d 829 (1995), reversing an order granting custody of defendant's minor children to defendant by Lanier (Russell J., Jr.), J., entered on 11 October 1994 in District Court, Duplin County. Heard in the Supreme Court 16 October 1996.

Gailor & Associates, PLLC, by Carole S. Gailor, for plaintiff-appellees Jackie and Mary Bivens.

Edward P. Hausle, P.A., by Edward P. Hausle; and Lea, Clyburn & Rhine, by James W. Lea, III, and J. Albert Clyburn, for defendant-appellant.

PER CURIAM.

APPEAL DISMISSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

NANCY GAY MANSFIELD v. GOLDEN CORRAL CORPORATION

No. 5A97

(Filed 6 June 1997)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 124 N.C. App. 670, 478 S.E.2d 675 (1996), affirming a judgment entered by Barnette, J., on 21 August 1995 in Superior Court, Alamance County. Heard in the Supreme Court 12 May 1997.

Law Offices of Gary R. Poole, by Gary R. Poole, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Leigh Ann Garner, for defendant-appellee.

PER CURIAM.

AFFIRMED.

TRAVIS F. DAUGHTRY AND GAYLE DAUGHTRY BIZZELL, CO-EXECUTORS OF THE ESTATE OF RUTH ROBERTS DAUGHTRY v. ROBIN GENE CASTLEBERRY AND GENE CASTLEBERRY

No. 459PA96

(Filed 6 June 1997)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 671, 474 S.E.2d 137 (1996), affirming an order entered by Brewer, J., on 27 December 1994 in Superior Court, Sampson County. Plaintiffs' petition for writ of certiorari to review decision of the North Carolina Court of Appeals was allowed 7 February 1997. Heard in the Supreme Court 13 May 1997.

Wallace, Morris & Barwick, P.A., by Elizabeth A. Heath and Edwin M. Braswell, Jr., for plaintiff-appellants.

Bailey & Dixon, L.L.P., by David S. Coats, for defendant-appellees.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. GRANVILLE L. HENDRICKSON

No. 492PA96

(Filed 6 June 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(1) and on discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 124 N.C. App. 150, 476 S.E.2d 389 (1996), finding no error in an order entered on 20 April 1995 by Thompson, J., in Superior Court, Wake County, denying defendant's motion to suppress evidence. Heard in the Supreme Court 13 May 1997.

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

John F. Oates, Jr., for defendant-appellant.

PER CURIAM.

APPEAL DISMISSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

REBECCA DUNKLEY v. LEE H. SHOEMATE, ERIC B. MUNSON, DAVID S. JANOWSKY, PRESTON A. WALKER, MARY F. LUTZ, DOE ONE, DOE TWO, AND DOE THREE

No. 28PA97

(Filed 6 June 1997)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order of the Court of Appeals, entered 9 December 1996, dismissing the plaintiff's appeal. Heard in the Supreme Court 14 May 1997.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., and Frank W. Hallstrom, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay, for defendant-appellee Shoemate.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Kenyann G. Brown, on behalf of Nationwide Mutual Insurance Company and the Alliance of American Insurers, amici curiae.

PER CURIAM.

The interlocutory order of the superior court, from which the plaintiff appealed, affects a substantial right which the plaintiff will lose if the order is not reviewed before final judgment. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1977); *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967). It was error to dismiss the appeal. We reverse the order dismissing the appeal and remand to the Court of Appeals for a hearing on the merits.

REVERSED AND REMANDED.

BAILEY v. BAILEY

No. 201P97

Case below: 125 N.C.App. 742

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

BARBER v. MARTIN

No. 219P97

Case below: 125 N.C.App. 746

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

BAYNOR v. COOK

No. 78P97

Case below: 125 N.C.App. 274

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

BENCHMARK CAROLINA AGGREGATES v.
MARTIN MARIETTA MATERIALS

No. 194P97

Case below: 125 N.C.App. 666

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

BICKET v. McLEAN SECURITIES, INC.

No. 1P97

Case below: 124 N.C.App. 548

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

BOOE v. PASSERALLO

No. 197P97

Case below: 125 N.C.App. 742

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

CAROLINA BUILDERS CORP. v. ALEXANDER SCOTT GROUP

No. 122PA97

Case below: 125 N.C.App. 615

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997.

CARTER v. STANLY COUNTY

No. 188P97

Case below: 125 N.C.App. 628

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

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

No. 21P97

Case below: 124 N.C.App. 669

Petition by petitioner (Elizabeth Childress) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 June 1997.

CHILDRESS v. TRION, INC.

No. 167P97

Case below: 125 N.C.App. 588

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

CITY OF WINSTON-SALEM v. YARBROUGH

No. 138P97

Case below: 125 N.C.App. 420

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

COLLINS v. COLLINS

No. 44P97

Case below: 125 N.C.App. 113

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

COMMISSIONER OF LABOR v. HOUSE OF RAEFORD FARMS

No. 504PA96

Case below: 124 N.C.App. 349

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997. Motion by Attorney General to dismiss petition for discretionary review denied 5 June 1997.

COOK v. WAKE COUNTY HOSPITAL SYSTEM

No. 202A97

Case below: 125 N.C.App. 618

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 June 1997.

CROUCH v. JONES

No. 94P97

Case below: 125 N.C.App. 421

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

CURRY v. FIRST FEDERAL SAVINGS AND LOAN ASSN.

No. 61P97

Case below: 125 N.C.App. 108

Petition by plaintiffs (Charlotte T. Curry et al) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

DWYER v. THURBER

No. 225P97

Case below: 125 N.C.App. 747

Petition by defendant (Mary Caroline Simmons Thurber) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

EDWARDS v. WEST

No. 174A97

Case below: 125 N.C.App. 742

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 June 1997.

GRASTY v. GRASTY

No. 223P97

Case below: 125 N.C.App.736

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

HEFTER v. CORNET, INC.

No. 180A97

Case below: 125 N.C.App. 743

Notice of appeal by defendants pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 5 June 1997.

HUFF v. AUTOS UNLIMITED, INC.

No. 246P97

Case below: 124 N.C.App. 410

Petition by defendants for writ of supersedeas and motion for temporary stay denied 5 June 1997. Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 June 1997.

HUNT v. N.C. DEPT. OF LABOR

No. 110PA97

Case below: 125 N.C.App. 293

Petition by N.C. Department of Labor for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997.

IN RE SPRINGMOOR, INC.

No. 79PA97

Case below: 125 N.C.App. 184

Petition by appellant for writ of supersedeas allowed 5 June 1997. Petition by appellant for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997.

JONES v. PIGGLY WIGGLY OF ROCKY MOUNT

No. 160P97

Case below: 125 N.C.App. 615

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

JORDAN v. CREW

No. 221P97

Case below: 125 N.C.App. 712

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

KING v. STATE OF NORTH CAROLINA

No. 137P97

Case below: 125 N.C.App. 379

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

KNIGHT PUBLISHING CO. v. CHASE MANHATTAN BANK

No. 70P97

Case below: 125 N.C.App. 1

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

KURTZMAN v. APPLIED ANALYTICAL INDUSTRIES

No. 103PA97

Case below: 125 N.C.App. 261

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997.

LAFFERTY v. LAFFERTY

No. 129P97

Case below: 125 N.C.App. 611

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

LEDFORD v. ASHEVILLE HOUSING AUTHORITY

No. 162P97

Case below: 125 N.C.App. 597

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

LIBERTY MUT. INS. CO. v. DITILLO

No. 220A97

Case below: 125 N.C.App. 701

Petition by defendant (Donna T. Stilwell) for discretionary review pursuant to G.S. 7A-31 and Appellate Rules 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 June 1997. Petition by defendant (Paula C. Burgoon) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 June 1997. Petition by plaintiffs (Liberty Mutual Insurance Company and State Farm Mutual Automobile Insurance Company) for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 June 1997.

MARKHAM v. NATIONWIDE MUT. FIRE INS. CO.

No. 163P97

Case below: 125 N.C.App. 443

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

MELVIN v. HOME FEDERAL SAVINGS & LOAN ASSN.

No. 195P97

Case below: 125 N.C.App. 660

Petition by defendant (Arthur Lane) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

MESSER v. TOWN OF CHAPEL HILL

No. 72A97

Case below: 125 N.C.App. 57

Petition by defendant (Town of Chapel Hill) to dismiss appeal allowed 5 June 1997.

NATIONSBANK OF N.C. v. AMERICAN DOUBLOON CORP.

No. 164P97

Case below: 125 N.C.App. 494

Petition by defendants (Parsons and Resources Planning Corp.) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

PHILLIPS v. SANDERS

No. 177P97

Case below: 125 N.C.App. 615

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

POOLE v. COPLAND, INC.

No. 145PA97

Case below: 125 N.C.App. 235

Upon consideration of plaintiff's petition for discretionary review and defendant's (Copland, Inc.) petition for discretionary review, the following order is entered: The petitions are allowed 5 June 1997 for the limited purpose of addressing the issues raised in the petitions as to the applicability of the "thin skull" rule and the instruction given by the trial court. All other issues requested for review are denied 5 June 1997.

POWERS v. POWERS

No. 229P97

Case below: 126 N.C.App. 225

Motion by defendant for temporary stay denied 15 May 1996. Petition by defendant for writ of supersedeas denied 15 May 1997. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 15 May 1997.

RECREECH, INC. v. SWARINGEN

No. 199P97

Case below: 125 N.C.App. 743

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

RENNER v. HAWK

No. 121P97

Case below: 125 N.C.App. 483

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

SANDERS v. WEST

No. 153P97

Case below: 125 N.C.App. 616

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

SCOTT v. BYRD FOOD STORES

No. 168P97

Case below: 125 N.C.App. 616

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

SMITH v. JOHNSON

No. 166P97

Case below: 125 N.C.App. 603

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. BANKS

No. 193PA97

Case below: 125 N.C.App. 681

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question denied 5 June 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997.

STATE v. BOYD

No. 76P97

Case below: 124 N.C.App. 230

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 June 1997.

STATE v. BROWN

No. 120P97

Case below: 120 N.C.App. 647

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 5 June 1997.

STATE v. CHEATHAM

No. 198P97

Case below: 125 N.C.App. 744

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. COX

No. 154P97

Case below: 125 N.C.App. 616

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. CRISP

No. 224P97

Case below: 126 N.C.App. 30

Notice of appeal by defendant (substantial constitutional question) dismissed 5 June 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. ELLEDGE

No. 183P97

Case below: 125 N.C.App. 744

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. FARRISH

No. 173P97

Case below: 125 N.C.App. 745

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. FLETCHER

No. 124P97

Case below: 125 N.C.App. 505

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. FOUNTAIN

No. 136P97

Case below: 125 N.C.App. 422

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. HARRIS

No. 30P97

Case below: 125 N.C.App. 212

Petition by defendant (Tommy Lee Martin) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. JACKSON

No. 244PA97

Case below: 126 N.C.App. 129

Motion by Attorney General for temporary stay allowed 27 May 1997.

STATE v. JONES

No. 196P97

Case below: 123 N.C.App. 355

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 June 1997.

STATE v. JONES

No. 435A90-2

Case below: Jones County Superior Court

Upon consideration of defendant's petition for writ of certiorari, the following order is entered: The case is remanded 5 June 1997 to the trial court for a hearing on whether defendant voluntarily waived his right to testify after being instructed by his attorney as to that right.

STATE v. MASON

No. 105P97

Case below: 125 N.C.App. 216

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. McHONE

No. 148A91-2

Case below: Surry County Superior County

Upon consideration of defendant's petition for writ of certiorari to review the Superior Court orders dated 26 August and 9 December 1996 denying defendant's motion for appropriate relief, the petition is allowed 5 June 1997 for the limited purpose of reviewing the following issues: (1) defendant's right to a hearing on his motion for appro-

priate relief pursuant to N.C.G.S. § 15A-1420(c); and (2) defendant's right, if any, to discovery pursuant to N.C.G.S. § 15A-1415(f).

STATE v. McLAUGHLIN

No. 89P97

Case below: 125 N.C.App. 420

Notice of appeal by defendant (substantial constitutional question) dismissed 5 June 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. McNEILL

No. 184A96

Case below: Wake County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County, denied 5 June 1997.

STATE v. MITCHELL

No. 156P97

Case below: 125 N.C.App. 617

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. MOORE

No. 191P97

Case below: 125 N.C.App. 745

Notice of appeal by Attorney General (substantial constitutional question) dismissed 5 June 1997. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. WALKER

No. 23P97

Case below: 124 N.C.App. 788

Notice of appeal by defendant (substantial constitutional question) dismissed 5 June 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE v. WARREN

No. 206P97

Case below: 96 N.C.App. 511

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 June 1997.

STATE v. ZAMORA

No. 182P97

Case below: 125 N.C.App. 748

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STONE v. N.C. DEPT. OF LABOR

No. 81PA97

Case below: 125 N.C.App. 288

Petition by N.C. Department of Labor for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997.

TAYLOR v. NATIONSBANK CORP.

No. 161PA97

Case below: 125 N.C.App. 515

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997. Justice FRYE recused.

TELEFLEX INFORMATION SYSTEMS v. ARNOLD

No. 64P97

Case below: 124 N.C.App. 673

Petition by plaintiff (Teleflex) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 June 1997. Petition by plaintiff (Teleflex) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

THACKER v. CITY OF WINSTON-SALEM

No. 178P97

Case below: 125 N.C.App. 671

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

TRAILMOBILE, INC. v. WILSON TRAILER SALES & SERVICE

No. 112PA97

Case below: 125 N.C.App. 617

Plaintiffs' petition for writ of mandamus, petition for prohibition, notice of appeal (constitutional question), and petition for discretionary review under G.S. 7A-31 are consolidated and disposed of as follows: The case is remanded to the Court of Appeals 5 June 1997 for reconsideration of the following sentence contained in the court's *per curium* opinion entered in the case: "In our discretion, we vacate all other remaining orders previously entered in this case."

VAN EVERY v. McGUIRE

No. 159PA97

Case below: 125 N.C.App. 578

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 June 1997.

VIRGINIA MUT. INS. CO. v. NEWCOMB

No. 210P97

Case below: 125 N.C.App. 617

Petition by defendant (Kimberly Amburn) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

WALL v. NORTH HILLS PROPERTIES, INC.

No. 141P97

Case below: 125 N.C.App. 357

Petition by defendants (North Hills and Aetna Life) for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

WARD v. LYALL

No. 211P97

Case below: 125 N.C.App. 732

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 5 June 1997.

WINN v. STATE OF NORTH CAROLINA

No. 149P97

Case below: 124 N.C.App. 788

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 June 1997.

WOODSTONE APTS. v. STYWALT

No. 75P97

Case below: 125 N.C.App. 215

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 June 1997.

STATE OF NORTH CAROLINA v. DANIEL CUMMINGS, JR.

No. 4A95

(Filed 24 July 1997)

1. Jury § 70 (NCI4th)— capital murder—jury selection—requested instruction—presumption of innocence—denied

The trial court did not err in a capital first-degree murder prosecution by denying defendant's requested instructions during jury selection that the presumption of innocence remained in place even though they would be asked questions concerning the possible sentencing phase. The trial court instructed the jury as required by N.C.G.S. § 15A-1213; the court in a capital case is not required to give any instructions other than those mandated by statute and nothing in this statute requires the court to instruct prospective jurors concerning the presumption of innocence. Moreover, the court correctly instructed the impaneled jurors of defendant's presumption of innocence at the appropriate time.

Am Jur 2d, Jury §§ 189 et seq.

2. Criminal Law § 1379 (NCI4th Rev.)— capital murder—jury selection—instructions—Issue Three

The trial court did not err in a capital prosecution for first-degree murder in its instruction during jury selection on Issue Three, which involves weighing aggravating and mitigating circumstances. Although defendant contended that the instructions improperly shifted the burden of proof to defendant to gain a unanimous verdict on Issue Three, the instructions given by the court during jury selection were a correct statement of the law in that the jury is required to reach a unanimous verdict on its sentencing recommendation regardless of whether it is death or life imprisonment, the trial court correctly stated the four issues put before the jury during the penalty phase of the trial, the jurors were reminded that the instructions they had received were simply a short statement of procedure, the jurors were given complete instructions on sentencing procedure when they retired, and those instructions were accurate statements of the law and in no way shifted the burden of proof to defendant to gain a unanimous verdict on Issue Three.

Am Jur 2d, Criminal Law §§ 598, 599, 609.

3. Jury § 260 (NCI4th)— capital murder—jury selection—peremptory challenge—not based on race

The trial court did not err during jury selection for a capital first-degree murder prosecution by overruling defendant's objection to the peremptory challenge of a prospective juror where defendant had argued that the challenge was based upon race. The reasons for the challenge volunteered by the prosecutor involved hesitancy about the death penalty and the juror's knowledge of persons and places related to controlled substances and crimes of violence. Reservations by jurors concerning their ability to impose the death penalty constitute a racially neutral basis for a peremptory challenge, and prosecutors may exercise peremptory challenges in order to select a jury that is stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement problems and pressures.

Am Jur 2d, Jury § 234.

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 Caucasian persons, as a racial group, from criminal jury—post-*Batson* state cases. 47 ALR5TH 259.

4. Jury § 219 (NCI4th)— jury selection—refusal to impose death penalty—challenge for cause

The trial court did not err during jury selection for a capital first-degree murder prosecution by excluding a prospective juror for cause when the prospective juror stated that he would follow the capital sentencing scheme but would choose life imprisonment over death. Prospective jurors in a capital case must be able to state clearly that they are willing to temporarily set aside their own beliefs concerning the death penalty in deference to the rule of law; the standard for determining whether prospective jurors may properly be excused for cause for their views on capital punishment is whether those views would prevent or substantially impair the performance of their duties as a juror in accordance with their instructions and oath.

Am Jur 2d, Jury § 234.

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

5. Jury § 226 (NCI4th)— jury selection—position on death penalty—challenge for cause—rehabilitation not allowed

The trial court did not err in a capital murder prosecution by refusing to allow defendant the opportunity to rehabilitate a prospective juror on capital sentencing where the juror had clearly stated his position on the death penalty, the court extensively questioned the juror concerning his beliefs about the death penalty, and defendant failed to show that any further questioning on his part would have resulted in a different answer.

Am Jur 2d, Jury § 279.

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

6. Criminal Law § 85 (NCI4th Rev.)— capital murder—initial arrest on other charges—statutory procedures for murder arrest delayed—confessions admissible

There was no plain error in a capital first-degree murder prosecution where defendant contended that his confessions should have been suppressed for undue delay in transporting him to Brunswick County for purposes of charging him with this murder and in administering the mandatory statutory procedures involved once a defendant has been charged and detained. Defendant was arrested for possession of a stolen vehicle in Sampson County at approximately 1:00 p.m. on 23 April 1994; he was not arrested for this murder (which occurred in Brunswick County) until 28 April 1994, although he was in custody on other charges; the earliest that the detective could have developed probable cause to arrest defendant was during an interview conducted on 24 April 1994; the warrant for defendant's arrest was issued on 25 April 1994; defendant was arrested for this murder on 28 April 1994; and defendant had a first appearance before a district court judge on that same day and an attorney was appointed to represent him on this murder charge. This complied with both the statutory and constitutional requirements. Furthermore, the record reflects that defendant made yet another statement to law enforcement officers concerning this murder

after the mandatory statutory procedures had been carried out in Brunswick County.

Am Jur 2d, Criminal Law §§ 408 et seq.

7. Constitutional Law § 266 (NCI4th)— capital murder—*Miranda* warning—appointment of counsel—statement that defendant might have to reimburse state—subsequent confession admissible

The trial court did not err in a capital prosecution for first-degree murder by not suppressing defendant's confessions because they were obtained after a law enforcement officer chilled defendant's exercise of his right to counsel by statements that defendant might have to pay the State for his lawyer. While advising defendant of his rights, the detective marked out the words "at no cost" in the sentence on the *Miranda* form regarding the provision of a lawyer and explained that it would be at no cost if defendant was found innocent, but that there was a chance the State would require reimbursement if he was found guilty. The detective effectively informed defendant that an attorney would be appointed for him before questioning, if he so desired; *Miranda* does not require that the officer inform an indigent defendant that an attorney would be appointed for him at no cost. The additional information supplied by the detective was accurate in that, while legal assistance is unconditional once indigency is established, the State reserves a general lien against defendant's future earnings if defendant is convicted and should later become able to pay. N.C.G.S. § 7A-451.

Am Jur 2d, Criminal Law §§ 743 et seq., 972 et seq.

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

8. Evidence and Witnesses § 2273 (NCI4th)— capital murder—pathologist's testimony—position of wound

There was no error in a capital prosecution for first-degree murder where the trial court admitted testimony from a pathologist that the victim's wound was consistent with leaning over, lying in a chair when shot. Although the pathologist had not viewed the crime scene, he did have an opinion concerning the direction from which the bullets were fired and the possible position of the victim. The pathologist who performed the autopsy

was in the best position to assist the jury in understanding the angles of the wounds and determining whether those were consistent with circumstances at the crime scene.

Am Jur 2d, Expert and Opinion Evidence § 262.

9. Evidence and Witnesses § 190 (NCI4th)— capital murder—victim's strength in right hand—testimony of son

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by admitting testimony from the son of the victim that the victim had very little strength in his right hand following testimony that the victim was right-handed and kept a pistol by the cash register in the store where he was shot. Although defendant contended that the testimony was speculative and that the probative value was outweighed by the danger of unfair prejudice in that the jury was left with the perception of an elderly man unable to hold a pistol, there was ample evidence to support the finding that the son had personal knowledge of his father's physical condition. The testimony served to impeach the partially self-serving confessions of defendant in that defendant told an officer that he had shot the victim in a struggle over a gun which the victim had attempted to use to protect himself from defendant's robbery attempt and the son's testimony was relevant to the ability of the victim to have armed himself and to have attempted to shoot defendant.

Am Jur 2d, Assault and Battery §§ 100, 105.

10. Criminal Law § 107 (NCI4th Rev.)— capital murder—caliber of bullets—discovery

There was no error in a capital prosecution for first-degree murder where the trial judge allowed the testimony of an SBI agent concerning the caliber of the bullets found in the victim's store and in his body. Although defendant argues that the evidence was procured in violation of discovery rules, there is no order of discovery in the record and it is apparent defendant was familiar with the evidence which was introduced during the trial. While defendant makes a reference to a request for voluntary discovery, there is no such request in the record and the State is not required to respond voluntarily to a request for discovery. Moreover, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt.

Am Jur 2d, Deposition and Discovery §§ 447, 449.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like—modern cases. 27 ALR4th 105.

11. Criminal Law § 697 (NCI4th Rev.)— capital murder—requested instructions—not supported by evidence

The trial court did not err in a capital murder prosecution by refusing to give defendant's requested instruction on the State introducing a confession which contained exculpatory material where the evidence was neither fully exculpatory nor uncontradicted. The trial court therefore properly declined to instruct the jury that the State was bound by any exculpatory statements contained in defendant's confession.

Am Jur 2d, Trial §§ 674 et seq.

12. Homicide § 476 (NCI4th)— first-degree murder—instructions—specific intent to kill

The trial court did not err in a capital murder prosecution by not giving defendant's requested instruction on specific intent to kill where the pattern jury instruction given by the court was in substantial conformity with the one requested by defendant.

Am Jur 2d, Homicide §§ 49, 499, 500.

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

13. Robbery § 135 (NCI4th)— armed robbery—weapon allegedly acquired in struggle with victim—instruction on common law robbery refused

The trial court did not err in an armed robbery prosecution by refusing to give defendant's requested instruction on the lesser included offense of common law robbery where defendant argued that his confession could have provided a factual basis by which a juror could have found that defendant acquired the gun in a struggle with the victim and that this conduct constituted a common law robbery. The evidence was uncontradicted that the robbery was committed with the use of a deadly weapon; whether defendant carried the gun into the store with him or acquired it in a struggle is irrelevant. Moreover, the uncontra-

dicted physical evidence did not support defendant's contention that a struggle occurred.

Am Jur 2d, Robbery §§ 75, 76.

14. Robbery § 138 (NCI4th)— armed robbery—use of gun—instruction on larceny refused

The trial court did not err in an armed robbery prosecution by refusing defendant's requested instruction on larceny where the evidence presented provided ample support for finding that defendant's use of the gun was so joined by time and circumstances to the taking as to make them parts of one continuous transaction. Even assuming that defendant's version of events is accurate, the evidence is uncontradicted that a gun was used by defendant in accomplishing his stated purpose of robbing the victim.

Am Jur 2d, Robbery §§ 75, 76.

15. Criminal Law § 1374 (NCI4th Rev.)— capital murder—sentencing—aggravating circumstance—course of conduct—evidence sufficient

The trial court did not err in a capital sentencing proceeding arising from the robbery and murder of a store owner by admitting evidence that defendant had broken into the home of Lena Hales and killed her during the course of a robbery to support the aggravating circumstance that the murder of the store owner was part of a course of conduct which included the commission of other violent crimes. The evidence, viewed in the light most favorable to the State, tended to show that defendant was seeking money to buy drugs when he broke into Hales's home, that she was badly beaten and died, and that defendant inflicted the injuries which caused her death. A murder is a crime of violence that will support the course of conduct aggravating circumstance, both of these murders occurred within several days of each other, both were committed to obtain money to buy cocaine, both involved elderly victims, and, in the early morning after killing Hales, defendant stole a van which he drove to Brunswick County to commit this murder. This was sufficient to support the conclusion that there existed in the mind of defendant a plan, scheme, system, or design involving both murders.

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 1374 (NCI4th Rev.)— capital sentencing—aggravating circumstance—course of conduct—instructions

There was no plain error in a capital sentencing proceeding where the court failed to give special instructions as to what conduct could be used in determining whether the course of conduct aggravating circumstance existed. The instructions given by the court were a correct statement of the law; juries in North Carolina considering the course of conduct aggravating circumstance have never been required to specify which crimes constitute the violent crimes required for the finding of this aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

17. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—details of prior killing—Rule 403 balancing not required—admissible

The trial court did not err in a capital sentencing proceeding by admitting evidence concerning the details of a prior killing where defendant argued that the probative value of the evidence was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The North Carolina Rules of Evidence do not apply in sentencing proceedings and the trial court was not required to perform the Rule 403 balancing test. The evidence was relevant to the course of conduct aggravating circumstance and not merely to show that defendant had killed the victim, but also to demonstrate his conduct in committing that murder.

Am Jur 2d, Criminal Law §§ 598 et seq.

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

18. Criminal Law § 1351 (NCI4th Rev.)— capital sentencing—instructions—Issues Three and Four—unanimity

The trial court did not err in a capital sentencing proceeding by refusing to instruct the jury that it did not need to be unanimous in order to answer no to Issues Three and Four.

Am Jur 2d, Criminal Law §§ 598 et seq.

19. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A sentence of death was not disproportionate where the evidence supports the aggravating circumstances found, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence was proportionate in that this case is more similar to certain cases in which the sentence was found proportionate than to those in which it was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. Although defendant argued that the sentence was disproportionate because the jury found twenty-eight of thirty-two mitigating circumstances and because of defendant's remorsefulness, the number of mitigating circumstances does not suffice to render a death sentence disproportionate and there is little evidence in the record that defendant expressed remorse. By contrast to the defendant in *State v. Bondurant*, 309 N.C. 674, this defendant shot the victim several times, left the victim lying helplessly on the floor, did not seek medical aid for the victim, stole money from the victim in order to buy drugs, and immediately fled the scene.

Am Jur 2d, Criminal Law §§ 609, 627, 628.

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., on 16 December 1994 in Superior Court, Brunswick County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill was allowed 19 January 1996. Heard in the Supreme Court 11 September 1996.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Special Deputy Attorney General, for the State.

William F.W. Massengale and Marilyn G. Ozer for defendant-appellant.

ORR, Justice.

This case arises out of the murder of Burns Babson. At the time of his death, Mr. Babson was operating a store which was located within fifty feet of his home in Ash, North Carolina, where he resided

with his wife of over fifty-two years. On 23 May 1994, defendant was indicted for first-degree murder, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill arising out of the slaying of Mr. Babson. Defendant was tried before a jury, and on 14 December 1994, the jury found defendant guilty of all charges. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder conviction. In accordance with the jury's recommendation, the trial court entered a sentence of death for the first-degree murder conviction based on the theory of premeditation and deliberation and the felony murder rule. The trial court also sentenced defendant to consecutive sentences of forty years' imprisonment for the robbery conviction and ten years' imprisonment for the assault conviction.

After consideration of the assignments of error brought forward on appeal by defendant and a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we conclude that defendant received a fair trial, free from prejudicial error.

At trial, the State's evidence tended to show the following: On 22 April 1994, while in her home, Mrs. Babson heard three or four gunshots fired in rapid succession. She ran into the yard and saw a man standing in the doorway of her husband's store. The man went around to the front of the store building, fired a gun at Mrs. Babson, and then got into a white van parked near the store. Mrs. Babson ran to a neighbor's house and called 911. She then entered the store, where she found her husband lying on the edge of a recliner behind the counter with a bullet wound in his head.

Ronnie Babson, Mr. Babson's son, operated a garage next door to his father's store. Shortly after his father's murder, Ronnie entered the store and went over to where Mr. Babson's body was lying. He moved Mr. Babson's head from the chair and placed his body on the floor. He noticed that the .38-caliber revolver which his father ordinarily kept behind the counter was missing.

Brunswick County Sheriff's Detective Tom Hunter arrived at the store at 7:56 p.m. Detective Hunter found Mr. Babson's body on the floor behind the counter and noted that there were gunshot wounds on the right side of the victim's head and in his back just above his waistline. Detective Hunter also observed two bullet holes in a box of receipts adjacent to the north wall of the store behind the counter.

Donald Ray Long testified at trial that he owned and operated Brunswick Farm Supply, which is located about one mile east of Mr. Babson's store. On 22 April 1994, at approximately 5:00 p.m., defendant drove a white Ford van into the driveway of Long's business. Mr. Long further testified that defendant got out of the van and asked him for directions to the beach. Defendant then drove off in the direction of Mr. Babson's business. Shortly thereafter, Mr. Long left his business and saw a van like the one driven by defendant at a gas station halfway between his business and Mr. Babson's store.

Martha Dean Fowler testified that she was operating Martha's Corner Store on the day of Mr. Babson's murder. The store is located about six miles from Mr. Babson's store. She stated that defendant entered her store twice on that evening. Around 7:45 p.m., defendant drove up to her store in a white van. He then entered the store and purchased a soft drink and a pack of cigarettes. Ms. Fowler further testified that defendant returned to her store sometime between 8:30 and 9:00 p.m. He was dressed in a plaid shirt and blue jeans and appeared quite nervous. Ms. Fowler testified that she gave him directions to Wilmington, and he then left the store.

On 23 April 1994, Sampson County Deputy Sheriff Everette Jones received a call to be on the lookout for "a white and green Ford Astro van" with North Carolina license plate number "Robert X-ray 8586" traveling north on U.S. 421. The call indicated that the driver would be "a dark[-]skinned white male with a greenish t-shirt and blue jeans and two or three days' facial hair growth." Deputy Jones testified that after receiving the call, he returned to a place on U.S. 421 where he had previously seen a white Ford van. He found the van parked on the side of the road, approximately six miles north of Clinton. Deputy Jones then verified that the license plate of the van matched that of the vehicle mentioned in the report. As Deputy Jones got out of his marked patrol car, defendant began to walk away from the van.

Deputy Jones testified that he approached defendant, handcuffed him, and told him that he was being detained. He placed defendant in the patrol car, called the dispatch center, and requested that they run the vehicle identification number through their computer. The information which Deputy Jones received indicated that the van was stolen. Based on that information, Deputy Jones placed defendant under arrest.

On 24 April 1994, Detective Hunter arrived at the Sampson County jail to interview defendant. Detective Hunter had been

informed that a suspect matching the description he put out had been detained in Sampson County. Prior to interviewing defendant, Detective Hunter advised him of his rights, and defendant signed a written waiver of those rights. Defendant then described the sequence of events leading up to Mr. Babson's murder. He told Detective Hunter that he was picked up by a black male named Joe driving a white van. Defendant said that the two of them drove around for several days, buying and smoking crack cocaine. Defendant stated that he and Joe had stopped at Mr. Babson's store for a drink of water on the day of the murder. They left the store only to return twenty or thirty minutes later intending to rob Mr. Babson. Defendant parked the van and then walked around the store. He heard four shots fired, went into the store, and saw Mr. Babson lying behind the counter. Defendant saw a woman near the store, fired one shot at her, and returned to the van where he found Joe waiting.

The next day, defendant was again interviewed by Detective Hunter and SBI Agents Janet Storms and Wayne Johnson. The interview took place at the New Hanover County Sheriff's Department, where defendant had been transported for the administration of a polygraph examination. Defendant was once again advised of his rights prior to the interview and voluntarily signed a waiver of those rights. Defendant then made a statement, which was reduced to writing, concerning the events surrounding Mr. Babson's murder. Defendant stated that "[o]n Wednesday[,] April 20th, 1994, [he] stole a white van from Shannon, North Carolina." He further stated that he rode around and "smoked crack cocaine for the next day or two." He then began to check out stores to rob in the Ash, North Carolina, area. He saw an old man running one of the stores by himself and decided it "looked easy to rob." Defendant left and returned about thirty minutes later. Defendant then described the events which followed:

> I parked the van outside and left the door open. I went inside and asked the old man about the pool tables. He told me to go on in and cut the lights on. I told the old man to, 'Give me your money'. The old man went towards the cash register and I thought he was going to get the money. The old man came back with a gun and shot at me. I crawled around the counter and we struggled over the gun. I believe I heard or counted about four shots that went off inside the store. I took the old man's wallet . . . . I did not see where the old man got shot. I got the money out of the cash register and left the old man laying face down in the chair.

Defendant stated that as he was leaving, he saw a lady through the screen door and fired the gun to scare her. Defendant then got into the van and left, eventually stopping at a store to ask directions. Defendant remained in custody after this statement was given.

On 28 April 1994, Detective Hunter once again spoke with defendant concerning the events surrounding Mr. Babson's death. Defendant was again informed of his rights and once again voluntarily signed a waiver of those rights. At that time, defendant had been arrested for the murder of Burns Babson. Defendant proceeded to make another statement very similar to the one set out above.

Dr. John Leonard Almeida, an expert in the field of forensic pathology, performed an autopsy on the body of Burns Babson. Dr. Almeida noted two bullet holes in the body of Mr. Babson, both of which were entrance wounds. One was in the right eye and the other in the lower back. Dr. Almeida was of the opinion that both of the gunshot wounds would have been fatal and that they were the cause of Mr. Babson's death.

SBI Agent Thomas Trochum, an expert in the field of forensic firearms identification and gunshot residue, examined the bullet that was removed from Mr. Babson's back and the bullet fragments that were removed from his head. Agent Trochum identified both as .44-caliber bullet jackets. The gun which Mr. Babson kept behind the counter in his store had been identified as a .38. In Agent Trochum's opinion, it is physically impossible to fire the .44-caliber bullet jackets that were found at the crime scene from a .38- or .357-type firearm.

Defendant presented no evidence during the guilt-innocence phase.

During the capital sentencing proceeding, the State presented additional evidence. The State sought to prove a continuing course of conduct on the part of defendant by introducing evidence of a prior murder. Barbara Hales Kinlaw testified that on 20 April 1994, she and her son found her mother, Lena Hales, sitting in her recliner unconscious. Ms. Kinlaw noticed that the entire side of her mother's face was black and blue and that she appeared to be badly beaten. Mrs. Hales subsequently died as a result of these injuries. Officer Edward Smith testified that on 26 April 1994, defendant made a statement in which he admitted that he broke into Mrs. Hales' home looking for money to buy drugs. He testified that Mrs. Hales retrieved her pock-

etbook from a closet and gave him all of the money that she had in it. Defendant told her not to yell, or he would come back and hurt her.

Dr. Deborah L. Radisch, the associate chief medical examiner for the State of North Carolina, testified that she performed the autopsy on Lena Hales. Dr. Radisch noted multiple bruising upon the head, neck, shoulder, chest, back, arms, and legs. Her internal examination revealed a bruising and swelling of the top of the scalp. In Dr. Radisch's opinion, Mrs. Hales' death was caused by a "blood clot over the brain due to a blunt trauma of the head."

Defendant also presented evidence during the sentencing proceeding. Roy Clark, a self-employed construction worker and minister for the Assemblies of God, testified that he had known defendant since defendant was a child. He stated that defendant had worked for him from 1988 to 1990, did quality work, and showed up for work reliably. Mr. Clark became aware defendant had a drug problem in 1992. He counseled defendant concerning the drug problem on three or four occasions over the next two years. Mr. Clark stated that he had never seen defendant engage in violent activities toward any person before the week of the killings.

Jimmy Bullard testified that he was a carpenter and a pastor involved in a prison ministry. Defendant had told Mr. Bullard that he was addicted to cocaine and that he was trying to quit. In Mr. Bullard's opinion, defendant would not have committed the offenses if he had not been using cocaine.

Sally Locklear Cummings, defendant's mother, testified that defendant was a normal, active boy when he was growing up. She further testified that defendant made his living by doing construction work from the time of his discharge from the Army until his arrest for these offenses. She stated that defendant supported his family and has a loving relationship with his children.

Daniel Cummings, Sr., defendant's father, testified that he and defendant were close when defendant was growing up. Mr. Cummings further testified that in 1992 he became aware defendant had a drug-abuse problem. Mr. Cummings stated that on the Sunday before the murder, defendant acknowledged that he needed help with his drug problem. Until the commission of these offenses, Mr. Cummings did not know of defendant's ever being violent.

Dr. John Warren, a licensed psychologist, testified that he conducted an evaluation of defendant consisting of psychological testing

and examination of available records concerning defendant's background. Dr. Warren testified that defendant's intellectual functioning falls within the borderline range of the ninth to thirteenth percentile and that his level of mental functioning falls between the mentally retarded and the low-average range of functioning. Based on his examination, it was Dr. Warren's opinion that defendant's thinking ability and behavior suffer because of his limited intellect. Dr. Warren further concluded that at the time of the offense, defendant suffered from acute cocaine intoxication as well as borderline intellectual functioning.

Daniel Richard Cummings, defendant's eight-year-old son, testified that he and his father got along pretty well. He stated that they would go to "the mountains and . . . the race track." He further testified that he went to Florida and out to eat with his father.

JURY SELECTION ISSUES

I.

Defendant's first assignment of error concerns the trial court's instructions to the jury. Defendant argues that the trial court improperly denied his motion for jury selection instructions and that the instructions given to the jury improperly shifted the burden of proof to defendant to gain a unanimous verdict on Issue Three of the sentencing instructions. In Issue Three, the jurors must answer the following question: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?"

[1] First, we will address defendant's argument that the trial court improperly denied his motion for jury selection instructions. Defendant requested that the trial court remind the jurors that the presumption of innocence remained in place, even though they would be asked questions concerning the possible sentencing phase. The court in a capital case is not required to give any instructions other than those mandated by statute. *See State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). N.C.G.S. § 15A-1213 requires that prior to the selection of jurors, the trial judge inform the prospective jurors

> as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of

> which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury.

N.C.G.S. § 15A-1213 (1988).

Here, the trial court instructed the jury as statutorily required. Nothing in the statute requires the court to instruct prospective jurors concerning the presumption of innocence. "The purpose of the informative statement by the court to the prospective jurors is a limited one." *Payne*, 337 N.C. at 518, 448 S.E.2d at 100. The official commentary to the statute states that the "procedure is designed to orient the prospective jurors as to the case." N.C.G.S. § 15A-1213. The court properly fulfilled its statutory duty to orient the venire to the case and did not err by denying defendant's motion. We also note that, at the appropriate time, the trial court correctly instructed the impaneled jurors of defendant's presumption of innocence.

[2] We next address defendant's contention that the trial court's instructions improperly shifted the burden of proof to defendant to gain a unanimous verdict on Issue Three of the sentencing instructions. The instructions given to the prospective jurors included the following:

> Then it will be the duty of the jury to retire and deliberate and recommend to the court whether the defendant should be sentenced to death or to life imprisonment. Your recommendation will be binding upon the court. If the jury unanimously recommends that the defendant be sentenced to death, the court will be required by law to impose a sentence of death. If the jury unanimously recommends a sentence of life imprisonment, the court will be required to impose a sentence of imprisonment in the State's prison for life.

The trial court further stated that at the penalty phase of the trial, the jury would be required to decide four things:

> First, whether the State has proved beyond a reasonable doubt the existence of any aggravating circumstances. Second, whether the defendant has shown the existence of any mitigating circumstances. Third, whether the State has proven beyond a reasonable doubt that any mitigating circumstances the jury has found are insufficient to outweigh aggravating circumstances the jury has found. Fourth, whether the State has proved beyond a reasonable doubt that the aggravating circumstances the jury has found are

sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances the jury has found.

Defendant objected to "the portions of [the] charge that had tended to show a burden on the defendant to prove mitigating circumstances, specifically where [the trial court] talked about the four matters that were put to the jury by [its] verdict."

Here, the instructions given by the trial court during the jury selection were a correct statement of the law. The jury is required to reach a unanimous verdict on its sentencing recommendation regardless of whether it is death or life imprisonment. N.C.G.S. § 15A-2000(b) (Supp. 1996). Further, the trial court correctly stated the four issues put before the jury during the penalty phase of the trial. In examining the instructions given by the court to the jury, they must be viewed contextually. *State v. Lynch*, 340 N.C. 435, 464, 459 S.E.2d 679, 693 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 558 (1996). In the present case, after the jury instructions were given, the trial court reminded the jurors that the instructions they had received were not the entire law, but were simply a short statement of the procedure. Further, when the jurors retired for deliberations, they were given complete instructions on the sentencing procedure. These instructions emphasized that only one or more of the jurors is required to find a mitigating circumstance before that juror is allowed to consider it. The trial court's instructions were accurate statements of the law and in no way shifted the burden of proof to defendant to gain a unanimous verdict on Issue Three of the sentencing instructions. This assignment of error is without merit.

II.

[3] Next, defendant contends that the trial court erred in overruling defendant's objection to the peremptory challenge of prospective juror Alfredia Brown. Defendant argues that this challenge was based upon the prospective juror's race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); the Equal Protection Clause of the Fourteenth Amendment; and Article I, Section 26 of the North Carolina Constitution. We do not agree.

A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). First, defendant must establish a *prima facie* case that

the peremptory challenge was exercised on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. *Id.* Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.*

In the present case, defendant objected to the excusal of prospective juror Brown. The trial court then found that there had not been a *prima facie* showing of purposeful discrimination by the State and denied the *Batson* objection. Although the trial court did not require the prosecutor to give his reasons for exercising the peremptory challenge, the prosecutor volunteered the following five reasons: (1) Brown expressed hesitancy concerning her ability to be a part of the process of imposing the death penalty, (2) Brown knew an individual with whom the State was familiar, (3) Brown knew an individual who was involved in a drug-related shooting, (4) Brown had a friend with a substance-abuse problem and was hesitant about disclosing her relationship with that person, and (5) Brown lived in an area known to the prosecutor to be a place where the sale of controlled substances regularly occurs.

In *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991), the State also volunteered its reasons for excusal and this Court stated:

> We find it unnecessary to address the trial court's conclusion that defendant failed to make a prima facie case of discrimination because in this case the State voluntarily proffered explanations for each peremptory challenge. Given that the purpose of the prima facie case is to shift the burden of going forward to the State, there is no need for us to examine whether defendant met his initial burden. *See United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989)[;] *United States v. Woods*, 812 F.2d 1483, 1487 (4th Cir. 1987). We proceed, therefore, as if the prima facie case had been established.

Robinson, 330 N.C. at 17, 409 S.E.2d at 296. Similarly, in the present case, we need not address whether defendant has established a *prima facie* case of discrimination. Thus, the issue remaining is whether the trial court correctly determined that the prosecutor had not intentionally discriminated. *State v. Thomas*, 329 N.C. 423, 430-31, 407 S.E.2d 141, 147 (1991).

In order to rebut a *prima facie* case of discrimination, the prosecution must "articulate legitimate reasons which are clear and rea-

sonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). These reasons " 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). Peremptory challenges may be exercised on the basis of " 'legitimate "hunches" and past experience[,]' so long as there was an absence of racially discriminatory motive." *State v. Jones*, 339 N.C. 114, 140, 451 S.E.2d 826, 839 (1994) (quoting *Porter*, 326 N.C. at 498, 391 S.E.2d at 151), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995). Because the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error. *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412.

Applying these principles, we now examine the prosecutor's reasons for peremptorily challenging prospective juror Brown. First, the prosecutor stated that Brown expressed hesitancy concerning her ability to be a part of the process of imposing the death penalty. During the prosecutor's questioning of Brown, the following exchange took place:

Q. Ms. Brown, based on the questions that have been put to you thus far, has it given you an opportunity to examine where it is that you actually stand as it relates to any opposition to the death penalty?

[DEFENSE COUNSEL]: JUDGE, OBJECTION.

THE COURT: OVERRULED, YOU MAY ANSWER.

A. Well, I don't think I really have a problem with the death penalty but I just have a problem with being a part of the death penalty. That's what I have a problem with, being a part.

Q. Being part of the process[?]

A. Process, giving somebody the death penalty. I have a problem with that, that's what——

Q. Can you tell me what, what——

A. It's not that I don't believe in the death penalty, I just have a problem with being part of, you know——

Q. All right. As to being a member of the jury and having to vote in an appropriate case for the death penalty, is that what you're having a problem with?

A. Yeah, I mean, me personally, I just wouldn't want to be one of the members that would, you know, that's what I have a problem with. But [as far] as believing in the death penalty, I don't have a problem with that, you know.

Reservations of a juror concerning his or her ability to impose the death penalty constitute a racially neutral basis for exercising a peremptory challenge. *State v. Basden*, 339 N.C. 288, 297, 451 S.E.2d 238, 242-43 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 845 (1995). Brown's answers clearly established that she was not sure if she could vote to impose the death penalty, despite the fact that she had no moral or religious beliefs in opposition to it.

The final four reasons enunciated by the prosecutor all involve the juror's knowledge of persons and places related to controlled substances and crimes of violence. This Court has held that a prosecutor may exercise peremptory challenges in order to select a jury that is " 'stable, conservative, mature, government[-]oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures.' " *Porter*, 326 N.C. at 498, 391 S.E.2d at 151 (quoting *Jackson*, 322 N.C. at 257, 368 S.E.2d at 841). This Court has also recognized that, although there is a potential for abuse for giving this reason, a prosecutor may exercise a peremptory challenge to excuse a juror who lived in a bad neighborhood where the record fails to reveal any discriminatory intent. *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995).

Based on the reasons given by the prosecutor, which are supported by the record, and based on the entire jury selection process, we conclude that the State has met its burden of coming forward with neutral, nonracial explanations for this peremptory challenge. Thus, the excusal of prospective juror Brown was not racially motivated and is not clearly erroneous. Accordingly, this assignment of error is overruled.

III.

[4] Defendant next contends that the trial court erred in excluding a prospective juror for cause when the prospective juror stated that he would follow the capital sentencing scheme, but would choose life

imprisonment over death. Defendant argues that the excusal of this juror violated defendant's constitutional right to a fair and impartial jury and a reliable sentencing hearing under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution. We disagree.

During the prosecutor's *voir dire* of prospective juror William Bland, the juror stated that if he had a choice between life imprisonment and death, he would always vote for life imprisonment:

Q. All right, sir. What I'm trying to determine is that if you would always do that regardless of the facts of the case, given the two choices, that regardless of the facts and the circumstances of the case, and regardless of how the judge instructed you, that based on your conscience, your belief and opposition to the death penalty, that you would always vote for life imprisonment?

A. Yes.

Q. All right. And in every case? And that you would always[,] in every case[,] reject the death penalty. Is that correct?

A. I can't take any middle roads here so, yes, I'd take the life imprisonment.

Q. All right, sir.

After this exchange, the prosecutor challenged prospective juror Bland for cause. Defendant then objected to Bland's excusal and requested the opportunity to rehabilitate him. The trial court denied defendant's motion and elected to question Bland itself:

Q. Okay and what I'm trying to determine[,] if you can answer it, would you automatically vote against capital punishment in this case and in any other case?

A. Yes, sir.

Q. Is your view or opposition to the death penalty such that it would prevent or substantially impair your ability to perform your sworn duties as a juror?

A. I could perform my duties, yes.

Q. Would you be able to perform those duties in reference to making a decision on whether to recommend life imprisonment or the death penalty?

A. I'd still have to go with life imprisonment.

Q. And if you were instructed during the course of this trial that you were to consider both life imprisonment and the death penalty, could you do that?

A. I could consider it, yes, sir, but you mean given a choice, right?

Q. Yes, sir. If given the choice, you'd automatically vote for life imprisonment without regard to the facts or circumstances in the case, is that what you're saying?

A. Yes, sir. If I'm given the decision to vote on one or the other in reference to a defendant, yes.

Q. Regardless of the facts or circumstances, you would never vote to recommend the death penalty, is that what you're saying?

A. That's what I said, yes, sir.

Subsequently, the trial court excused Bland for cause.

Prospective jurors in a capital case must be able to state clearly that " 'they are willing to temporarily set aside their own beliefs [concerning the death penalty] 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)). The standard for determining whether a prospective juror may properly be excused for cause for his views on capital punishment is whether those views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The decision to excuse a juror is within the discretion of the trial court because "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425-26, 83 L. Ed. 2d at 852.

In the present case, an examination of the questioning of Bland on *voir dire* indicates that the trial court properly excused him for cause. Bland stated that he was opposed to the death penalty on "more religious [beliefs] than anything else." He stated that he would automatically vote against the death penalty if given a choice

between life imprisonment and death. When asked if he would reject the death penalty in every case, Bland replied, "I can't take any middle roads here so, yes, I'd take the life imprisonment."

[5] Further, the trial court did not abuse its discretion by refusing to allow defendant the opportunity to rehabilitate Bland. It is not an abuse of discretion for the trial court to deny defendant an attempt to rehabilitate a juror unless defendant can show that further questions would have produced different answers by the juror. *State v. Davis*, 340 N.C. 1, 19, 455 S.E.2d 627, 636, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 83 (1995). Bland clearly stated his position on the death penalty. The trial court extensively questioned Bland concerning his beliefs about the death penalty, and defendant has failed to show that any further questioning on his part would have resulted in a different answer. This assignment of error is without merit.

GUILT-INNOCENCE PHASE

IV.

[6] Next, defendant contends that the trial court committed plain error by failing to suppress *ex mero motu* defendant's confessions. Defendant argues that these confessions were obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

On 14 November 1994, a suppression hearing was held concerning six confessions defendant made to law enforcement officers between 23 April 1994 and 28 April 1994. Defendant argued that the confessions were not voluntary because he was suffering from cocaine withdrawal at the time the statements were made, and therefore, he was unable to understand his *Miranda* rights. On appeal, defendant now asserts that the statements should have been suppressed because the confessions were obtained while defendant was in custody and was transported between three venues without being taken before a magistrate, without appointment of counsel, and without a first appearance in Brunswick County.

Defendant alleges this error for the first time on appeal under the plain error rule, which holds that errors or defects affecting substantial rights may be addressed even though they were not brought to the attention of the trial court. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This Court has elected to review such unpreserved issues for plain error when Rule 10(c)(4) of the Rules of

Appellate Procedure has been complied with and when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> [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 the appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings . . . ."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (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)). However, this is not the exceptional case where, after reviewing the entire record, it can be said that the claimed error is so fundamental that justice could not have been done.

Specifically, defendant points to chapter 15A of the North Carolina General Statutes and N.C.G.S. § 7A-453 as support for his contention that his statutory rights were violated. Chapter 15A requires an appearance before a magistrate without unnecessary delay. N.C.G.S. § 15A-511(a) (1988). At the initial appearance, the magistrate must inform the defendant of: (1) the charges against him, (2) his right to communicate with counsel and friends, and (3) the general circumstances under which he may secure release. N.C.G.S. § 15A-511(b). A defendant who is arrested for a felony and cannot obtain pretrial release must be afforded a first appearance before a district court judge within ninety-six hours. N.C.G.S. § 15A-601 (Supp. 1996). To avoid delay between arrest and appointment of counsel, N.C.G.S. § 7A-453(b) provides: "In counties which do not have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court."

In further support of his contention, defendant cites several cases which discuss the failure of law enforcement officers to seek a probable cause determination after arresting defendant without a warrant. In *Gerstein v. Pugh*, 420 U.S. 103, 43 L. Ed. 2d 54 (1975), the

United States Supreme Court held that a defendant who is arrested without a warrant is entitled to a prompt determination of probable cause by a judicial official. The Court later defined "prompt" as generally being within forty-eight hours. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 114 L. Ed. 2d 49, 63 (1991). If there is a delay in taking defendant before the magistrate for that determination, the prosecution may demonstrate the existence of an extraordinary circumstance to justify the delay. *Id.* However, because defendant was not arrested for Babson's murder without a warrant, these cases are not applicable to the case at bar.

Here, the issue is whether the confessions relating to the murder of Babson should have been suppressed. On three separate occasions prior to his arrest and detention in Brunswick County, defendant made statements in relation to this murder. Prior to making each statement, defendant was read his *Miranda* rights and voluntarily signed a waiver of these rights. On appeal, defendant does not contest the procedural process used to obtain these statements, but instead contends that there was undue delay in transporting him to Brunswick County for the purpose of charging him with the murder of Babson and in administering the mandatory statutory procedures involved once a defendant has been charged and detained for a criminal offense. We note that when a defendant has multiple charges pending against him involving several different jurisdictions, it is not possible for the defendant to be taken immediately to every jurisdiction. Defendant cites no authority for the proposition that statements made regarding crimes committed in another jurisdiction should be suppressed if he has yet to be detained in that jurisdiction. Defendant's only authority involves the mandatory statutory procedures of chapter 15A of the North Carolina General Statutes, which are required once a defendant has been charged and is in custody, and cases in which law enforcement officers failed to seek a probable cause determination after arresting defendant without a warrant.

Here, defendant was not arrested for the murder of Babson without a warrant. From the record, it is clear that defendant was arrested for possession of a stolen vehicle in Sampson County at approximately 1:00 p.m. on 23 April 1994. Defendant was not arrested for the murder of Babson until 28 April 1994, although he was in custody on other charges. From the record, the earliest that Detective Hunter could have developed probable cause to arrest defendant was during an interview conducted on 24 April 1994. The warrant for

defendant's arrest was issued on 25 April 1994, and defendant was arrested for the Brunswick County murder on 28 April 1994. On that same day, defendant had a first appearance before a district court judge, and an attorney was appointed to represent him on the Babson murder charge. This complied with both the statutory and constitutional requirements. Additionally, the record reflects that defendant made yet another statement to law enforcement officers concerning the Babson murder after the mandatory statutory procedures had been carried out in Brunswick County.

Based on the above analysis, it is clear that defendant has failed to demonstrate that any violation of his constitutional or statutory rights has occurred. Accordingly, this is not the exceptional case where, after reviewing the entire record, it can be said that the claimed error is so fundamental that justice could not have been done. This assignment of error is overruled.

V.

[7] In a related assignment of error, defendant contends that the trial court erred by failing to suppress his confessions because they were obtained after a law enforcement officer "chilled defendant's exercise of his right to counsel." Defendant argues that the statements made to him by Detective Hunter concerning the possibility that he may have to pay the State for his lawyer violated the requirements of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). He further asserts that the taint of the alleged error in the *Miranda* warnings was not cured as to the two subsequent statements that were made to Detective Hunter and that those statements should likewise have been suppressed. We again do not agree.

On 24 April 1994, defendant was interviewed by Detective Hunter and SBI Agent Storms at approximately 6:00 p.m. Prior to the interview, Detective Hunter advised defendant of his *Miranda* rights. While advising defendant of his rights, Detective Hunter marked out the words "at no cost" in sentence number four, which read, "If you want a lawyer before or during questioning but cannot afford to hire one, one will be appointed to represent you *at no cost* before any questioning." (Emphasis added.) Detective Hunter explained to defendant, "I don't know why they put in this at no cost. If you are found innocent, it is no cost[,] but if you are found guilty[,] there is a chance the state will require you to reimburse them for the attorney fees." Detective Hunter then explained that he "was going to cross it off and initial it because [he] didn't want to mislead [defendant]."

After this conversation, defendant made a statement to Detective Hunter that was admitted into evidence during the trial.

When a person is subjected to custodial interrogation by law enforcement officers,

> "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently."

State v. Ingle, 336 N.C. 617, 634, 445 S.E.2d 880, 888 (1994) (quoting *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706-07), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995).

> *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant."

California v. Prysock, 453 U.S. 355, 359-60, 69 L. Ed. 2d 696, 701 (1981) (quoting *Miranda*, 384 U.S. at 476, 16 L. Ed. 2d at 725).

The rights read by Detective Hunter to defendant on 24 April 1994 constituted a fully effective equivalent of the *Miranda* rights. *Miranda* does not require that the officer inform an indigent defendant that an attorney would be appointed for him at no cost. All that is required is that the defendant be informed that an attorney will be appointed for him before questioning, if he so desires. *Miranda*, 384 U.S. at 479, 16 L. Ed. 2d at 726. Detective Hunter effectively informed defendant of this right.

Further, the additional information supplied by Detective Hunter to defendant was accurate. Under North Carolina law, indigents are entitled to court-appointed counsel whenever they are involved in adversarial proceedings that jeopardize their liberty interests. N.C.G.S. § 7A-451 (Supp. 1996). Legal assistance is unconditional once indigency is established, although the State reserves to itself a general lien against defendant's future earnings if defendant is convicted and should later become able to pay. N.C.G.S. § 7A-455 (1995).

Informing defendant that he may be required to reimburse the State for the costs of his attorney also does not "chill" his right to have counsel provided. In *Fuller v. Oregon*, 417 U.S. 40, 40 L. Ed. 2d 642 (1974), the United States Supreme Court addressed the issue of whether the requirement of repayment of attorney's fees in some circumstances would "chill" the defendant's right to counsel by possibly compelling him to decline counsel to avoid the possibility of repayment. In finding the Oregon recoupment statute, which is very similar to North Carolina's statute, constitutional, Justice Stewart stated:

> Unlike the statutes found invalid in those cases where the provisions "had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them," [*United States v. Jackson*, 390 U.S. 570,] 581, 20 L. Ed. 2d 138, [147 (1968),] Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.

Fuller, 417 U.S. at 54, 40 L. Ed. 2d at 655.

Detective Hunter correctly stated the law when he informed defendant that, under certain circumstances, sometime in the future he may be required to reimburse the State for his attorney. The warnings given by Detective Hunter to defendant complied with the mandate of *Miranda*, and accordingly, this assignment of error is overruled.

VI.

[8] Defendant further contends that the trial court erred by allowing speculative testimony concerning whether the victim was killed during the course of a struggle. Specifically, defendant assigns as error the testimony of Babson's son, Ronnie Babson, and Dr. Almeida, the pathologist who performed the autopsy on Babson. Defendant contends that the admission of this testimony violated his statutory and constitutional rights. We disagree.

After being qualified as an expert in the field of forensic pathology, Dr. Almeida testified as follows:

> Q. Do you have an opinion as to the cause of death of Mr. Babson?

A. Yes, I do.

Q. And what is that opinion?

A. That he died from a gunshot wound to the head and to the back.

Q. Now, as to the wound to the back, in describing the tract, were you able to determine how Mr. Babson would have been—where he would have been located when that wound would have been inflicted?

MR. FAIRLY [DEFENSE COUNSEL]: OBJECTION.

MR. RAMOS [DEFENSE COUNSEL]: OBJECTION, NO FOUNDATION.

THE COURT: THE OBJECTION IS OVERRULED.

A. I cannot say where he was located. I can say that that is a very acute angle fired from the area of the feet.

Q. Doctor, acute angle, what do you mean by that?

A. It entered low on the back, went through and exited right here. The shot had to be fired from the feet.

MR. RAMOS: OBJECTION TO WHERE THE SHOT HAD TO BE FIRED FROM.

THE COURT: THE OBJECTION IS OVERRULED.

Q. Do you have an opinion as to how the body would have been located when that shot would have been fired?

A. The shot had to come from below the feet. Mr. Babson would have had to have been above the person that fired the shot or on the ground.

Q. When you say he would either have been above—

A. Standing above him.

Q. And the person shooting up?

A. Or the person that was shooting was on the ground.

Q. Or the person shooting down in order to get that acute angle?

A. Correct.

On redirect, Dr. Almeida testified, over objection, that the wound in the back was consistent with Mr. Babson's leaning over, lying in a chair when shot.

Defendant contends that the expert's opinions should have been excluded under both Rules 401 and 403 of the Rules of Evidence. Defendant notes that the witness admitted on direct examination that he could not say where the victim was located when he was shot, but then on redirect testified that the wound in the back was consistent with Mr. Babson's leaning over, lying in a chair when shot. Defendant argues that this testimony was prejudicial, as it left the jury with the impression that the victim was shot while sitting in his chair.

Rule 401 provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Relevant evidence may be excluded by the court if its probative value is substantially outweighed by its prejudicial effect. N.C.G.S. § 8C-1, Rule 403 (1992). Whether to exclude evidence pursuant to Rule 403 is within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986).

On direct examination, Dr. Almeida testified that he had no opinion as to where Mr. Babson had been located at the time that he was shot. This testimony was directed at the fact that Dr. Almeida had not viewed the crime scene and, thus, could not know where Mr. Babson was at the time that he was shot. However, he did have an opinion concerning the direction from which the bullets were fired and the possible position of the victim. An expert opinion is admissible if the witness " 'is in a better position to have an opinion . . . than is the trier of fact.' " *State v. Saunders*, 317 N.C. 308, 314, 345 S.E.2d 212, 216 (1986) (quoting *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978)). Dr. Almeida, as the pathologist who performed the autopsy of Mr. Babson, was in the best position to assist the jury in understanding the angles of the wounds and determining whether the angles of the wounds were consistent with circumstances at the crime scene. *State v. Ali*, 329 N.C. 394, 415, 407 S.E.2d 183, 196 (1991). Therefore, the trial court did not err in admitting Dr. Almeida's testimony.

[9] We next address defendant's contention that the trial court erred in admitting the testimony of Ronnie Babson, the son of the victim. Ronnie Babson testified that he had given his father a .38-caliber

"police special," which was kept under a towel by the cash register. He also testified his father was right-handed and that his right little finger had been removed. The State's last question to Babson was as follows:

Q. Were you familiar with whether or not your father had much strength in that particular hand?

A. Very little.

[DEFENSE COUNSEL]: OBJECTION.

THE COURT: OVERRULED.

Q. Do you recall whether or not he had much strength in his right hand?

A. Very little.

Defendant contends that the court's denial of defendant's objection left the jury with the perception of an elderly man unable to hold a pistol. Defendant argues that because of the speculative nature of this testimony, the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.

A witness may testify to matters within his personal knowledge if there is sufficient evidence to show that he has personal knowledge of the facts. N.C.G.S. § 8C-1, Rule 602 (1992). In the present case, there was ample evidence in the record to support the finding that Ronnie Babson had personal knowledge of his father's physical condition. Ronnie Babson had operated a business next door to his father's store and home for approximately six years prior to the murder of his father. He had constant contact with his father and was familiar with where his father kept items in the store.

Further, defendant told the officer that he shot Babson as they struggled over a gun which Babson had attempted to use to protect himself from defendant's robbery attempt. Ronnie Babson's testimony was relevant to the ability of Babson to have armed himself with a weapon and to have attempted to shoot defendant. The testimony established that the victim was an elderly man who had difficulty holding a pistol. This testimony also served to impeach the partially self-serving confessions of defendant. The trial court did not abuse its discretion by allowing the introduction of this testimony. Accordingly, this assignment of error is without merit.

VII.

[10] Next, defendant contends that the trial court erred by allowing the testimony of an SBI agent concerning the caliber of the bullets found in the victim's store and in his body. Defendant contends that he had not received the results of the agent's examination prior to his testimony. Defendant argues that this expert evidence was procured in violation of discovery rules and should not have been heard by the jury. Defendant contends that the admission of this testimony violated his statutory and constitutional rights. We do not agree.

SBI Agent Thomas Trochum testified as an expert in the field of firearms identification. Over defendant's objection, the trial court allowed Agent Trochum to testify concerning his examination of bullets from the crime scene. He testified that the bullets which were removed from the wall in Mr. Babson's store and from Mr. Babson's body were .44-caliber bullets. He also testified that the bullets removed from the wall and from Babson's body had been fired from the same firearm. He concluded that the bullets which were recovered from the crime scene could not have been fired from the .38-caliber weapon that Babson kept in his store.

The record reflects that defendant received notice of the evidence of which he now complains. In objecting to a diagram introduced at trial, the defense counsel stated:

> We would object to the—I notice on there that it describes that particular illustration as a hollow-point jacketed bullet[.] I have the results of Mr. Trochum's analysis[,] and the only thing he can tell us, at least as far as from that[,] is that these were .44 bullet jackets and the lead fragments are unsuitable for microscopic comparison and, therefore, I guess he can't tell us whether it was a hollow[-]point or any other kind of point bullet[.]

The State has no statutory duty to provide discovery absent a request from defendant. N.C.G.S. § 15A-903 (1988). Nor is the State required to respond voluntarily to a request for discovery. *State v. Anderson*, 303 N.C. 185, 278 S.E.2d 238 (1981), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 251, 367 S.E.2d 639, 644 (1988). Here, defendant makes a reference to a request for voluntary discovery that the defense had served upon the State, but there is no such request in the record. The defendant has the responsibility to provide a complete record. N.C. R. App. P. 9. Because there is no order of discovery in the record and it is apparent defendant was

familiar with the evidence which was introduced during the trial, it was not error for the trial court to allow the introduction of this evidence.

Assuming, *arguendo*, that this testimony should have been excluded, the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt. *See* N.C.G.S. § 15A-1443(b) (1988); *State v. Eason*, 336 N.C. 730, 746, 445 S.E.2d 917, 927 (1994).

VIII.

[11] Defendant next assigns as error the trial court's refusal to give defendant's requested instructions on the effect of the alleged struggle between defendant and the victim and the specific intent to kill. Defendant contends that the failure of the trial court to give his requested instructions violated his constitutional and statutory rights, and he is thus entitled to a new trial. We disagree.

At the close of the guilt-innocence phase, defendant submitted two jury instructions. Both instructions went to the issue of what evidence the jury should consider while deliberating on defendant's specific intent to kill the victim. The first instruction requested was as follows:

> The State introduced a statement into evidence purported to be the confession of the defendant. When the State introduces into evidence a defendant's confession containing exculpatory statements which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the exculpatory statements.

The trial court declined to give this instruction. The second instruction requested by defendant was as follows:

> The specific intent to kill necessary to find a person guilty of first[-]degree murder based on premeditation and deliberation must arise from a fixed determination to kill previously formed after weighing the matter. If the killing was the product of a specific intent to kill formed under the influence of the provocation of a struggle itself, then there would be no deliberation and hence no murder in the first degree.

The trial court also declined to give this instruction, but instead used the pattern jury instruction to instruct on the elements of first-degree murder.

The trial court need only give a requested instruction which is supported by the evidence. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). 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), this Court stated: "When the State introduces into evidence a defendant's confession containing exculpatory statements which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the exculpatory statements." *Id.* at 66, 301 S.E.2d at 347.

Here, the requested instructions were not supported by the evidence. Defendant's confessions tended to show two versions of the killing. The 24 April 1994 statement tended to show that defendant was not present in the store when Babson was shot. The later statements tend to show that defendant went into the store unarmed, intending to rob Babson, and that Babson was shot accidentally when he pulled a gun on defendant and the two struggled over the weapon. This evidence was neither fully exculpatory nor uncontradicted. Accordingly, the trial court properly declined to instruct the jury that the State was bound by any exculpatory statements contained in defendant's confession.

[12] Further, the trial court did not err by refusing to give defendant's requested instruction on the specific intent to kill. Instead, the trial court elected to use the pattern jury instructions when instructing on the elements of first-degree murder:

> Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

The instruction given by the trial court allowed the jury to consider the "nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances" in determining whether they were satisfied beyond a reasonable doubt that defendant intended to kill Babson. Whether defendant and Babson were involved in a struggle at the time of the killing is a determination to be made by the jury when considering the nature and manner of the assault. This instruction was in substantial conformity with the one requested by defendant, and the trial court did not err in giving this instruction rather than the one requested by defendant. *See State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976).

IX.

[13] Next, defendant contends that the trial court erred by refusing to give defendant's requested instruction on the lesser included offenses of common law robbery and larceny with respect to the armed robbery charge. Defendant points to his own exculpatory statement as support for this contention. He argues that his statement could have "provided a factual basis by which a juror could have found the Defendant acquired a gun in a struggle with [the] victim and his conduct constituted a common law robbery." We disagree.

"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.' " *State v. 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)).

We first address defendant's contention that the trial court erred by failing to instruct on the lesser included offense of common law robbery. We have held that where the uncontroverted evidence is positive and unequivocal as to each and every element of armed robbery, and there is no evidence supporting defendant's guilt of a lesser included offense, the trial court does not err by failing to instruct the jury on the lesser included offense of common law robbery. *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). "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. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981).

"The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195. The use or threatened use of a dangerous weapon is not an essential ele-

ment of common law robbery. *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (1971).

Here, the evidence is uncontradicted that the robbery was committed with the use of a deadly weapon. Whether defendant carried the gun into the store with him, or as he alleges, "acquired a gun in a struggle" is irrelevant. As we stated above, the critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon. It is clear from the evidence before us that a dangerous weapon was actually used in the present case, not merely threatened. Additionally, the uncontradicted physical evidence did not support defendant's contention that a struggle occurred. The gun which Babson kept in his store was identified as a .38-caliber handgun. The bullets which killed Babson were fired from a .44-caliber weapon. We do not believe the evidence in this case would have convinced a rational trier of fact that defendant committed the lesser offense of common law robbery. Therefore, the trial court properly denied defendant's request for an instruction on the lesser included offense of common law robbery.

[14] Next, we address defendant's contention that the trial court erred by failing to instruct on the lesser included offense of larceny. Larceny is a lesser included offense of robbery with a dangerous weapon. *White*, 322 N.C. at 514, 369 S.E.2d at 817. "[T]here 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.' " *Id.* at 512, 369 S.E.2d at 816 (quoting *State v. Rhinehart*, 322 N.C. 53, 59, 366 S.E.2d 429, 432 (1988)). "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 present case, 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. The evidence presented 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 a statement made to law enforcement officers, defendant stated:

> I told the old man to, 'Give me your money'. The old man went towards the cash register and I thought he was going to get the money. The old man came back with a gun and shot at me. I crawled around the counter and we struggled over the gun. I believe I heard or counted about four shots that went off inside the store. I took the old man's wallet . . . . I did not see where the old man got shot. I got the money out of the cash register and left the old man laying face down in the chair.

Even assuming *arguendo* that defendant's version of what happened is accurate, the evidence is uncontradicted that a gun was used by defendant in accomplishing his stated purpose of robbing the victim. Thus, the trial court properly denied defendant's request to instruct on the lesser included offense of larceny. Accordingly, this assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

X.

[15] Defendant contends that the trial court erred in the capital sentencing proceeding by admitting evidence of a prior unadjudicated murder to support the aggravating circumstance that the murder was part of a course of conduct which included the commission of other violent crimes. Defendant argues that the evidence presented was insufficient to prove defendant's guilt of the prior crime and was thus irrelevant, inflammatory, and unfairly prejudicial to defendant. Defendant contends that the submission of this evidence violated his federal and state constitutional rights to due process of law and freedom from cruel and unusual punishment. We do not agree.

Before presentation of the evidence in the sentencing phase of these proceedings, defendant filed a motion *in limine* to prohibit the introduction of evidence that defendant had broken into the home of Lena Hales on 19 April 1994 and had killed Hales during the course of a robbery. Defendant had been charged with the offense, but he had not been tried. The trial court denied defendant's motion and found that the evidence was probative on the issue of whether the killing of Babson was part of a course of conduct involving crimes of violence against others. Based on this evidence and the evidence that defendant had fired a gun at Mrs. Babson after killing her husband, the trial court submitted the statutory aggravating circumstance that "[t]he murder for which 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). Subsequently, the jury found that this aggravating circumstance did exist.

Submission of course of conduct requires that "there is evidence that the victim's murder and the other violent crimes were part of a pattern of intentional acts establishing that in defendant's mind, there existed a plan, scheme or design involving the murder of the victim and the other crimes of violence." *State v. Walls*, 342 N.C. 1, 69, 463 S.E.2d 738, 775 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 794 (1996). This Court has refused to require a conviction of the offense before the State may use that offense to establish the course of conduct aggravating circumstance. *See State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (course of conduct aggravator in defendant's conviction of a robbery-murder supported by evidence of a robbery-murder that was committed three hours later without any evidence of whether defendant was convicted of those offenses), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906 (1994) (evidence of unadjudicated murder and rapes in another county that occurred three months before the murder for which defendant had been convicted admissible to support course of conduct aggravator), *cert. denied*, 513 U.S. 1120, 130 L. Ed. 2d 802 (1995).

In determining whether there is sufficient evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving all contradictions in favor of the State. *State v. Skipper*, 337 N.C. 1, 53, 446 S.E.2d 252, 281 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995).

" 'If there is substantial evidence of each element of the [aggravating] issue under consideration, the issue must be submitted to the jury for its determination.' " *State v. Gregory*, 340 N.C. 365, 411, 459 S.E.2d 638, 664 (1995) (quoting *State v. Moose*, 310 N.C. 482, 494, 313 S.E.2d 507, 516 (1984)), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). In determining whether the evidence tends to show that another crime and the crime for which defendant is being sentenced were part of a course of conduct, the trial court must consider a number of factors, including the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons. *State v. Cummings*, 332 N.C. 487, 509, 422 S.E.2d 692, 704 (1992).

In the present case, there was sufficient evidence to warrant submission of the course of conduct aggravating circumstance to the jury. The evidence, when viewed in the light most favorable to the State, tended to show that defendant was seeking money to buy drugs when he broke into the home of Hales and that Hales was badly beaten. The evidence further showed that Hales died as a result of the beating and that the defendant inflicted the injuries which caused her death. A murder is a crime of violence that will support the course of conduct aggravating circumstance. *State v. Pinch*, 306 N.C. 1, 30, 292 S.E.2d 203, 225, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988).

Additionally, the evidence demonstrated that there was a sufficient link between the murders of Hales and Babson. First, both murders occurred within several days of each other. Second, the evidence showed that both murders were committed for the purpose of obtaining money for cocaine. Third, both incidents involved elderly victims. The evidence further showed that in the early morning hours, after the killing of Hales, defendant stole the van which he used to drive to Brunswick County to commit the murder of Babson. This was sufficient to support the conclusion that there existed in the mind of defendant a plan, scheme, system, or design involving the murders of both Babson and Hales. Accordingly, the trial court did not err in submitting this aggravating circumstance to the jury.

[16] Defendant further contends that the trial court erred by failing to give special instructions as to what conduct could be used in determining whether the course of conduct aggravating circumstance

existed. Defendant did not object to the trial court's instructions concerning the course of conduct aggravating circumstance. When defendant fails to object to a jury instruction at trial, the plain error standard is applied. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To demonstrate plain error, defendant must show "that there was error, but that absent that error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In the present case, defendant has failed to meet this burden. First, the instructions given by the trial court were a correct statement of the law. Second, in considering the course of conduct aggravating circumstance, the jury is required to determine whether the killing was part of a course of conduct in which defendant engaged and whether that conduct involved crimes of violence against another or others. *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 263 (1995). The fact that the jury did not specify which crimes constitute the violent crimes required for the finding of this aggravating circumstance does not render the verdict invalid. This Court has never required that the jury do so. *See State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98 (1990). Thus, the trial court did not err in failing to instruct concerning what conduct could be used in determining whether the course of conduct aggravating circumstance existed.

[17] Finally, defendant contends that the trial court should have excluded the evidence concerning the details of Hales' murder, as "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1, Rule 403. However, the North Carolina Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Any evidence the court "deems relevant to sentence" may be introduced at this stage. N.C.G.S. § 15A-2000(a)(3). The State "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." *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Thus, the trial court was not required to perform the Rule 403 balancing test. The evidence of the killing of Hales was relevant to prove the existence of the course of conduct aggravating circumstance. It was relevant not merely to show defendant had killed Mrs. Hales, but also to demonstrate his conduct in

committing that murder. Accordingly, this assignment of error is overruled.

XI.

[18] Next, defendant contends that the trial court erred by refusing to instruct the jury that it did not need to be unanimous in order to answer "no" to Issues Three and Four on the "Issues and Recommendation as to Punishment" form. Defendant argues that the instruction given by the trial court prejudiced him by reducing the State's burden of proof, thereby depriving defendant of his federal and state constitutional rights. We disagree.

In the present case, the jury was instructed from the pattern jury instructions, and the jury was given the pattern written Issues and Recommendation as to Punishment form. As to Issue Three, the trial court instructed, "If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer Issue Three [']yes[']. If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three ['']no['']."

In *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996), this Court held that the trial court did not err by specifically instructing the jury that the answer to Issue Three needs to be unanimous regardless of whether the answer is "yes" or "no." "In a capital sentencing proceeding, any jury recommendation requiring a sentence of death or life imprisonment must be unanimous." *Id.* at 389, 462 S.E.2d at 39. As this Court has previously stated:

> Since the sentence recommendation, *if any*, must be unanimous under constitutional and statutory provisions, and particularly in light of the overwhelming policy reasons for a unanimity requirement, we conclude that any issue which is *outcome determinative* as to the sentence a defendant in a capital trial will receive—whether death or life imprisonment—must be answered unanimously by the jury. That is, the jury should answer Issues One, Three, and Four on the standard form used in capital cases either unanimously "yes" or unanimously "no."

Id. at 390, 462 S.E.2d at 39.

Further, in *McCarver*, the jury sent a written inquiry to the trial court regarding Issue Three. The note read, "Must there be twelve

votes, 'Yes,' or twelve votes, 'No,' to reach a unanimous decision?" *Id.* at 389, 462 S.E.2d at 39. Here, the jury never inquired about the unanimity requirement, and the trial judge was not required to give any additional instructions. Thus, the trial court did not err in instructing the jury as to Issue Three.

Further, the trial court did not err in instructing the jury as to Issue Four. In the present case, the trial court instructed the jurors that "each juror may consider any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence." This Court has previously decided this issue contrary to defendant's position in *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994), and we see no reason to overturn that decision now. Accordingly, we find no merit to this assignment of error.

PRESERVATION

XII.

Defendant raises eight additional issues which he concedes have been decided contrary to his position previously by this Court: (1) the trial court erred in denying defendant's motion to strike the death penalty on the ground it is unconstitutional; (2) the trial court committed reversible error by denying defendant's motion to have a bifurcated jury thereby violating defendant's statutory and constitutional rights; (3) the trial court erred by denying defendant's motion to preclude the prosecution from using peremptory challenges to strike jurors who indicated uncertainty about the death penalty or jurors who were struck because of sex, color, race, religion, or national origin; (4) the trial court erred by denying defendant's motion to allocute and thereby violated defendant's statutory and constitutional rights; (5) the trial court erred by submitting the pecuniary gain aggravating circumstance to the jury because it was not in accordance with the law and the evidence and by not allowing defendant's motion to set aside the death sentence for lack of evidence, thereby violating defendant's statutory and constitutional rights; (6) the trial court erred by refusing to submit defendant's final instruction and overruling defendant's objection to language requiring the jury to enter a death verdict after answering Issue Four "Yes," thereby violating defendant's statutory and constitutional rights; (7) the trial court committed reversible error by refusing defendant's request for instructions on Issue Three and Four and thereby violated defendant's statutory and constitutional rights; and (8) the trial court

erred by refusing to give defendant's requested parole eligibility instruction, thereby violating defendant's statutory and constitutional rights.

Defendant raises these issues for purposes of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[19] Having found no error in either the guilt-innocence or sentencing phase, we must determine whether: (1) the evidence supports the aggravating circumstances found by the jury; (2) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (3) the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

In the present case, defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation and also under the felony murder rule. The jury found the aggravating circumstances that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and that the murder was part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11). We conclude that the evidence supports each aggravating circumstance found. We further conclude, based on a thorough review of the record, that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Thus, the final statutory duty of this Court is to conduct a proportionality review.

Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Williams*, 308 N.C. at 79, 301 S.E.2d at 355; *accord* N.C.G.S. § 15A-2000(d)(2). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court."

State v. Green, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). It is also proper for this Court to compare this case with the cases in which we have found the death penalty to be proportionate. *Id.* Although we review all of these cases when engaging in this statutory duty, we will not undertake to discuss or cite all of those cases each time we carry out that duty. *Id.*

This case is distinguishable from the cases in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. In three of those cases, *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant either pled guilty or was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of malice, premeditation, and deliberation and also the felony murder rule. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Further, the seventy-four-year-old victim would have been no match for the physical strength of defendant, a healthy thirty-nine-year-old man.

We recognize that juries have imposed sentences of life imprisonment in several cases which are similar to the present case. However, "the fact that one or more cases is factually similar to the one under review, in which juries have recommended life imprisonment, is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. Our review of such cases reveals that they are distinguishable and do not render the sentence of death in this case disproportionate.

Defendant argues that his sentence is disproportionate for several reasons, including: (1) the jury found twenty-eight of the thirty-two mitigating circumstances submitted, and (2) defendant's remorsefulness. The number of mitigating circumstances does not suffice to render a death sentence disproportionate. Even a "single

aggravating circumstance may outweigh a number of mitigating circumstances and . . . be sufficient to support a death sentence." *State v. Bacon*, 337 N.C. 66, 110, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995).

Further, we do not find defendant's alleged remorsefulness a persuasive argument in conducting our proportionality review. Defendant states that "[t]his Court has placed great weight on remorse in previous proportionality reviews." However, there is little evidence in the record that defendant expressed remorse concerning the murder of Mr. Babson. In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), this Court discussed the defendant's remorsefulness in determining that the sentence of death was disproportionate. However, *Bondurant* is distinguishable from the present case.

In *Bondurant*, the defendant immediately exhibited remorse and concern for the victim's life by directing the driver of the vehicle 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 shot the victim several times and left the victim lying helplessly on the floor. The defendant did not seek medical aid for the victim and instead stole money from the victim in order to buy drugs. Further, defendant immediately fled the scene.

After reviewing the cases, we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. Therefore, the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. Comparing this case to similar cases in which the death penalty was imposed and considering both the crime and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. Therefore, the sentence of death entered against defendant must be and is left undisturbed.

NO ERROR.

LEANDRO v. STATE OF NORTH CAROLINA

[346 N.C. 336 (1997)]

KATHLEEN M. LEANDRO, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ROBERT A. LEANDRO; STEVEN R. SUNKEL, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR ANDREW J. SUNKEL; CLARENCE L. PENDER, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SCHNIKA N. PENDER; TYRONE T. WILLIAMS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JASON E. LOCKLEAR; ANGUS B. THOMPSON, II, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF VANDALIAH J. THOMPSON; JENNIE G. PEARSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SHARESE D. PEARSON; WAYNE TEW, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF NATOSHA L. TEW; DANA HOLTON JENKINS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF RACHEL M. JENKINS; FLOYD VICK, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ERVIN D. VICK; HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION, PLAINTIFFS,

AND

CASSANDRA INGRAM, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF DARRIS INGRAM; CAROL PENLAND, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JEREMY PENLAND; DARLENE HARRIS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SHAMEK HARRIS; NETTIE THOMPSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ANNETTE RENEE THOMPSON; DAVID MARTINEZ, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF DANIELA MARTINEZ; OPHELIA AIKEN, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF BRANDON BELL; ASHEVILLE CITY BOARD OF EDUCATION; BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION; WAKE COUNTY BOARD OF EDUCATION; WINSTON SALEM/FORSYTH COUNTY BOARD OF EDUCATION, PLAINTIFF-INTERVENORS V. STATE OF NORTH CAROLINA; STATE BOARD OF EDUCATION, DEFENDANTS

No. 179PA96

(Filed 24 July 1997)

1. Constitutional Law § 94 (NCI4th)— public education system—constitutional challenge—justiciable issue

A constitutional challenge to the state's public education system is not a nonjusticiable political question but is an issue which the courts have a duty to address.

Am Jur 2d, Constitutional Law §§ 169, 312; Federal Courts § 685.

2. Constitutional Law § 94 (NCI4th)— public schools—child's right to sound basic education

Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. A "sound basic education" is one that will provide

the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 624; Schools § 216.

Tort liability of public schools and institutions of higher learning for educational malpractice. 1 ALR4th 1139.

3. Constitutional Law § 94 (NCI4th); Schools § 47 (NCI4th)—funding of public schools—no violation of "equal opportunities" clause

The "equal opportunities" clause of Article IX, Section 2(1) of the North Carolina Constitution does not require substantially equal funding or educational advantages in all school districts. Consequently, the provisions of the current state system for funding schools which require or allow counties to help finance their school systems and result in unequal funding among the school districts of the state do not violate constitutional principles.

Am Jur 2d, Constitutional Law § 764; Schools §§ 9, 92, 93.

Validity of basing public school financing system on local property taxes. 41 ALR3d 1220.

4. Constitutional Law § 94 (NCI4th); Schools § 47 (NCI4th)—state funding of public schools—additional funding by local governments—constitutionality

Because Article IX, Section 2(2) of the North Carolina Constitution expressly states that units of local governments

with responsibility for public education may provide additional funding to supplement the educational programs provided by the state, there can be nothing unconstitutional about their doing so or in any inequality of opportunity occurring as a result.

Am Jur 2d, Constitutional Law § 764; Schools §§ 9, 92, 93.

Validity of basing public school financing system on local property taxes. 41 ALR3d 1220.

5. Constitutional Law § 94 (NCI4th); Schools § 47 (NCI4th)—disparities in school funding—local supplements—constitutionality

Disparities in school funding resulting from local supplements in the wealthier school districts do not deprive those in the poorer school districts of equal protection of the laws in violation of Article I, Section 19 of the North Carolina Constitution because such disparities are expressly authorized by Article IX, Section 2(2), and terms or requirements of a constitution cannot be in violation of the same constitution.

Am Jur 2d, Constitutional Law § 764; Schools §§ 9, 92, 93.

Validity of basing public school financing system on local property taxes. 41 ALR3d 1220.

6. Constitutional Law § 94 (NCI4th)— sound basic education—supplemental state funding—power of legislature

The General Assembly has the inherent power to do those things reasonably related to meeting its constitutionally prescribed duty of providing the children of every school district with access to a sound basic education, including the power to create a supplemental state funding program which has as its purpose the provision of additional state funds to poor districts so that they can provide their students access to a sound basic education. However, a funding system that distributes state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives would not be a valid exercise of that constitutional authority and could result in a denial of equal protection or due process.

Am Jur 2d, Constitutional Law § 764; Schools §§ 9, 92, 93.

7. Constitutional Law § 94 (NCI4th)— public schools—supplemental state funding—arbitrariness and capriciousness—sufficient allegations by wealthy counties

Plaintiff-intervenors have made sufficient allegations in their complaint to entitle them to proceed to attempt to prove that the state supplemental funding system is unrelated to legitimate educational objectives and, therefore, is arbitrary and capricious where they alleged that their relatively wealthy urban districts have been denied equal protection of the laws because they have greater numbers of students requiring special education programs than other districts, and the current funding system does not take into consideration the amount of money required to educate particular students with special needs.

Am Jur 2d, Schools §§ 9, 92, 93.

8. Schools § 2 (NCI4th)— school funding system—violations of chapter 115C—depriving children of sound basic education—sufficient allegations

Plaintiff-parties' allegations that the current school funding system violates portions of N.C.G.S. §§ 115C-1, 115C-81(a1), 115C-122(3), and 115C-408(b) state a claim upon which relief may be granted if they are supported by substantial evidence that the alleged violations of chapter 115C have occurred and that those violations have deprived children of some school districts of the opportunity to receive a sound basic education.

Am Jur 2d, Schools §§ 8, 9.

9. Constitutional Law § 94 (NCI4th)— public school funding—denial of sound basic education—factors considered

Factors which may be considered by the trial court in its determination as to whether any of the state's children are being denied their right to a sound basic education by the current school funding system include the goals and standards adopted by the legislature; the level of performance of the children of the state and its various districts on standard achievement tests; and the level of the state's general educational expenditures and per-pupil expenditures. However, no single factor will be determinative of this issue, and other factors may be relevant for consideration in appropriate circumstances when determining this issue.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 624.

Tort liability of public schools and institutions of higher learning for educational malpractice. 1 ALR4th 1139.

10. Constitutional Law § 94 (NCI4th)— sound basic education—deference to legislative and executive branches

The courts of the state must grant every reasonable deference to the legislative and executive branches of government when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education, and a clear showing to the contrary must be made before the courts may conclude that they have not.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 624.

Tort liability of public schools and institutions of higher learning for educational malpractice. 1 ALR4th 1139.

11. Constitutional Law § 94 (NCI4th)— denial of sound basic education—fundamental right—burden on defendants—duty of court

If the trial court makes findings and conclusions from competent evidence that defendants, the State and the State Board of Education, are denying children of the state a sound basic education, a denial of a fundamental right will have been established, and it will then become incumbent upon defendants to establish that their actions denying this fundamental right are necessary to promote a compelling governmental interest. If defendants are unable to do so, it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government.

Am Jur 2d, Constitutional Law § 750.

Justice ORR dissenting in part and concurring in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, 122 N.C. App. 1, 468 S.E.2d 543 (1996), reversing an order entered by Braswell, J., on 1 February 1995 in the Superior Court, Halifax

County, denying defendants' motion to dismiss. Heard in the Supreme Court 17 October 1996.

Parker, Poe, Adams & Bernstein L.L.P., by Robert W. Spearman and Robert H. Tiller; and Hux, Livermon & Armstrong, by H. Lawrence Armstrong, Jr., for plaintiff-appellants and -appellees.

Smith Helms Mulliss & Moore, L.L.P., by Richard W. Ellis, for plaintiff-intervenor-appellants and -appellees.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, and Ronald M. Marquette and Tiare B. Smiley, Special Deputy Attorneys General, for defendant-appellants -appellees.

North Carolina School Boards Association, by Ann W. McColl, amicus curiae.

Petree Stockton, L.L.P., by M. Gray Styers, Jr., on behalf of Eastern North Carolina Chamber of Commerce, amicus curiae.

North Carolina Education and Law Project, by Gregory C. Malhoit, Carlene McNulty, and Stephon J. Bowens; and Legal Services of North Carolina, by Deborah M. Weissman and John Vail, amici curiae.

Everett, Gaskins, Hancock & Stevens, by William G. Hancock, Hugh Stevens, and Jeffrey B. Parsons, on behalf of the North Carolina Low Wealth Schools Funding and Equalization Consortium and Education: Everybody's Business Coalition, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael Weddington, B. Davis Horne, Jr., and Robert J. Morris, on behalf of the Small Rural School Consortium, amicus curiae.

John Charles Boger; Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Ann Hubbard; and Debra K. Ross, Legal Director, on behalf of the American Civil Liberties Union of North Carolina, amicus curiae.

MITCHELL, Chief Justice.

Plaintiffs originally brought this action in Halifax County. Defendants moved for a transfer of venue to Wake County contend-

ing that under N.C.G.S. § 1-77(2), Wake County was the only proper venue for this action against public officers. Judge E. Maurice Braswell entered an order on 19 January 1995 transferring venue to Wake County and directing that all papers relating to this suit be forwarded to the Clerk of Superior Court for Wake County.

Plaintiffs in this action for declaratory and injunctive relief are students and their parents or guardians from the relatively poor school systems in Cumberland, Halifax, Hoke, Robeson, and Vance Counties and the boards of education for those counties. Plaintiff-intervenors are students and their parents or guardians from the relatively large and wealthy school systems of the City of Asheville and of Buncombe, Wake, Forsyth, Mecklenburg, and Durham Counties and the boards of education for those systems. Both plaintiffs and plaintiff-intervenors (hereinafter "plaintiff-parties" when referred to collectively) allege in their complaints in the case resulting in this appeal that they have a right to adequate educational opportunities which is being denied them by defendants under the current school funding system. Plaintiff-parties also allege that the North Carolina Constitution not only creates a fundamental right to an education, but it also guarantees that every child, no matter where he or she resides, is entitled to equal educational opportunities. Plaintiff-parties allege that defendants have denied them this right.

Plaintiffs allege that children in their poor school districts are not receiving a sufficient education to meet the minimal standard for a constitutionally adequate education. Plaintiffs further allege that children in their districts are denied an equal education because there is a great disparity between the educational opportunities available to children in their districts and those offered in more wealthy districts of our state. Plaintiffs allege that their districts lack the necessary resources to provide fundamental educational opportunities for their children due to the nature of the state's system of financing education and the burden it places on local governments. They allege that the state leaves the funding of capital expenses, as well as twenty-five percent of current school expenses, to local governments. They further allege that although their poor districts are the beneficiaries of higher local tax rates than many wealthy school districts, those higher rates cannot make up for their lack of resources or for the disparities between systems. Plaintiffs also allege that students in their poor school districts are not receiving the education called for by the Basic Education Program, part of the statutory framework for providing education to the children of this state.

Plaintiffs complain of inadequate school facilities with insufficient space, poor lighting, leaking roofs, erratic heating and air conditioning, peeling paint, cracked plaster, and rusting exposed pipes. They allege that their poor districts' media centers have sparse and outdated book collections and lack the technology present in the wealthier school districts. They complain that they are unable to compete for high quality teachers because local salary supplements in their poor districts are well below those provided in wealthy districts. Plaintiffs allege that this relative inability to hire teachers causes the number of students per teacher to be higher in their poor districts than in wealthy districts.

Plaintiffs allege that college admission test scores and yearly aptitude test scores reflect both the inadequacy and the disparity in education received by children in their poor districts. Plaintiffs allege that end-of-grade tests show that the great majority of students in plaintiffs' districts are failing in basic subjects.

Plaintiff-intervenors allege that the current state educational funding system does not sufficiently take into consideration the burdens faced by their urban school districts, which must educate a large number of students with extraordinary educational needs. In particular, plaintiff-intervenors claim that their school districts have a large number of students who require special education services, special English instruction, and academically gifted programs. They allege that providing these services requires plaintiff-intervenor school boards to divert substantial resources from their regular education programs.

Plaintiff-intervenors contend that defendants, the State of North Carolina and the State Board of Education, have violated the North Carolina Constitution and chapter 115C of the North Carolina General Statutes by failing to ensure that their relatively wealthy school districts have sufficient resources to provide all of their students with adequate and equal educational opportunities. In addition, plaintiff-intervenors claim that the state's singling out of certain poor rural districts to receive supplemental state funds, while failing to recognize comparable if not greater needs in the urban school districts, is arbitrary and capricious in violation of the North Carolina Constitution and state law. Plaintiff-intervenors allege that deficiencies in physical facilities and educational materials are particularly significant in their systems because most of the growth in North Carolina's student population is taking place in urban areas such as those served by plaintiff-intervenor school boards. They claim that

their urban districts must serve a disproportionate number of children who due to poverty, language barriers, or other handicaps, require special resources. They allege that because urban counties have high levels of poverty, homelessness, crime, unmet health care needs, and unemployment which drain their fiscal resources, they cannot allocate as large a portion of their local tax revenues to public education as can the more rural poor districts.

In response to plaintiffs' and plaintiff-intervenors' complaints seeking declaratory and other relief, defendants filed a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(1), (2), and (6), asserting that the trial court lacked subject matter and personal jurisdiction and that plaintiff-parties had failed to state any claim upon which relief could be granted. After a hearing, Judge Braswell denied defendants' motion to dismiss. Defendants filed a timely notice of appeal to the Court of Appeals from the order denying their motion to dismiss. Following denial of a joint petition of the parties for discretionary review by this Court prior to determination by the Court of Appeals, defendants filed an alternative petition for writ of certiorari with the Court of Appeals. The petition was allowed, and the matter was heard 24 January 1996 in the Court of Appeals.

The Court of Appeals reversed the trial court's order denying defendants' motion to dismiss. In its opinion, the Court of Appeals concluded that the right to education guaranteed by the North Carolina Constitution is limited to one of equal access to the existing system of education and does not embrace a qualitative standard. *Leandro v. North Carolina*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996). The Court of Appeals found plaintiff-parties' claims to be indistinguishable from the plaintiffs' claims in *Britt v. N.C. State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. rev. denied and appeal dismissed*, 320 N.C. 790, 361 S.E.2d 71 (1987), which the Court of Appeals had found without merit. Therefore, the Court of Appeals concluded that plaintiff-parties' claims were foreclosed.

Plaintiff-parties petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31. We allowed those petitions. Plaintiffs also gave notice of appeal as a matter of right on the basis that their claims presented substantial constitutional questions.

[1] Defendants argued in the Court of Appeals that the trial court had erred by denying their motion to dismiss plaintiff-parties' educational adequacy claims as being "nonjusticiable political questions." Defendants did not raise this defense as to plaintiff-parties' other

claims. The Court of Appeals based its decision on other grounds and did not reach the "political question" issue, but defendants maintain that the "political question" issue is a threshold question that must be addressed. We address it now.

It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution. *See, e.g., Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968); *Ex parte Schenck*, 65 N.C. 353, 367 (1871); *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787). When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits. *See Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996) ("It is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith."). Therefore, it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system. Defendants' argument is without merit.

Plaintiff-parties first argue that the Court of Appeals erred in holding that no right to a qualitatively adequate education arises under the North Carolina Constitution. We agree.

The right to a free public education is explicitly guaranteed by the North Carolina Constitution: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. The Constitution also provides:

> The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

Id. art. IX, § 2(1). The principal question presented by this argument is whether the people's constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality. We answer that question in the affirmative and conclude that the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.

The Court of Appeals concluded that the right to education guaranteed by the state constitution "is limited to one of equal access to education, and it does not embrace a qualitative standard." *Leandro*, 122 N.C. App. at 11, 468 S.E.2d at 550. It based its holding on a single sentence from this Court's opinion in *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 264 S.E.2d 106 (1980): " 'It is clear, then, that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.' " *Leandro*, 122 N.C. App. at 11, 468 S.E.2d at 550 (quoting *Sneed*, 299 N.C. at 618, 264 S.E.2d at 113).

Sneed involved a challenge to the Greensboro City Board of Education's practice of charging public school students with incidental course and instructional fees and of denying enrollment to those who did not pay the fees and failed to get a waiver. This Court concluded that imposing such fees on students and parents who were financially able to pay did not offend the North Carolina Constitution's requirement of a general and uniform system of free public schools. *Sneed*, 299 N.C. at 617, 264 S.E.2d at 113. We further concluded, however, that the school system's failure to provide poor students and their parents with adequate notice of provisions for waiver of the fees was unconstitutional. *Id.* at 618-19, 264 S.E.2d at 113-14. It was in the context of this holding protecting the right of poor students to equal access to existing public education opportunities that this Court made the statement relied upon by the Court of Appeals. The present case does not involve issues of equal access to available educational opportunities, and the Court of Appeals' reliance upon *Sneed* was misplaced.

This Court has long recognized that there is a qualitative standard inherent in the right to education guaranteed by this state's constitution. In *Board of Educ. v. Board of Comm'rs of Granville County*, 174 N.C. 469, 93 S.E. 1001 (1917), for example, we stated:

> [I]t is manifest that these constitutional provisions were intended to establish a system of public education *adequate to the needs of a great and progressive people*, affording school facilities of recognized and ever-increasing merit to all the children of the State, and to the full extent that our means could afford and intelligent direction accomplish.

Id. at 472, 93 S.E. at 1002 (emphasis added).

The General Assembly also seems to have recognized the constitutional right to a sound basic education and to have embraced that right in chapter 115C of the General Statutes. For example, in a statute governing the use of funds under the control of the State Board of Education, the General Assembly has stated:

> (a) It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skills demanded in the marketplace, and the skills necessary to cope with contemporary society, using State, local and other funds in the most cost-effective manner. . . .
>
> (b) To insure a *quality* education for every child in North Carolina, and to assure that the necessary resources are provided, it is the policy of the State of North Carolina to provide from State revenue sources the instructional expenses for current operations of the public school system as defined in the standard course of study.

N.C.G.S. § 115C-408 (1994) (emphasis added). In addition, the legislature has required local boards of education "to provide *adequate* school systems within their respective local school administrative units, as directed by law." N.C.G.S. § 115C-47(1) (Supp. 1996) (emphasis added).

[2] We conclude that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society. *See generally Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *Pauley v. Kelly*, 162 W. Va. 672, 705-06, 255 S.E.2d 859, 877 (1979).

The trial court properly denied defendants' motion to dismiss this claim for relief. The Court of Appeals erred in concluding otherwise.

By other arguments, plaintiff-parties contend that the Court of Appeals erred in holding that the alleged disparity in the educational opportunities offered by the different school districts in the state does not violate their right to equal opportunities for education. They contend that Article IX, Section 2(1), requiring a "general and uniform system" in which "equal opportunities shall be provided for all students," mandates equality in the educational programs and resources offered the children in all school districts in North Carolina.

Plaintiffs and plaintiff-intervenors make somewhat different arguments in support of their purported rights to equal educational opportunities. Specifically, plaintiffs contend that inequalities in the facilities, equipment, student-teacher ratios, and test results between their poor districts and the wealthy districts compel the conclusion that students in their poor districts are denied equal opportunities for education. Plaintiffs contend that such inequalities arise from great variations in per-pupil expenditures from district to district.

We first look to the North Carolina Constitution itself to determine whether it provides a basis for relief. It places upon the General Assembly the duty of providing for "a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2(1). We conclude that at the time this provision was originally written in 1868 providing for a "general and uniform" system but without the equal opportunities clause, the intent of the framers was that every child have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime. *See, e.g., City of Greensboro v. Hodgin*, 106 N.C. 182, 190, 11 S.E. 586, 589 (1890); *Lane v. Stanly*, 65 N.C. 153, 158 (1871). The 1970 amendment adding the equal opportunities clause ensured that all the children of this state would enjoy this right.

[3] The issue here, however, is plaintiffs' contention that North Carolina's system of school funding, based in part on funding by the county in which the district is located, necessarily denies the students in plaintiffs' relatively poor school districts educational opportunities equal to those available in relatively wealthy districts and thereby violates the equal opportunities clause of Article IX, Section

2(1). Although we have concluded that the North Carolina Constitution requires that access to a sound basic education be provided equally in every school district, we are convinced that the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts. We have considered the language and history underlying this and other constitutional provisions concerned with education as well as former opinions by this Court. As a result, we conclude that provisions of the current state system for funding schools which require or allow counties to help finance their school systems and result in unequal funding among the school districts of the state do not violate constitutional principles.

Article IX, Section 2(2) of the North Carolina Constitution expressly authorizes the General Assembly to require that local governments bear part of the costs of their local public schools. Further, it expressly provides that local governments may add to or supplement their school programs as much as they wish.

> The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

N.C. Const. art. IX, § 2(2).

The idea that counties are to participate in funding their local school districts has a long history. In 1890, for example, Chief Justice Merriman wrote for this Court that

> the funds necessary for the support of public schools—the public school system—are not derived exclusively from the State. The Constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of supplying such funds.

Hodgin, 106 N.C. at 187-88, 11 S.E. at 588.

[4] Because the North Carolina Constitution expressly states that units of local governments with financial responsibility for public education may provide additional funding to supplement the educational programs provided by the state, there can be nothing unconstitutional about their doing so or in any inequality of opportunity

occurring as a result. We agree with the reasoning of the Court of Appeals in *Britt* that

> the Constitution itself contains provisions that contradict plaintiffs' arguments. The governing boards of units of local government having financial responsibility for public education are expressly authorized to "use local revenues to add to or supplement any public school or post-secondary school program." N.C. Const., Article IX, § 2(2). Clearly then, a county with greater financial resources will be able to supplement its programs to a greater degree than less wealthy counties, resulting in enhanced educational opportunity for its students. . . . [This] provision[] obviously preclude[s] the possibility that exactly equal educational opportunities can be offered throughout the State.

Britt, 86 N.C. App. at 288, 357 S.E.2d at 435-36.

Further, as the North Carolina Constitution so clearly creates the likelihood of unequal funding among the districts as a result of local supplements, we see no reason to suspect that the framers intended that substantially equal educational opportunities beyond the sound basic education mandated by the Constitution must be available in all districts. A constitutional requirement to provide substantial equality of educational opportunities in every one of the various school districts of the state would almost certainly ensure that no matter how much money was spent on the schools of the state, at any given time some of those districts would be out of compliance. If strong local public support in a given district improved the educational opportunities of that district to the point that they were substantially better than those of any other district, the children of all the other school districts by definition would be denied substantially equal educational opportunities. The result would be a steady stream of litigation which would constantly interfere with the running of the schools of the state and unnecessarily deplete their human and fiscal resources as well as the resources of the courts.

Substantial problems have been experienced in those states in which the courts have held that the state constitution guaranteed the right to a sound basic education. *See generally Horton v. Meskill*, 195 Conn. 24, 486 A.2d 1099 (1985) (describing changes in the Connecticut public schools since the Connecticut Supreme Court had struck down an earlier financing system); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (a 5-4 decision upholding the state's school financing plan after the Texas Supreme Court had

struck down three state plans for funding public education in Texas); *State ex rel. Bds. of Educ. v. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988) (describing changes in the public schools since the Supreme Court of West Virginia had struck down the school financing system); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & Legal Educ. 219 (1990) (describing the difficulty in understanding and implementing the mandates of the courts); James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 Va. L. Rev. 349, 392-93 (1990) (arguing that changes in Connecticut schools after successful litigation had failed to improve student performance); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1072, 1075-78 (1991) (describing the lack of an adequate remedy in New Jersey). We believe that even greater problems of protracted litigation resulting in unworkable remedies would occur if we were to recognize the purported right to equal educational opportunities in every one of the state's districts. *See generally Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) (decision of a divided Court striking down the most recent efforts of the New Jersey legislature and for the third time declaring the funding system for the schools of that state to be in violation of the state constitution). We conclude that the framers of our Constitution did not intend to set such an impractical or unattainable goal. Instead, their focus was upon ensuring that the children of the state have the opportunity to receive a sound basic education.

For the foregoing reasons, we conclude that Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the opportunity for a sound basic education, but it does not require that equal educational opportunities be afforded students in all of the school districts of the state. The Court of Appeals did not err in reversing the order of the trial court to the extent that order denied defendants' motion to dismiss this claim for relief.

Plaintiff-intervenors make a different argument. They neither allege in their complaint nor argue before this Court that constitutionally mandated educational opportunities require equal funding. Instead, they allege and contend that due to the particular demographics of their urban districts, which include many disadvantaged children, the current state system leaves them unable to provide all of their students a "minimally adequate" basic education. Ironically, if

plaintiff-intervenors' argument should prevail, they would be entitled to an unequally large per-pupil allocation of state school funds for their relatively wealthy urban districts. When reduced to its essence, however, this argument by plaintiff-intervenors is merely repetitious of their previous argument that the state must provide all of its children with the opportunity to receive a sound basic education. As we have already concluded that the children of the state enjoy that right and that plaintiff-intervenors may proceed on that claim, we need not and do not address this argument by plaintiff-intervenors.

[5] In another argument, plaintiffs contend that the disparities in the funding provided their poor school districts as compared to the wealthier districts deprive them of equal protection of the laws in violation of Article I, Section 19 of the North Carolina Constitution. Here again, plaintiffs are complaining of the disparities resulting from the local supplements going to the wealthier districts as expressly authorized by Article IX, Section 2(2). Any disparity in school funding among the districts resulting from local subsidies is directly attributable to Article IX, Section 2(2) itself. Plaintiffs are essentially reduced to arguing that one section of the North Carolina Constitution violates another. It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself. This argument is without merit.

In another argument, plaintiff-intervenors contend that their relatively wealthy urban districts have been denied equal protection of the laws because there is no rational nexus between the current allocation of the state's portion of the funding for the school districts and the actual costs of providing students with educational services. This problem is especially acute in plaintiff-intervenors' districts, they contend, because they have greater numbers of students requiring special education programs than other districts. Plaintiff-intervenors complain that the current funding system does not take into consideration the amount of money required to educate particular students with special needs. Plaintiff-intervenors argue, therefore, that the state system providing supplemental state funding to poor and small school districts is arbitrary and denies students in plaintiff-intervenors' wealthy urban districts the equal protection of the laws guaranteed by Article I, Section 19.

Plaintiff-intervenors do not argue that the General Assembly may not provide supplemental state funds to some districts and not oth-

ers. Instead, they contend that the General Assembly has set up the programs for supplementing some but not all districts from purely state funds arbitrarily and without regard for the actual supplemental educational needs of particular school districts throughout the state.

[6] Because we conclude that the General Assembly, under Article IX, Section 2(1), has the duty of providing the children of every school district with access to a sound basic education, we also conclude that it has inherent power to do those things reasonably related to meeting that constitutionally prescribed duty. This power would include the power to create a supplemental state funding program which has as its purpose the provision of additional state funds to poor districts so that they can provide their students access to a sound basic education. However, a funding system that distributed state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives simply would not be a valid exercise of that constitutional authority and could result in a denial of equal protection or due process.

[7] We conclude that the Court of Appeals erred in reversing the trial court's denial of the motion to dismiss this claim by plaintiff-intervenors. Plaintiff-intervenors have made sufficient allegations in their complaint to entitle them to proceed to attempt to prove that the state supplemental funding system in question is unrelated to legitimate educational objectives and, therefore, is arbitrary and capricious. The Court of Appeals erred in holding to the contrary and in reversing the trial court's denial of defendants' motion to dismiss this claim for relief.

[8] In other arguments, plaintiff-parties contend that the Court of Appeals erred in holding that they had not made sufficient allegations in their complaints to state a claim for the violation of their rights under chapter 115C of the North Carolina General Statutes. We find it unnecessary to dwell at length on these arguments by plaintiff-parties, as even they agree that most of the sections of the statutes they rely upon do little more than codify a fundamental right guaranteed by our Constitution.

Specifically, plaintiff-parties allege in their complaints that the education system of North Carolina as currently maintained and operated violates the following requirements of chapter 115C: (1) that part of N.C.G.S. § 115C-1 requiring a "general and uniform system of free public schools . . . throughout the State, wherein equal oppor-

tunities shall be provided for all students"; (2) that part of N.C.G.S. § 115C-81(a1) requiring that the state provide "every student in the State equal access to a Basic Education Program"; (3) that part of N.C.G.S. § 115C-122(3) requiring the state to "prevent denial of equal educational . . . opportunity on the basis of . . . economic status . . . in the provision of services to any child"; and (4) that part of N.C.G.S. § 115C-408(b) requiring that the state "assure that the necessary resources are provided . . . from State revenue sources [for] the instructional expenses for current operations of the public school system as defined in the standard course of study." We conclude that none of the statutes relied upon by plaintiff-parties requires that substantially equal educational opportunities be offered in each of the school districts of the state. Instead, those statutes, at most, reiterate the constitutional requirement that every child in the state have equal access to a sound basic education. To the extent that plaintiff-parties can produce evidence tending to show that defendants have committed the violations of chapter 115C alleged in the complaints and that those violations have deprived children of some districts of the opportunity to receive a sound basic education, plaintiff-parties are entitled to do so. The Court of Appeals erred in its conclusion to the contrary.

As we have stated in this opinion, we conclude that the North Carolina Constitution does not guarantee a right to equal educational opportunities in each of the various school districts of the state. Therefore, the Court of Appeals was correct in concluding that the trial court erred in failing to dismiss plaintiff-parties' claims for relief based upon this purported right.

We have concluded, however, that the North Carolina Constitution does guarantee every child of the state the opportunity to receive a "sound basic education" as we have defined that phrase in this opinion. We have announced that definition with some trepidation. We recognize that judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives a sound basic education. However, it is the duty of this Court under the North Carolina Constitution to be the final authority in interpreting that constitution, and the definition we have given of a "sound basic education" is that which we conclude is the minimum constitutionally permissible.

We acknowledge that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each

child of the state receives a sound basic education. The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.

We have concluded that some of the allegations in the complaints of plaintiff-parties state claims upon which relief may be granted if they are supported by substantial evidence. Therefore, we must remand this case to the trial court to permit plaintiff-parties to proceed on those claims.

[9] Educational goals and standards adopted by the legislature are factors which may be considered on remand to the trial court for its determination as to whether any of the state's children are being denied their right to a sound basic education. *See generally* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597 (1994). They will not be determinative on this issue, however.

Another factor which may properly be considered in this determination is the level of performance of the children of the state and its various districts on standard achievement tests. *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. on Legis. 307, 332 (1991). In fact, such "output" measurements may be more reliable than measurements of "input" such as per-pupil funding or general educational funding provided by the state. *Id.* at 329. It must be recognized, however, that the value of standardized tests is the subject of much debate. Therefore, they may not be treated as absolutely authoritative on this issue.

Another relevant factor which may be considered by the trial court on remand of this case is the level of the state's general educational expenditures and per-pupil expenditures. *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48, 439 N.E.2d 359, 369, 453 N.Y.S.2d 643, 653 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 986 (1983). However, we agree with the observation of the United States Supreme Court that

> [t]he very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. *Jefferson v. Hackney*, 406 U.S. [535], 546-547[, 32 L. Ed. 2d 285, 296 (1972)]. *On even the most basic questions in this area the scholars and educational experts are divided.* Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education . . . .

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43, 36 L. Ed. 2d 16, 48-49 (1973) (emphasis added).

More recently, one commentator has concluded that "available evidence suggests that substantial increases in funding produce only modest gains in most schools." William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 Conn. L. Rev. 721, 726 (1992). The Supreme Court of the United States recently found such suggestions to be supported by the actual experience of the Kansas City, Missouri, schools over several decades. The Supreme Court expressly noted that despite massive court-ordered expenditures in the Kansas City schools which had provided students there with school "facilities and opportunities not available anywhere else in the country," the Kansas City students had not come close to reaching their potential, and "learner outcomes" of those students were "at or below national norms at many grade levels." *Missouri v. Jenkins*, 515 U.S. 70, —, 132 L. Ed. 2d 63, 88-89 (1995).

We note that in every fiscal year since 1969-70, the General Assembly has dedicated more than forty percent of its general fund operating appropriations to the public primary and secondary schools. Marvin K. Dorman, Jr. and Robert L. Powell, N.C. Off. of State Budget & Mgmt., *Post-Legislative Budget Summary, 1996-97*, app. tbl. 11, at 154 (Oct. 1996); Fiscal Research Div., 1997 N.C. Gen. Assembly, *Selected Economic Revenue and Budget Data* (Feb. 11, 1997). During each of those same years, more than fifty-nine percent of the general fund operating appropriations were dedicated to overall public education, which includes community colleges and higher education. *Id.* Additionally, the Excellent Schools Act, which became effective when signed by Governor James B. Hunt, Jr., on 24 June

1997, will require additional large appropriations to the primary and secondary schools of the state. S.B. 272, 1997 N.C. Gen. Assembly (enacted June 24, 1997). Courts, however, should not rely upon the single factor of school funding levels in determining whether a state is failing in its constitutional obligation to provide a sound basic education to its children.

Other factors may be relevant for consideration in appropriate circumstances when determining educational adequacy issues under the North Carolina Constitution. The fact that we have mentioned only a few factors here does not indicate our opinion that only those factors mentioned may properly be considered or even that those mentioned will be relevant in every case.

[10] In conclusion, we reemphasize our recognition of the fact that the administration of the public schools of the state is best left to the legislative and executive branches of government. Therefore, the courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. A clear showing to the contrary must be made before the courts may conclude that they have not. Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

[11] But like the other branches of government, the judicial branch has its duty under the North Carolina Constitution. If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions denying this fundamental right are "necessary to promote a compelling governmental interest." *Town of Beech Mountain v. County of Watauga*, 324 N.C. 409, 412, 378 S.E.2d 780, 782, *cert. denied*, 493 U.S. 954, 107 L. Ed. 2d 351 (1989). If defendants are unable to do so, it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government. *Corum v. University of N.C.*, 330 N.C. 761, 784, 413 S.E.2d 276, 291, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

For the foregoing reasons, the decision of the Court of Appeals is reversed in part and affirmed in part. This case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for proceedings not inconsistent with this opinion.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.

Justice ORR dissenting in part and concurring in part.

I dissent from the portion of the majority opinion that holds that the alleged disparity in the educational opportunities offered by different school districts in this state does not violate Article IX, Section 2(1) of the North Carolina Constitution. I believe, for the reasons stated below, that if the allegations in plaintiffs' complaint are proven at trial, then the state's funding plan for public education would violate the "equal opportunities" clause set forth in our Constitution.

The majority advances two arguments in support of its ruling upholding the current method of state funding for the public school system. The first is that "Article IX, Section 2(2) of our Constitution expressly authorizes the General Assembly to require that local governments bear part of the costs of their local public schools." Second, the majority points out that, historically, local governments have played a significant role in funding our public school system. All of this is true.

However, the majority also views the role of local government as somehow reducing or eliminating the state's ultimate responsibility for funding our public schools. Thus, according to the majority logic, the unequal funding brought about by this system must have been anticipated by the framers of our Constitution. Therefore, no equal treatment in educational opportunities was ever intended. I disagree. The framers of our Constitution also provided, "The people have a right to the privilege of education, and it is the duty of the *State* to guard and maintain that right." N.C. Const. art. I, § 15 (emphasis added). The Constitution further provides that the *General Assembly* shall "provide by taxation and otherwise for a general and uniform system of free public schools." N.C. Const. art. IX, § 2(1) (emphasis added). It must be noted that in both of these constitutional provisions, the burden and responsibility is placed upon the state and the General Assembly. Nowhere is the constitutional responsibility for public education placed on local governments. In fact, the counties of North Carolina were created by the General Assembly as governmen-

tal agencies of the state. N.C. Const. art. VII, § 1. Counties are merely regarded as

> "agencies of the State for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision" . . . .

Town of Saluda v. Polk County, 207 N.C. 180, 183, 176 S.E. 298, 300 (1934) (quoting *Jones v. Commissioners*, 137 N.C. 579, 596, 50 S.E. 291, 297 (1905)).

The reliance by the majority on the language in Article IX, Section 2(2) of our Constitution that declares the General Assembly "*may* assign to units of local government such responsibility for the financial support of the free public schools as they may deem appropriate" (emphasis added) can in no way reduce the state's ultimate responsibility. Nor can the simple fact that local governments may use local revenue to "add or supplement" public school programs allow the state to avoid its constitutionally mandated obligation to "provide for a general and uniform system of free public schools." N.C. Const. art. IX, § 2(1).

Moreover, the majority contends that because local funding has been utilized throughout our state's history, any disparities in funding must have been anticipated by the framers of our Constitution. This argument cannot be maintained. I agree with the Tennessee Supreme Court's characterization of this reasoning as a " 'cruel illusion.' " *See Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 155 (Tenn. 1993) (quoting *Serrano v. Priest*, 18 Cal. 3d 728, 761, 557 P.2d 929, 948, 135 Cal. Rptr. 345, 364 (1976), *cert. denied*, 432 U.S. 907, 53 L. Ed. 2d 1079 (1977)). Local education funds are primarily generated through property taxes. If a county has a relatively low total assessed value of property, it has a barrier beyond which it cannot go in funding its educational system(s). Although these counties might impose a higher tax rate than their wealthier counterparts, their efforts cannot substitute for a lack of resources. The poorer counties simply cannot tax themselves to a level of educational quality that its tax base cannot supply. In those circumstances, the argument for local funding is a "cruel illusion" for those officials and citizens who are interested in a quality education for their children.

Although the majority opinion acknowledges the 1970 constitutional amendment to Article IX, Section 2(1) that added the phrase

"wherein equal opportunities shall be provided for all students," the majority apparently gives no significance to its meaning. Defendants, in their brief, contend that the phrase was adopted for the sole purpose of addressing racial segregation. *Britt v. N.C. State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. rev. denied and appeal dismissed*, 320 N.C. 790, 361 S.E.2d 71 (1987). I disagree and believe that the majority fails to give this constitutional mandate the full scope of its meaning.

Contrary to the rationale presented in *Britt*, the 1971 constitutional framers removed existing language from the 1877 Constitution which mandated that "the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race." N.C. Const. of 1877, art. IX, § 2 (1969). The framers did not choose simply to remove the initial racially discriminatory language, but instead rewrote the constitutional language to provide for "*equal opportunities . . . for all students.*" N.C. Const. art. IX, § 2(1) (emphasis added).

In arguing the phrase applies only to racial issues, the *Britt* court essentially violated a rule of statutory interpretation: " '[W]here the meaning is clear from the words used,' " courts should not search for a meaning elsewhere but rather should give meaning to the plain language of the constitution. *Martin v. North Carolina*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)). To interpret the phrase "equal opportunities . . . for all students" as equal opportunities for only minority students creates a restrictive definition that the framers could not have intended. Indeed, in regard to education, our Constitution displays a deep concern for " 'ensur[ing] every child a fair and full opportunity to reach his full potential.' " *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) (quoting N.C.G.S. § 115-1.1 (1978)) (recodified as N.C.G.S. § 115C-106 (1994)) (explaining the force of N.C. Const. art. IX, § 2(1) and N.C. Const. art. I, § 15). The Constitution, by its literal reading, means *all* students. It does not discriminate as to race, gender, handicap, economic status, or geography. Thus, students residing in a poorer district are still entitled to substantially equal educational opportunities as students in wealthier districts.

The majority also advances the rationale that plaintiffs' argument for equal educational programs and resources is not practical. This

justification is based on the notion that identical funding and programs are unattainable. However, I believe that the phrase "equal educational opportunities," as advanced by plaintiffs, encompasses more than identical programs and funding for all the school districts in our state. The concept also addresses access to new textbooks, adequate facilities, other educational resources, and quality teachers with competitive salaries. The majority primarily focuses on the word "equal," interpreting this to mean "identical," and rejects the concept because of the fear of never-ending litigation. However, plaintiffs, in their brief, characterize equality as follows:

> [T]he concept of equality is never absolute. When used in the context of human relations, the notion of equality must take [into] account the fact that no two people and no two situations are in all respects exactly alike. We use the word equality to express a range within which things can and should be similar.

See Horton v. Meskill, 172 Conn. 615, 652, 376 A.2d 359, 375 (1977). Plaintiffs are essentially arguing that while perfect equality can never be achieved, much can be done to provide substantially equal opportunities. This description is consistent with *Black's Law Dictionary*, which defines "equality" as "[t]he condition of possessing *substantially* the same rights, privileges, and immunities." *Black's Law Dictionary* 536 (6th ed. 1990) (emphasis added). Thus, the phrase "equal opportunities," in practical terms, means substantially equal opportunities.

Therefore, the equality plaintiffs seek is not necessarily absolute and identical but, rather, is substantial equality. Although the concept of substantial equality is difficult to define, it is clear that a gross disparity in resources does not fall within its definition. For example, plaintiffs allege that many of their schools lack adequate classroom space and that they are forced to hold classes in hallways, cafeterias, libraries, and closets. Plaintiffs also argue that students in Wake County have science laboratories to conduct biology experiments; however, children in Hoke County must watch videos of others conducting the experiment because of lack of resources. Plaintiffs also point to several less obvious disparities: lack of sewer connections and problematic waste water disposal, leaking roofs that cause extensive damage and sometimes require classrooms to be closed during heavy rains, and lighting systems and acoustics that are often poor and inadequate. Plaintiffs also allege that higher teacher pay supplements in the wealthier counties make it more difficult for them

to attract the best teachers to their schools. The result of the above inadequacies is that in basic courses such as math, history, and English, more than 80% of the students in plaintiffs' counties are failing. If these allegations are true, these students may not even be receiving the sound basic education that the majority mandates. It also reflects the fact that there is a wide disparity between the wealthier and poorer counties. Can it be rationally argued that students from economically disadvantaged school districts with outdated texts, aging buildings, limited resources, and teachers at the lower end of the wage scale are receiving substantially equal educational opportunities with those students from well-financed school districts with state-of-the-art facilities? The answer is as obvious as is the constitutional mandate that there be "equal opportunities . . . for all students." N.C. Const. art. IX, § 2(1).

The notion of substantial equality in educational opportunities for all students is not a novel concept. *See, e.g., McDuffy v. Secretary of Exec. Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139. Even our constitutional framers addressed this issue. They commented that the Constitution was designed to "*level upwards*, to *every* child, as far as the State can, an opportunity to develop to the *fullest* extent, all his intellectual gifts. So noble an effort, needs no vindication." *Journal of the Constitutional Convention of the State of North Carolina* 487 (1868) (emphasis added). Three years later, this Court pronounced in *Lane v. Stanly*, 65 N.C. 153 (1871), that Article IX provides that the state public school system

> will be observed as a "system"; it is to be "general," and it is to be "uniform." It is not subject to the caprice of localities, but *every locality, yea every child, is to have the same advantage* . . . .
>
> . . . .
>
> [Otherwise,] [i]n some townships there would be no schools, in others inferior ones, and in others extravagant ones, to the oppression of the taxpayers. There would be no "uniformity" and but little usefulness, and *the great aim of the government in giving all of its citizens a good education would be defeated.*

Id. at 157-58 (emphasis added). In essence, I believe that our constitutional framers intended for *all* students to have equal access to public schools and substantially equal educational opportunities. To conclude otherwise would create arbitrary boundaries on educa-

tional opportunities based on geographical lines and local funding circumstances.

In evaluating plaintiffs' claim under Rule 12(b)(6), the facts alleged are to be taken as true, *Embree Const. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 490, 411 S.E.2d 916, 919-20 (1992), and a complaint should not be dismissed "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim," *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970). In our case, statistics employed by both plaintiffs and the state show, for example, that for the 1990-91 fiscal year, the funding for operation of the state's public school system came from the following sources: state funds (66.1%), local funds (24.5%), federal funds (6.6%), and private funds (2.8%). National Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Digest of Education Statistics*, tbl. 157, at 152 (1993). For capital outlay expenditures, the allocation was as follows: state funds (9%), local funds (90%), and federal funds (1%). Public Schools of N.C., State Bd. of Educ., *N.C. Public Schools Statistical Profile*, tbl. 30, at 58 (1993) (citing 1991-92 fiscal year statistics). These statistics show without question that a sizeable portion of funding, particularly in the area of capital outlays, falls upon local governments. Consequently, wealthier counties are more capable of meeting their educational needs than are economically disadvantaged counties. These allegations, if true, are more than adequate to state a claim under both the right to a sound basic education and the right to a substantially equal opportunity to get the best education possible.

By the above discussion, I do not contend that the state must necessarily assume complete control over educational allocations. The General Assembly still has the discretion to allocate this responsibility between the state and local governments. Yet it must be reemphasized that the inability or indifference of local governments to provide funds does not excuse the General Assembly from a duty specifically imposed on it by the Constitution.

In closing, we should reflect upon the history of education in North Carolina. The control over education has often been fraught with political overtones of class, race, and gender. In the early 1900s, the New South movement led a classroom revolution to reform the existing education system. Since that turning point, reformers have espoused a platform of simple justice and equality in an effort to ensure a quality education for all children. *See generally* James L.

LeLoudis, *Schooling the New South* (1996). This process has been long and arduous. As Robert Ogden, a leading reformer in the early 1900s, explained: "[T]he work must be thorough-going, because we wish gradually to change . . . an outworn system of society." *Id.* at 146.

The essential issue in this debate concerns substantial equality of educational opportunities. The issue is not, as the majority argues, simply equality of funding. It is the sole responsibility of the General Assembly to formulate and implement the North Carolina public education system. The state's ultimate responsibility for education under the Constitution cannot be delegated. The specific duties implementing the responsibility are assignable, but the responsibility *per se* is not. Therefore, any assignment of authority to local governments fails to relieve the state of its responsibility to provide substantially equal educational opportunities to all students. I believe the majority erred in holding that the North Carolina Constitution does not entitle students in all school districts to substantially equal educational opportunities. In this case, plaintiffs have alleged substantial disparities in educational opportunities between wealthier and poorer counties based upon the state's funding system. These are sufficient allegations to state a claim and, if proven true, would entitle plaintiffs to relief.

Because I am unable to join the majority's decision regarding the issue of equal opportunities, I respectfully dissent in part as to this and related issues. I concur, however, with the analysis and results reached by the majority in the remainder of the opinion that does not deal with substantially equal educational opportunities.

STATE OF NORTH CAROLINA v. MAMIE DELOIS JEAN BISHOP

No. 32A93

(Filed 24 July 1997)

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

Statements by a murder victim to a banker and to her brother expressing her concern about defendant's handling of her real estate transactions and her intent to document defendant's debt to her, to seek repayment, and to confront defendant about her concern that defendant had stolen from her were properly admitted into evidence pursuant to the state of mind exception to the hearsay rule because those statements bore directly on the relationship between the victim and defendant at the time of the killing and were relevant to show a motive for the killing. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence §§ 658-707.

Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence, providing that statement is not hearsay if party-opponent has manifested his adoption or belief in its truth. 48 ALR Fed. 721.

2. Evidence and Witnesses § 876 (NCI4th)— statements by victim—improper admission under state of mind exception—absence of prejudice

Assuming arguendo that a murder victim's statement to her brother indicating that she had not been paid for horses that defendant had sold for her and her statement to her mother indicating that she had sent money to defendant to lift restrictions on property which defendant was selling for her were improperly admitted under the state of mind exception to the hearsay rule, defendant was not prejudiced by the admission of this testimony in light of other evidence that defendant's motive for the murder was the victim's insistence that defendant pay money defendant owed her, the accomplice's testimony that defendant planned, directed, and participated in the murder of the victim, and evidence that after the murder defendant took the lead in creating and refining an alibi for the accomplice and herself.

Am Jur 2d, Evidence §§ 679-703.

Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence, providing that statement is not hearsay if party-opponent has manifested his adoption or belief in its truth. 48 ALR Fed. 721.

3. Evidence and Witnesses § 881 (NCI4th)— promissory note—not hearsay—relevancy to show motive

A $40,750 promissory note signed by defendant and made payable to a murder victim was not admitted solely to show the truth of the matter asserted but was admitted to show that the victim sought repayment for money defendant owed her and was thus relevant to establish a motive for the killing.

Am Jur 2d, Evidence §§ 301-323.

4. Evidence and Witnesses § 881 (NCI4th)— financial transactions—writings in victim's possession—admissibility to show motive

A murder victim's check register books showing checks and wire transfers to defendant, a list made by the victim documenting checks, money orders, and wire transfers to defendant, handwritten calculations corresponding to amounts the victim believed defendant owed her, a spiral notebook containing various notes, and a writing by the victim placing a $40,753 value on cash advances and on land and horses sold by defendant were admissible for the non-hearsay purpose of showing that the victim had followed through on her stated intention to document defendant's debt to her and to establish a motive for the killing. Even if some or all of the victim's writings were inadmissible hearsay, defendant was not prejudiced by any error in admitting them in light of the overwhelming evidence that defendant planned, directed, and participated in the victim's killing.

Am Jur 2d, Evidence § 359.

5. Evidence and Witnesses § 179 (NCI4th)— cash advances—real estate dealings—defendant's tax returns—admissibility to show motive

Evidence of a murder victim's cash advances to defendant and the victim's real estate dealings with defendant shed light on their relationship at the time of the victim's death and, in conjunction with the victim's statements suggesting that the victim intended to confront defendant about defendant's debt to her and

defendant's statement to her boyfriend that the victim actually confronted defendant, was relevant to show that defendant had a motive to kill the victim. Furthermore, evidence of defendant's tax returns tending to show that defendant did not earn enough money to lend the victim $30,000 was relevant to refute defendant's contention that money given to her by the victim was in repayment for loans made by defendant to the victim. The trial court did not abuse its discretion by declining to exclude this evidence under Rule 403 on the ground that any probative value was substantially outweighed by the danger of unfair prejudice.

Am Jur 2d, Evidence §§ 558 et seq.

6. Evidence and Witnesses § 179 (NCI4th)— life insurance—change of beneficiary—motive for killing

Evidence that defendant sold a murder victim two life insurance policies and that both policies were amended to make defendant the primary beneficiary was relevant to show a motive for the killing. Assuming arguendo that the order of a superior court judge requiring the insurance company to pay $300,000 into court pending a determination of the parties' rights should not have been admitted, defendant cannot show that there is a reasonable possibility that, had the order not been admitted, a different outcome would have been reached at trial.

Am Jur 2d, Evidence §§ 558 et seq.

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, sec. 1.

7. Evidence and Witnesses § 1259 (NCI4th)— exercise of right to remain silent—testimony by SBI agent—not plain error

Assuming that an SBI agent's testimony that he did not interview defendant again because he was advised by her boyfriend that she had an attorney and that he should not attempt to interview her again constituted improper evidence of defendant's exercise of her right to remain silent, the admission of this testimony was not plain error since any damage to defendant's credibility caused by the SBI agent's statement was de minimis compared with defendant's own trial testimony in which she

abandoned her alibi and asserted that she was an innocent bystander while her boyfriend, acting alone, killed the victim.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 748-753.

8. Evidence and Witnesses § 2942 (NCI4th)— prearrest silence—impeachment of defendant—no denial of federal constitutional rights

The use of defendant's prearrest silence to impeach defendant during cross-examination when the prosecutor inquired into defendant's failure to talk with law officers after her interview by an SBI agent a few days after a murder did not violate defendant's federal constitutional rights where defendant was not induced to remain silent prior to her arrest by any government assurances that her silence would not be used against her; defendant did not invoke or rely upon her right to remain silent; and defendant denied any involvement in the crime when she talked with the SBI agent. U. S. Const. amends. V and XIV.

Am Jur 2d, Witnessess § 539.

9. Evidence and Witnesses § 2942 (NCI4th)— prearrest silence—impeachment of defendant—improper under N.C. law—no plain error

Assuming arguendo that the prosecutor's questions on cross-examination of defendant inquiring into defendant's failure to talk with law officers after her interview by an SBI agent a few days after a murder constituted an improper use of her prearrest silence for impeachment pursuant to rules of evidence formulated by our jurisdiction, any error in the trial court's failure to limit the prosecutor's questions did not rise to the level of plain error where there was evidence tending to show that defendant made a false statement to the SBI agent, this statement was inconsistent with defendant's trial testimony and was highly damaging to her credibility, and questions about her subsequent failure to speak to law officers did not further damage her credibility.

Am Jur 2d, Witnesses § 539.

10. Evidence and Witnesses § 264 (NCI4th)— character of victim—improper testimony—not plain error

Assuming that testimony by a murder victim's mother that the victim was "beautiful," "loving," "very gentle," and "her best friend" was improper character evidence, the admission of this testimony was not plain error where evidence by both the State and the defendant tended to characterize the victim in positive terms.

Am Jur 2d, Evidence §§ 363 et seq.

Admissibility, in prosecution for maintaining liquor nuisance, of evidence of general reputation of premises. 68 ALR2d 1300.

11. Evidence and Witnesses § 1688 (NCI4th)— photograph of murder victim while alive—admissible for illustrative purposes

A photograph of a murder victim while she was alive was admissible to illustrate her mother's testimony which described the color of her daughter's hair and which was relevant to show that the victim did not fit the description of a woman seen on the day before the murder purchasing oil lamps found in the mother's house where the victim was killed.

Am Jur 2d, Evidence § 1451.

12. Evidence and Witnesses § 3019 (NCI4th)—prior convictions—misleading testimony—opening door—details of crimes

Where defendant gave misleading testimony on direct examination that her two prior fraud convictions resulted from a mere failure to report two insurance premiums, defendant opened the door to the prosecutor's questions about the details of her prior crimes.

Am Jur 2d, Witnesses §§ 905-909.

13. Evidence and Witnesses § 3027 (NCI4th)— taking money from boyfriend—character for untruthfulness—inquiry properly allowed

The purpose of the prosecutor's cross-examination of a defendant charged with murder as to whether she had taken money from her former boyfriend by forging his name on both a

loan application and a check and cashing the check without his permission was to show conduct indicative of defendant's character for untruthfulness, and the trial court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 608(b) by allowing this inquiry.

Am Jur 2d, Witnesses §§ 901-904, 968, 969.

14. Evidence and Witnesses § 2786 (NCI4th)— cross-examination—assumption of fact not in evidence—absence of prejudice

Even if the trial court erred by permitting the prosecutor to ask the defendant in a murder trial whether she was "aware that [the victim] also went to her attorney . . . and expressed concern that you hadn't paid her" because the question assumed a fact not in evidence, defendant cannot show prejudice by the court's ruling where three witnesses gave testimony suggesting that defendant owed the victim money, that the victim had begun to document that debt, and that the victim intended to seek repayment of the money defendant owed her.

Am Jur 2d, Witnesses § 750.

15. Criminal Law § 478 (NCI4th Rev.)— prosecutor's question—not attempt to humiliate defendant—legitimate purpose

The trial court could have reasonably concluded that the prosecutor's question to a defendant on trial for murder as to whether she cried more at the crime scene "than you cried today" was not designed to simply badger and humiliate the witness but rather was designed to challenge defendant's testimony on direct examination that she was hysterical and crying at the scene of the crime.

Am Jur 2d, Trial §§ 1562, 1564.

16. Evidence and Witnesses § 607 (NCI4th)— instances of bad character—admissibility for rebuttal—another instance not plain error

Testimony by defendant's former boyfriend that defendant changed the beneficiary on his life insurance policy without his knowledge and that defendant took the accrued value of his life insurance policy without his consent, even though ordinarily inadmissible as specific instances of bad character, was properly

admitted to rebut and discredit defendant's testimony that her actions were taken with the boyfriend's knowledge and consent. Even if further testimony by the boyfriend that defendant moved out of his home because he and defendant had a disagreement over a horse sale and "there was some money missing" did not relate to any of defendant's testimony and was inadmissible for rebuttal or any other purpose, any error in the trial court's failure to exclude this testimony did not amount to plain error where the State presented substantial evidence tending to impeach defendant's credibility, and the former boyfriend testified that defendant subsequently moved back into his home.

Am Jur 2d, Witnesses §§ 837-844, 900, 956.

17. Criminal Law § 431 (NCI4th Rev.)— closing argument—mother's failure to testify—avoidance of perjury—no gross impropriety

Any impropriety in the prosecutor's argument to the jury in a murder case suggesting that defendant's mother did not take the stand in order to avoid committing perjury was not so grossly improper as to require the trial court to intervene ex mero motu where the State's evidence suggested that defendant's mother agreed after the murder to support any story that defendant and her accomplice might tell, and the absence of contradictory evidence was the essence of the prosecutor's argument.

Am Jur 2d, Trial §§ 609 et seq.

18. Criminal Law § 445 (NCI4th Rev.)— closing argument—criminal conduct will "cost" witness—no impropriety

The prosecutor's closing argument in a first-degree murder trial that defendant's boyfriend, an accomplice in the murder and a witness for the State, would be found guilty of second-degree murder and that his criminal conduct would "cost him" was supported by the evidence presented at trial and was properly made in response to defense counsel's argument that the boyfriend had not been punished for his role in the crime.

Am Jur 2d, Trial §§ 632-639.

19. Criminal Law § 436 (NCI4th Rev.)— closing argument—no misstatement or misleading statement of evidence

The prosecutor's closing argument in a first-degree murder case that he didn't ask defendant about the number of car keys

because her answer would be, "May I explain? There were two car keys" did not misstate defendant's testimony or mislead the jury concerning what was in evidence; rather, the purpose of the argument was to show that defendant's testimony that her boyfriend asked her for her car keys while he was driving her car from the crime scene did not make any sense and to question defendant's credibility by noting her manner of answering questions. Therefore, the argument was not so grossly improper as to require the trial court to intervene ex mero motu.

Am Jur 2d, Trial § 611.

20. Criminal Law § 448 (NCI4th Rev.)— closing argument—community sentiment—no impropriety

The prosecutor's closing argument in a first-degree murder case did not improperly urge the jury to "lend its ear" to anticrime sentiment in the community and to convict defendant in order to "do something" about crime but merely referred to community sentiment and urged the jury to render a verdict justified by the evidence.

Am Jur 2d, Trial §§ 644 et seq.

21. Homicide § 374 (NCI4th)— first-degree murder—acting in concert—sufficiency of evidence

The trial court did not err by instructing the jury that it could find defendant guilty of first-degree murder under the theory of acting in concert where the State's evidence tended to show that defendant asked her boyfriend to help her "rough up" the victim, that the boyfriend went to the home of the victim's mother with the intent of helping defendant assault the victim, and that defendant and her boyfriend acted together to beat and stab the victim to death; defendant provided her boyfriend with a wooden baton and knife that the boyfriend used to beat and stab the victim, defendant personally beat the victim, and defendant personally inflicted the stab wounds that caused the victim's death; defendant started a fire after killing the victim, took the lead in concocting and refining an "alibi story," and urged her boyfriend to "stick" to this story; and the boyfriend helped defendant dispose of evidence and made statements to law officers that he and defendant were together at the time of the killing. The evidence was sufficient to show that defendant acted with premeditation and deliberation and to show not only that the victim's murder

was a natural or probable consequence of the joint purpose of defendant and her boyfriend to commit a crime, but that defendant and her boyfriend acted together pursuant to a joint purpose to murder the victim.

Am Jur 2d, Trial §§ 1077 et seq.

22. Arson and Other Burnings § 29 (NCI4th); Criminal Law § 805 (NCI4th Rev.)-second-degree arson—acting in concert—sufficiency of evidence

The trial court did not err by instructing the jury that it could find defendant guilty of second-degree arson under the theory of acting in concert where the State's evidence tended to show that defendant and her boyfriend acted together to kill the victim and that the boyfriend was present when defendant poured oil over the victim's body and set it on fire; the boyfriend subsequently drove defendant to defendant's trailer and assisted defendant in disposing of their bloody clothing; defendant and her boyfriend agreed on an alibi; and both initially gave statements to the police denying any involvement in the crime.

Am Jur 2d, Arson and Related Offenses § 55.

23. Homicide § 583 (NCI4th)— first-degree murder—acting in concert—instructions on specific intent

The trial court's instructions on acting in concert in a first-degree murder trial were not erroneous under *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, because they included the phrase "either acting by herself or together with another" in the instruction on each of the elements relating to specific intent. Moreover, the instructions also complied with the rule in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727, which was overruled by *Barnes*, where they made it clear that, in order to convict defendant, defendant herself must have had the requisite specific intent.

Am Jur 2d, Trial §§ 1077 et seq.

24. Criminal Law § 771 (NCI4th Rev.)— instructions—reasonable doubt—insufficient evidence as basis

The trial court's instructions on reasonable doubt sufficiently informed the jury that reasonable doubt could arise out of the insufficiency of the evidence where the instruction informed the jury that a reasonable doubt may arise out of "some or all of

the evidence that has been presented, or a lack of that evidence, as the case may be" and that a reasonable doubt may be generated by an "insufficiency of the proof."

Am Jur 2d, Trial §§ 1371 et seq.

25. Criminal Law § 770 (NCI4th Rev.)— instructions—reasonable doubt—ingenuity of counsel—what reasonable doubt was not

The trial court's instruction that a "reasonable doubt is not a doubt suggested by ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony" did not preclude the jury from considering ingenuity of counsel legitimately warranted by the testimony. Furthermore, the trial court did not err by instructing the jury as to what reasonable doubt was "not."

Am Jur 2d, Trial §§ 1371 et seq.

26. Criminal Law § 773 (NCI4th Rev.)— instructions—reasonable doubt—use of "moral certainty" and "honest substantial misgiving"

The trial court did not use the phrases "moral certainty" and "honest substantial misgiving" in its instructions on reasonable doubt in a manner that unconstitutionally reduced the State's burden of proof.

Am Jur 2d, Trial §§ 1371 et seq.

27. Criminal Law § 1200 (NCI4th Rev.)— arson—aggravating factor—damage causing great monetary loss

The evidence supported the trial court's finding as an aggravating factor for arson that the offense involved property damage causing great monetary loss where the State presented evidence that the house that was burned was a frame, single-story house with two bedrooms, a living room, a kitchen, a den, and a porch; two persons resided in the house; the owner testified that the house had a replacement value of $80,000 and was a "complete loss"; an assistant fire marshall testified that it took firemen two hours to suppress the flames and that one-third of the house had flames coming through the roof; and the State presented photographs showing the house as it appeared before and after the fire. N.C.G.S. § 15A-1340.16(d)(14).

Am Jur 2d, Arson and Related Offenses §§ 33, 40-51.

28. Criminal Law § 970 (NCI4th Rev.)— first-degree murder—denial of motion for appropriate relief—new witness not truthful

The trial court did not abuse its discretion in denying defendant's motion for appropriate relief in a first-degree murder case on the basis of newly discovered evidence where a witness who contacted defendant's attorney after the jury found defendant guilty of murder testified that he was an eyewitness to the murder and that defendant's boyfriend was solely responsible for the victim's killing; the evidence at the hearing supported the trial court's finding that the State's cross-examination of the witness and the testimony of other witnesses "tended to substantially question his character for truthfulness and veracity"; and this finding supported the trial court's conclusions that the testimony of the new witness was not true and that the testimony was not of such a nature as to show that a different result would probably be reached at another trial.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 44 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Downs, J., at the 25 May 1992 Mixed Session of Superior Court, Buncombe County, upon a jury verdict of guilty of first-degree murder. Defendant also appeals from an order, entered 6 May 1994, denying her post-trial motion for appropriate relief. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for second-degree arson was allowed on 28 November 1995. Heard in the Supreme Court 10 September 1996.

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

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

PARKER, Justice.

Defendant Mamie Delois Jean Bishop was tried capitally on indictments charging her with first-degree murder and first-degree arson. The jury found defendant guilty of first-degree murder and second-degree arson. Following a capital sentencing proceeding, the jury recommended a sentence of life imprisonment; and the trial

court entered judgment accordingly. The trial court also imposed a consecutive sentence of forty years' imprisonment for second-degree arson. For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error.

The State's evidence tended to show the following. On 24 or 25 July 1988 defendant and her boyfriend, Arthur John Boergert, killed Glenda Sue Nelson ("victim") at the Buncombe County home of the victim's mother and stepfather, Ava and Vonno Payne.

The victim was an accountant who worked and lived in New Jersey. On the weekend of the killing, she was staying at the Paynes' house while they were out of town. The victim had been a close friend of defendant's since 1984, and defendant had handled real estate transactions and horse sales for the victim. Between 1986 and 1988 the victim transferred to defendant approximately $30,000 by check, money order, and wire transfer; and the victim apparently considered these transfers to be cash advances. In early 1988 the victim made statements indicating that she was concerned that defendant had been stealing money from the sale of her property and that the victim had not been paid for horses that defendant had sold for her. The victim made statements to Dee Dickerson and Joseph Nelson indicating that she was attempting to document the amount owed her by defendant and that she intended to confront defendant about the debt. On 7 March 1988 the victim asked defendant to sign a promissory note in the amount of $40,753, and defendant did so.

On Sunday, 24 July 1988, defendant told Boergert that the victim had been harassing her, that the victim wanted money for a $10,000 check, and that she wanted to get the victim "off her back." Defendant asked Boergert to help her "rough [the victim] up a little bit and that would be the end of it."

At some time after 11:00 p.m. on 24 July, defendant met the victim at the J & S Cafeteria. From that location they took the victim's car to the Paynes' house. Following defendant's instructions Boergert drove his truck to the J & S Cafeteria, left his truck in the parking lot, took defendant's car, and proceeded to the Paynes' house. Boergert entered the house and saw defendant and the victim fighting. Using a wooden baton given to him by defendant earlier in the evening, Boergert hit the victim on the back of the head. Defendant took the baton from Boergert and beat the victim until the baton broke.

Defendant tossed Boergert a folding, lock-blade knife and told him to open it. Boergert opened the knife and stabbed the victim twice. Defendant then grabbed the knife and stabbed the victim repeatedly, inflicting numerous stab wounds including several to the victim's neck. The medical examiner testified that stab wounds to the victim's neck were the cause of death.

Defendant retrieved two oil lamps from a bedroom. She poured oil from one of the lamps onto the victim's body, smashed the other lamp on the floor, and rolled the victim's body into the resulting puddle of oil. She then started a fire which charred the victim's body and damaged the Paynes' house.

Defendant and Boergert left the Paynes' house in defendant's car and drove to her trailer. They put their bloody clothes in a garbage bag which they later threw into a river. Defendant told Boergert that they had to concoct an alibi in order to avoid arrest. They decided to say that they took a ride in defendant's car after working late Sunday evening, returned to defendant's trailer, and then went to the J & S Cafeteria to retrieve Boergert's truck.

The following day defendant and Boergert talked with defendant's mother, and she agreed to confirm any story defendant and Boergert might tell. Defendant and Boergert were interviewed by law enforcement officers two or three days after the murder, and they gave statements consistent with their story. A week or two after the murder, defendant and Boergert refined the story and had it transcribed. The State's evidence suggested that defendant took the lead in developing and refining the "alibi story" and that she later encouraged Boergert to "stick" to the story.

A short time after the murder, defendant ended her relationship with Boergert and moved into a house owned by her former boyfriend, Howard Treadway. Defendant told Boergert that she was the beneficiary of a $100,000 life insurance policy on the victim's life and promised to give Boergert $25,000 from the proceeds.

Defendant was a life insurance agent, and the evidence showed that she sold the victim two life insurance policies several years before the killing. In 1987 the policies were amended with defendant's knowledge to make defendant the primary beneficiary and defendant's daughter the contingent beneficiary. A short time after the murder, defendant filed a claim against Home Beneficial Insurance Company seeking $300,000 on the life insurance policies.

In May 1989 Boergert made a statement to law enforcement officers which implicated defendant. He subsequently agreed to meet with defendant, to wear a "wire," and to record their conversation. During this meeting defendant assured Boergert that the police did not have any evidence against them and urged him to "stick" to their story. Defendant was arrested and charged with the victim's murder a short time later.

Defendant testified that Boergert killed the victim in a jealous rage. She stated that she and the victim were alone at the Paynes' house when Boergert entered the house and angrily made a statement suggesting that he believed that defendant and the victim were having a lesbian affair. Over defendant's protests Boergert killed the victim and set the house ablaze. Defendant stated that she owed the victim only $3,500 at the time of the murder. She explained that she loaned the victim $30,000 in 1986 and that the victim repaid that loan over the next few years. She stated that the reason she did not contact the police or reveal her presence at the murder scene was that Boergert threatened her and members of her family. Defendant's evidence suggested that an attorney advised her to file a claim against the insurance company that issued the victim's life insurance policies to find out whether she was a suspect in the victim's death.

Additional facts will be presented as necessary to address specific issues.

GUILT-INNOCENCE PHASE

By her first assignment of error, defendant argues that statements made by the victim to three witnesses constituted inadmissible and irrelevant hearsay. She also argues that the trial court erred by admitting various writings related to the victim's finances.

Dee Dickerson testified that Commercial Credit Corporation made a $5,000 loan to the victim. She stated that she distributed the proceeds of this loan to the victim by giving the victim two checks. The checks were introduced into evidence and tended to show that the proceeds of the loan were ultimately transferred to defendant. One of the checks was made payable to defendant; the other was made payable to the victim. The victim endorsed the check made payable to her and gave it to defendant, and defendant cashed it. Eight weeks before she was killed, the victim called Dickerson and requested copies of both checks. Dickerson testified that the victim told her that she needed the copies "because [defendant] was saying

that she did not owe her any money and she needed the documents to prove . . . that [defendant] did, indeed, owe her this money plus other monies."

Joseph Nelson, the victim's brother, testified that the victim told him that "she was concerned that [defendant] was stealing the money . . . from the real estate sale of her property." The victim also told Nelson that she was "planning to get an injunction against [defendant] to collect the money that she owed her." Nelson further testified that the victim stated that she had not been paid for horses that defendant had sold for her.

Ava Payne, the victim's mother, gave testimony during the State's rebuttal case with respect to a 7.3-acre parcel of land owned by the victim. The victim told Payne that defendant had not sold the land "because there was some restrictions on the land and she had to send . . . [defendant] money to lift" the restrictions.

Defendant argues that these statements constituted irrelevant and inadmissible hearsay. " '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). "[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 trial court determined that the victim's statements fell within the state of mind exception to the hearsay rule, N.C.G.S. § 8C-1, Rule 803(3) (1992), which provides that "[a] statement of the declarant's then existing state of mind" is not excluded by the hearsay rule. "Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). The victim's state of mind is relevant if it bears directly on the victim's relationship with the defendant at the time the victim was killed. *See State v. Westbrooks*, 345 N.C. 43, 59, 478 S.E.2d 483, 493 (1996); *State v. McLemore*, 343 N.C. 240, 246, 470 S.E.2d 2, 5 (1996). We have also stated that "a victim's state of mind is relevant if it relates directly to circumstances giving rise to a potential confrontation with the defendant." *McLemore*, 343 N.C. at 246, 470 S.E.2d at 5.

[1] Several of the victim's statements to Dickerson and Nelson expressed her concern about defendant's handling of her real estate transactions and her intent to document defendant's debt, to seek

repayment, and to confront defendant about her concern that defendant had stolen from her. These statements bore directly on the relationship between the victim and defendant at the time of the killing and were relevant to show a motive for the killing—that defendant was in debt to the victim, that defendant was refusing to repay the amount owed or to reimburse the victim for money taken from the victim, and that the victim was insisting that defendant pay. Accordingly, the statements were properly admitted pursuant to the state of mind exception to the hearsay rule.

[2] The victim also made a statement to her brother indicating that she had not been paid for horses that defendant had sold for her and a statement to her mother indicating that she had sent money to defendant to lift restrictions on property which defendant was selling for her. Even if we assume *arguendo* that these statements were admitted for the truth of the matter asserted and did not relate to the victim's state of mind, their admission did not prejudice defendant. Dickerson and Nelson gave testimony suggesting that the victim intended to confront defendant with respect to financial concerns. Boergert testified that defendant told him that the victim had been harassing her and that defendant told him that the victim wanted money for a $10,000 check. Boergert also gave eyewitness testimony which tended to show that defendant planned, directed, and participated in the murder of the victim. After the murder defendant took the lead in creating and refining an alibi and encouraged Boergert to "stick" to this story. In light of this evidence, defendant cannot show that there is a reasonable possibility that, had the trial court excluded the statements at issue, a different result would have been reached at trial. *See* N.C.G.S. § 15A-1443(a) (1988).

The trial court also admitted various writings which had been in the victim's possession and which related to the victim's financial transactions with defendant. This evidence included (i) the victim's check register books, showing numerous checks and wire transfers to defendant; (ii) a list made by the victim documenting checks, money orders, and wire transfers to defendant; (iii) handwritten notations made by the victim, consisting of calculations which corresponded to the amounts the victim believed defendant owed her; (iv) a small spiral notebook memo pad containing various notes; (v) a handwritten writing made by the victim placing dollar amounts of $5,578 on land, $29,425 on cash advances, and $5,750 on horses, for a total of $40,753; and (vi) a 7 March 1988 $40,750 "promissory note" signed by defendant, made payable to the victim, and containing a

handwritten provision made by the victim. Defendant argues that this evidence constituted inadmissible and irrelevant hearsay.

[3] The promissory note was not admitted into evidence solely to show the truth of the matter asserted—that defendant promised to pay the victim $40,750. Rather, the note tended to show that several months before the killing, the victim confronted defendant about the debt and sought repayment for the money defendant owed. The note was relevant to establish a possible motive for the killing and was properly admitted into evidence.

[4] We also conclude that the check register books; the list of checks, money orders, and wire transfers to defendant; the calculations; the notes in the spiral notebook; and the writing placing a value of $40,753 on land, cash advances, and horses were admissible for the non-hearsay purpose of showing that the victim had followed through with her stated intention to document defendant's debt. Viewed in conjunction with the evidence that the victim had actually confronted defendant by asking her to sign a promissory note and Boergert's testimony that defendant had told him the victim had been harassing her about money, this evidence was relevant to show a motive for the killing.

Even if we assume *arguendo* that some or all of the victim's writings were inadmissible hearsay, any error in admitting them did not prejudice defendant. In addition to the victim's check register books and other writings, the State introduced checks, Western Union money transfer applications, and evidence of wire transfers charged to the victim's account at United Jersey Bank to show that the victim had transferred approximately $30,000 to defendant between 1986 and 1988. Defendant testified and admitted receiving approximately $30,000 from the victim during this time period, claiming that the victim gave her this money to repay a loan. Boergert's testimony confirmed that the victim had confronted defendant about the debt. He testified that on the day of the killing, defendant told him that the victim was harassing her, that she wanted to get the victim off her back, and that the victim wanted money for a $10,000 check. Boergert also gave testimony suggesting that defendant planned, directed, and participated in the victim's killing. In light of this evidence, defendant cannot show that there is a reasonable possibility that the outcome of her trial would have been different if the trial court had excluded the writings at issue. *See* N.C.G.S. § 15A-1443(a).

This assignment of error is overruled.

[5] Defendant next contends that the trial court erred by admitting evidence relating to defendant's finances and financial transactions with the victim. She argues that this evidence was not relevant and that any probative value was substantially outweighed by the danger of unfair prejudice. The contested evidence includes statements made by defendant suggesting that she and the victim loaned money to each other, that the victim wired her money by way of Western Union, and that she owed the victim only $3,500 when the victim died. The evidence includes Dickerson's testimony that Commercial Credit Corporation loaned the victim approximately $5,000 in August of 1987 and that the proceeds of that loan were ultimately transferred to defendant. Defendant also argues that the court erred by admitting the following exhibits: (i) two checks from Commercial Credit Corporation, representing the proceeds of the $5,000 loan made to the victim and ultimately transferred to defendant; (ii) twelve checks, money orders, and wire transfers from the victim to defendant; (iii) defendant's bank records and tax returns; and (iv) the deed and a package of writings pertaining to defendant's sale of a 7.3-acre piece of property owned by the victim.

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).

The victim's cash advances to defendant and the victim's real estate dealings with defendant shed light on their relationship at the time of the victim's death. This evidence, in conjunction with the victim's statements suggesting that the victim intended to confront

defendant about defendant's debt and defendant's statements to Boergert suggesting that the victim actually confronted defendant, was relevant to show that defendant had a motive to kill the victim. Defendant's tax returns tended to show that defendant did not earn enough money to loan the victim $30,000 and refuted defendant's suggestion that the money given to her by the victim was in repayment for loans made by defendant to the victim. We conclude that the evidence at issue was relevant and that the trial court did not abuse its discretion by declining to exclude this evidence pursuant to Rule 403.

Defendant next contends that the trial court erred by permitting the prosecutor to ask defendant questions during cross-examination with respect to her financial, real estate, and horse transactions with the victim; her bank records; her tax returns; the writings of the victim found in the victim's apartment; and the money given to her by the victim. We conclude that the prosecutor's inquiries were relevant and that the court did not abuse its discretion under Rule 403 by permitting the prosecutor to cross-examine defendant with respect to these subjects.

This assignment of error is overruled.

[6] By her next assignment of error, defendant contends that the trial court erred by admitting into evidence an order entered by a superior court judge in a civil action initiated by defendant. Defendant sold the victim two life insurance policies, and both policies were amended in 1987 to make defendant the primary beneficiary. After the killing defendant instituted a civil action against the insurer to collect the proceeds of the policies. On 9 June 1989 Superior Court Judge Hollis M. Owens entered an order requiring the insurance company to pay into the court the sum of $300,000 and further ordered that this sum be held by the clerk of court until a final determination had been made with respect to the rights of the parties. Defendant argues that the 9 June 1989 order was irrelevant, inadmissible hearsay and that any probative value was substantially outweighed by the danger of unfair prejudice.

We first note that the evidence that defendant sold the victim two life insurance policies and that both policies were amended to make defendant the primary beneficiary was relevant to show a motive for the killing. *See State v. White*, 340 N.C. 264, 292, 457 S.E.2d 841, 857-58, *cert. denied*, 116 U.S. 530, 133 L. Ed. 2d 436 (1995). Assuming *arguendo* that the order requiring the insurance company to pay $300,000 into the court pending a determination of the parties'

rights was not admissible, we conclude that defendant cannot show that there is a reasonable possibility that, had the order not been admitted, a different outcome would have been reached at trial. *See* N.C.G.S. § 15A-1443(a). Contrary to defendant's assertion before this Court which was not raised in the court below, the order was not a record of judicial findings in a prior civil action. The order contained no findings which could have prejudiced defendant. This assignment of error is overruled.

[7] Defendant next contends that the trial court committed plain error by permitting the prosecution to elicit testimony commenting on defendant's exercise of her rights to silence and counsel in violation of her rights under the Fifth Amendment and Article I, Section 23 of the North Carolina Constitution. At trial the following colloquy occurred between the prosecutor and SBI Agent Tim Shook:

> Q So the day you interviewed [defendant] was, in fact, her thirty-seventh birthday?
>
> A That's correct.
>
> Q Did you ever talk to Defendant Bishop again?
>
> A No.
>
> Q Did you ever talk to A.J. Boergert after that day?
>
> A Yes, sir, I did.
>
> Q And when was that?
>
> A It was approximately a week after this interview.
>
> Q And where did you talk to him.
>
> A It was a telephone conversation. I called him at the number provided by [defendant] . . . .
>
> Q Did you ever interview Defendant Bishop again?
>
> A No.
>
> Q Why not?
>
> A I was advised that she had an attorney and to not attempt to interview her again.
>
> Q When were you advised of that?
>
> A When I talked to Mr. A.J. Boergert.

Defendant argues that this statement was substantive evidence of her exercise of her right to remain silent and that the trial court erred by failing to intervene. Defendant is correct in her assertion that the exercise of her constitutionally protected rights to remain silent and to request counsel during interrogation may not be introduced as evidence against her by the State at trial. *State v. Ladd*, 308 N.C. 272, 283-84, 302 S.E.2d 164, 171-72 (1983); see also *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). However, even when a defendant objects, this constitutional error will not merit a new trial where the State shows that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). Where, as in this case, a defendant has failed to object, the defendant has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *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); *see also State v. Walker*, 316 N.C. 33, 38-39, 340 S.E.2d 80, 83-84 (1986). Assuming *arguendo* that the trial court erred in admitting Agent Shook's testimony, we conclude defendant has failed to show plain error. The evidence against defendant was substantial. Any damage to defendant's credibility caused by Agent Shook's statement was *de minimis* compared with defendant's own trial testimony in which she abandoned her alibi and asserted that she was an innocent bystander while Boergert, acting alone, killed the victim. Under these circumstances a different result probably would not have been reached absent Agent Shook's comment on defendant's exercise of her right to remain silent, nor did the comment deprive defendant of a fair trial.

[8] Defendant also contends that questions posed to defendant during cross-examination constituted improper comment on defendant's exercise of her rights to silence and counsel.

> Q Now, after you talked with Agent Shook and after [Boergert] came back from the beach, you and [Boergert] told law enforcement [officers] you didn't want to talk to [them] until you had lawyers, didn't you?
>
> A I did not tell . . . law enforcement that I didn't want to talk to them. At no time did any officer ever speak with me and ask me to come in or anything until the night I was arrested.
>
> Q Agent Shook sat down with you, didn't he?

A After I spoke with Agent Shook and left his office, no one from law enforcement spoke directly to me until the night I was arrested.

Q You were waiting for them to come seek you out again?

[DEFENSE COUNSEL]: I'll object to this line of questioning. He's commenting on her decision to remain silent.

COURT: Sustained.

The use of prearrest silence to impeach a defendant's credibility on cross-examination does not violate the Fifth or Fourteenth Amendment to the United States Constitution. *Jenkins v. Anderson*, 447 U.S. 231, 235-40, 65 L. Ed. 2d 86, 92-96 (1980); *accord Westbrooks*, 345 N.C. at 63, 478 S.E.2d at 495. In the present case defendant was not induced to remain silent prior to her arrest by any government assurances that her silence would not be used against her. Defendant did not invoke or rely upon her right to remain silent. She talked with Agent Shook a few days after the murder and denied any involvement in the crime. Under these circumstances the use of defendant's prearrest silence to impeach her testimony did not violate her federal constitutional rights.

[9] However, the determination that the use of defendant's prearrest silence for impeachment purposes did not violate her federal constitutional rights does not end our inquiry. *See Westbrooks*, 345 N.C. at 63-64, 478 S.E.2d at 495. In *Jenkins* the Supreme Court stated that

> [e]ach jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

Jenkins, 447 U.S. at 239, 65 L. Ed. 2d at 95. We look to our opinion in *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980), to analyze defendant's contention that her rights were violated by the use of her prearrest silence pursuant to the rules of evidence formulated by our jurisdiction. *See Westbrooks*, 345 N.C. at 64, 478 S.E.2d at 496.

In *Lane* we addressed the issue of allowing the prosecutor to use evidence of the defendant's pre-*Miranda* silence to impeach the defendant during cross-examination. The defendant stated prior to receiving any *Miranda* warnings, "Hell, I sold heroin before, but I didn't sell heroin to this person." *Lane*, 301 N.C. at 382, 271 S.E.2d at 274. The defendant testified at trial that he had an alibi for the crime

for which he was being tried. On cross-examination the prosecutor asked the defendant why he had not told the police about this alibi prior to trial. In determining whether the cross-examination was permissible, we noted:

> "Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment. . . .
>
> " '. . . [I]f the former statement fails to mention a material circumstance presently testified to, *which it would have been natural to mention in the prior statement*, the prior statement is sufficiently inconsistent,' . . . . [Citations omitted.] [Emphasis added.]"

Id. at 386, 271 S.E.2d at 276 (quoting *State v. Mack*, 282 N.C. 334, 339-40, 193 S.E.2d 71, 75 (1972)) (citations omitted) (alterations in original). We stated in *Lane* that "[t]he crux of this case is whether it would have been natural for defendant to have mentioned his alibi defense at the time he voluntarily stated [to the police] that he 'did not sell heroin to this person.' " *Id.*

Even assuming *arguendo* that the prosecutor's questions in this case inquiring into defendant's failure to talk with law enforcement officers after her interview with Agent Shook and prior to her arrest were not within the scope of inquiry permitted under *Lane*, we nevertheless conclude that this inquiry did not prejudice defendant. The State presented evidence that defendant talked to Agent Shook, denied any involvement in the crime, and stated that she and Boergert were elsewhere at the time of the crime. This statement was inconsistent with her testimony at trial, was properly admitted into evidence, and was highly damaging to defendant's credibility. Additionally, other evidence suggested that defendant spent much effort and even money to sustain the alibi she originally told law enforcement officers. In light of the evidence tending to show that defendant made a false statement to Agent Shook, questions about her subsequent failure to speak to law enforcement officers did not further damage her credibility. Accordingly, on the record before us, we conclude that any error in failing to limit the prosecutor's questions with respect to defendant's prearrest silence did not rise to the level of plain error.

This assignment of error is overruled.

[10] Defendant contends that the trial court committed plain error by permitting Ava Payne to testify to the victim's good character. Payne, the victim's mother, cried on the stand while testifying that the victim was "beautiful," "loving," "very gentle," and "her best friend." Even if we assume *arguendo* that this testimony was inadmissible, under the plain error standard, defendant has failed to satisfy her burden of showing prejudice. Both the State's evidence and defendant's evidence tended to characterize the victim in positive terms.

[11] Defendant also contends that the trial court committed plain error by admitting into evidence a photograph of the victim while alive. " '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)). "[W]e have repeatedly held that showing photographs of victims made during their lives is not prejudicial error." *State v. Norwood*, 344 N.C. 511, 532, 476 S.E.2d 349, 358 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 500 (1997); *accord State v. Goode*, 341 N.C. 513, 539-40, 461 S.E.2d 631, 646-47 (1995). In the present case the trial court admitted a photograph of the victim which had been taken in December 1987. This photograph was admissible to illustrate Payne's testimony, which described the color of her daughter's hair and which was relevant to show that the victim did not fit the description of a woman who was seen on the day before the murder purchasing oil lamps similar to the lamps found in the Paynes' house.

This assignment of error is overruled.

[12] By her next assignment of error, defendant contends that the trial court erred by permitting the prosecutor to pursue improper lines of inquiry during his cross-examination of defendant. Defendant first argues the prosecutor questioned her about the details of prior crimes in violation of N.C.G.S. § 8C-1, Rule 609(a):

> Q You just answered [defense counsel's] question with regard to the prior record. I believe you said everything was years back; is that right?
>
> A Yes, sir. The insurance fraud took place after I was arrested, and it was two counts. I had some insufficient checks in the past which I paid every dime of the money back.
>
> Q Well, actually, the two counts of insurance [fraud] you just mentioned, you took a little old man's money, two thousand dollars, in September of '87, didn't you.

A That's what we're speaking of, sir.

Q And that was before the murder, wasn't it.

A Yes, but I was not charged until after.

Q And after the murder you took another lady's money, didn't you.

A Yes, sir.

Q Took three hundred dollars from her?

A Yes, and I would have put it back.

Q On each of those you gave those people a receipt and didn't turn the money in and pocketed the cash, didn't you.

A Yes, sir.

"The permissible scope of inquiry into prior convictions for impeachment purposes is restricted . . . to the name of the crime, the time and place of the convictions, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993). However, "[t]his Court has consistently permitted the introduction of evidence in explanation or rebuttal of a particular fact or transaction even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Alston*, 341 N.C. 198, 234, 461 S.E.2d 687, 706 (1995), *cert. denied*, 116 U.S. 1021, 134 L. Ed. 2d 100 (1996). Such evidence is admissible to correct inaccuracies or misleading omissions in a defendant's testimony or to dispel inferences favorable to defendant arising therefrom. *Lynch*, 334 N.C. at 412, 432 S.E.2d at 354.

> For example, when the defendant "opens the door" by misstating his criminal record or the facts of the crimes or actions, or when he has used his criminal record to create an inference favorable to himself, the prosecutor is free to cross-examine him about details of those prior crimes or actions.

Id.

On direct examination defense counsel asked defendant whether she had been convicted of or had pleaded guilty to any crimes. Defendant responded in the affirmative and described her convictions in the following manner:

> I failed to report two premiums of policy holders. And I also have—or had some insufficient checks which I called the magis-

trate's office and told them in advance that they would be coming in, and they, in turn, called me. I came in and paid them. But we're talking about years back. We're not talking about at the time of this.

Defendant volunteered information concerning the nature and circumstances of her convictions on direct examination. She suggested that her insurance fraud convictions resulted from a mere failure to report two premiums. This testimony was misleading and "opened the door" to the prosecutor's questions.

[13] Defendant next contends that the trial court erred by allowing the prosecutor to cross-examine defendant with respect to whether she had taken money from Howard Treadway. Defendant argues that the prosecutor's questions related to specific instances of conduct which were not probative of truthfulness and that the inquiry violated N.C.G.S. § 8C-1, Rule 608(b).

Rule 608(b) provides that specific instances of conduct of a witness may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness." N.C.G.S. § 8C-1, Rule 608(b) (1992).

> Rule 608(b) of the North Carolina Rules of Evidence governs the admissibility of specific acts of misconduct where (i) the purpose of the inquiry is to show conduct indicative of the actor's character for truthfulness or untruthfulness; (ii) the conduct in question is in fact probative of truthfulness or untruthfulness; (iii) the conduct in question is not too remote in time; (iv) the conduct did not result in a conviction; and (v) the inquiry takes place during cross-examination. *See State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986). "Among the types of conduct most widely accepted as falling into this category are 'use of false identity, making false statements on affidavits, applications or government forms (including tax forms), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' " *Id.* at 635, 340 S.E.2d at 90 (quoting 3 D. Louisell & C. Mueller, *Federal Evidence* § 305 (1979)).

State v. Bell, 338 N.C. 363, 382, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995).

Defendant argues that the prosecutor exceeded the scope of Rule 608(b) by asking whether defendant had taken money from her for-

mer boyfriend, Howard Treadway. Defendant contends that taking money from a friend does not inherently involve dishonesty and that nothing in the context of the challenged questions suggested that the "taking" involved any deceit or was probative of defendant's truthfulness or untruthfulness. The record shows that the prosecutor's questions referred to two separate instances of alleged misconduct. The first instance related to the allegation that defendant applied for a loan against Treadway's life insurance policy on 13 May 1988 and that she forged Treadway's signature on the application. In response to the prosecutor's questions on cross-examination, defendant explained that she signed the application with Treadway's consent. Defendant stated that she received a check made payable to Treadway in the amount of $1,148.39, that she cashed the check and deposited the money in her checking account with Treadway's consent, and that she gave Treadway the money. The "taking" referred to by the prosecutor's inquiry involved the allegation that defendant forged Treadway's name on both a loan application and a check and that she cashed the check without Treadway's permission. We conclude that the purpose of the prosecutor's inquiry was to show conduct indicative of defendant's character for untruthfulness and that the trial court did not abuse its discretion under Rule 608(b) by allowing the inquiry.

The prosecutor subsequently asked defendant whether she had taken $2,000 from Treadway in June 1988. After defendant objected the court asked the jury to leave the courtroom and heard argument from counsel. The prosecutor told the court that the question related to a bad-check charge that had been dismissed after defendant reconciled with Treadway. The court never formally ruled on defendant's objection. Instead, the court told the prosecutor that the questions were "getting mighty collateral" and instructed him to "get back on the theme in mind, and that is the charges that she's facing." The prosecutor did not ask any further questions on this subject. We conclude that the trial court did not abuse its discretion in handling defendant's objection.

[14] Defendant next argues that the trial court erred by permitting the prosecutor to ask defendant whether she was "aware that [the victim] also went to her attorney, Steve Barden, and expressed concern that you hadn't paid her." The trial court overruled defendant's objection, and defendant responded that she was not aware of this fact. Defendant argues that there was no evidence to suggest that the victim ever expressed a concern to her attorney that defendant had

not paid her and argues that the objection should have been sustained on the ground that it assumed a fact not in evidence. *See State v. Simpson*, 327 N.C. 178, 190, 393 S.E.2d 771, 778 (1990). Even if the trial court erred by failing to sustain defendant's objection, defendant cannot show that she was prejudiced by the court's ruling. Boergert, Dickerson, and the victim's brother gave testimony suggesting that defendant owed the victim money, that the victim had begun to document that debt, and that the victim intended to seek repayment of the money defendant owed her. The State presented substantial evidence that the victim transferred to defendant a large amount of money between 1986 and 1988 by check, money order, and wire transfer; and defendant admitted receiving approximately $30,000 during this time period. In light of this evidence, defendant cannot show that there is a reasonable possibility that, had the trial court sustained her objection, a different outcome would have been reached at trial. *See* N.C.G.S. § 15A-1443(a).

[15] Defendant next argues that the court erred by permitting the prosecutor to pursue the following line of inquiry during cross-examination of defendant:

> Q Now, I believe you told [defense counsel] that on the night of July 24th and 25th you were real emotional and cried a lot?
>
> A No, sir.
>
> Q You didn't say that?
>
> A No, sir, I did not.
>
> Q You didn't say you were crying there at the scene?
>
> . . . .
>
> A When the incident happened, yes sir, I was crying.
>
> Q I take it you cried more than you cried today?
>
> A Yes sir, I did.
>
> [DEFENSE COUNSEL]: Objection to that question. That's a badgering question, your Honor.
>
> COURT: Overruled.

Counsel may not "ask impertinent and insulting questions which he knows will not elicit competent or relevant evidence but are designed simply to badger and humiliate the witness." *State v. Britt*,

288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975). In the present case the trial court could have reasonably concluded that the question at issue was not designed simply to badger and humiliate the witness but rather was designed to challenge the defendant's testimony on direct examination that she was hysterical and was crying at the scene of the crime. On the specific facts presented here, we conclude that the trial court did not abuse its discretion by overruling defendant's objection.

This assignment of error is overruled.

[16] By her next assignment of error, defendant contends that the trial court committed plain error by admitting the testimony of Howard Treadway notwithstanding the absence of an objection by defendant. During the State's rebuttal evidence, Treadway testified that defendant moved out of Treadway's home in April of 1988. The prosecutor asked Treadway why defendant moved, and Treadway's response suggested that he and defendant had a disagreement relating to a horse sale and that "there was some money missing." Treadway's testimony also suggested that defendant changed the beneficiary on his life insurance policy without his knowledge and that defendant took the accrued value of his life insurance policy without his consent. Defendant argues that this testimony was inadmissible under N.C.G.S. § 8C-1, Rule 405 and N.C.G.S. § 8C-1, Rule 608(b) as specific instances of bad character.

" 'Discrediting a witness by proving, through other evidence, that the facts were otherwise than [s]he testified, is an obvious and customary process that needs little comment. If the challenged fact is material, the contradicting evidence is just as much substantive evidence as the testimony under attack, and no special rules are required.' " *State v. Lambert*, 341 N.C. 36, 49, 460 S.E.2d 123, 131 (1995) (quoting 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 160 (4th ed. 1993)). Defendant placed her credibility at issue by testifying at trial. During her testimony she denied any wrongdoing with respect to the loan against Treadway's insurance policy and the checks made payable to Treadway. She stated that her actions were taken with Treadway's knowledge and with Treadway's consent. Treadway's testimony with respect to his life insurance policy contradicted defendant's testimony. Even though this testimony would not ordinarily be admissible, we conclude that it was properly admitted on rebuttal to discredit defendant's testimony.

Even if we assume *arguendo* that the portion of Treadway's testimony referring to the disagreement over a horse sale did not relate to any of defendant's testimony at trial and was inadmissible for any purpose, any error in failing to exclude this testimony did not amount to plain error. The State presented substantial evidence tending to impeach defendant's credibility. Defendant admitted on both direct examination and cross-examination that she had previously been convicted of insurance fraud. Furthermore, Treadway testified that he and defendant had settled the matter between themselves and that defendant subsequently moved back into his home. This assignment of error is overruled.

Defendant next contends that the trial court erred by permitting the prosecutor to make several improper arguments at the close of the guilt-innocence phase of the trial. 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." *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996).

[17] Defendant contends it was improper for the prosecutor to argue that defendant's mother did not testify to avoid committing perjury. The State's evidence suggested that defendant and Boergert contacted defendant's mother after the murder and that she agreed to support any story that they might tell. No evidence was adduced at trial to suggest that defendant's mother declined to testify to avoid committing perjury, and the State concedes the argument to this effect was improper. However, a prosecutor is permitted to argue that the defendant did not contradict evidence presented by the State, *see State v. Hunt*, 339 N.C. 622, 641, 457 S.E.2d 276, 287 (1995); and the absence of contradictory evidence was the essence of the prosecutor's argument. Any impropriety in suggesting that defendant's mother did not take the stand in order to avoid committing perjury was not so grossly improper as to require the court to intervene *ex mero motu*.

[18] Defendant next argues that the prosecutor improperly travelled outside the record and injected his own personal opinion into the proceeding by assuring the jury that Boergert would be found guilty of second-degree murder and that his criminal conduct would "cost him." The evidence at trial tended to show that Boergert participated in the killing of the victim, that Boergert had been arrested and charged with second-degree murder, and that Boergert had not been

offered immunity or given any promises in exchange for his testimony. In his closing argument one of defendant's attorneys noted that Boergert had not spent one day in jail and asked the jury not to hold this against defendant. We conclude that the prosecutor's argument that Boergert's conduct would "cost him" was supported by the evidence presented at trial and that the prosecutor's remarks were properly made in response to defense counsel's suggestion that Boergert had not been punished for his role in the crime.

[19] Defendant next argues that the prosecutor travelled outside the record by making the following argument:

> I didn't ask [defendant about the number of car keys] because I knew [that the answer] would be, "May I explain? There were two car keys." You know that's what she'd say. Does that make sense?

Defendant's testimony tended to suggest that Boergert drove her car away from the scene of the crime and that Boergert asked her for her car keys just before they arrived at her trailer. The purpose of the prosecutor's argument was to show that it did not make any sense for Boergert to ask defendant for her car keys while he was driving her car and to question defendant's credibility by noting her manner of answering questions. While counsel should refrain from speculating as to how a witness would have answered an unasked question, the comment in this case did not misstate defendant's testimony or mislead the jury concerning what was in evidence. Accordingly, we conclude that the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[20] Finally, defendant argues that the following argument was grossly improper:

> I'm sure you've probably made the comment or heard folks say, "And why doesn't somebody do something" when you hear about a bad crime. Well, the buck stops right here today. Right here. Go back, deliberate, and come back with a verdict. "Verdict" means "truth." That's the gist of what it means in Latin. Go back and deliver a verdict that you can be proud of tonight, tomorrow, a week from now, a month from now, a year from now. This case deserves a verdict of "guilty," and as a spokesman on behalf of the State, we demand a verdict of "guilty."

Defendant argues that the prosecutor improperly urged the jury to "lend its ear" to anticrime sentiment in the community and to convict defendant in order to "do something" about crime. She cites *State*

v. Erlewine, 328 N.C. 626, 403 S.E.2d 280 (1991), and *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985).

"[P]rosecutorial argument encouraging 'the jury to lend an ear to the community rather than a voice' is improper." *State v. Jones*, 339 N.C. 114, 161, 451 S.E.2d 826, 852 (1994) (quoting *Scott*, 314 N.C. at 312, 333 S.E.2d at 298), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). However, we have repeatedly stated that it is proper to urge the jury to act as the voice and conscience of the community. *See, e.g., State v. Campbell*, 340 N.C. 612, 635, 460 S.E.2d 144, 156 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 871 (1996); *Jones*, 339 N.C. at 161, 451 S.E.2d at 852; *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). In *Scott* the prosecutor argued that "there's a lot of public sentiment at this point against drinking and driving, causing accidents on the highway." *Scott*, 314 N.C. at 311, 333 S.E.2d at 297. We held that the "argument was improper because it went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents." *Id.* at 312, 333 S.E.2d at 298. In *Erlewine* we concluded that the prosecutor "crossed the line into impropriety by encouraging the [jurors] to follow [their] view of the sentiment of the community rather than the evidence, the law and their own views in acting as the voice and conscience of the community." *Erlewine*, 328 N.C. at 634, 403 S.E.2d at 284.

In the present case the prosecutor did not suggest that the jury should punish defendant based on community sentiment against murder rather than the evidence presented. The prosecutor's argument merely referred to community sentiment and urged the jury to render a verdict justified by the evidence and the law. Accordingly, we conclude that the argument at issue was proper.

This assignment of error is overruled.

[21] Defendant next contends that the trial court erred by instructing the jury that it could find defendant guilty of first-degree murder and second-degree arson under the theory of acting in concert. Defendant argues that the evidence, particularly Boergert's testimony, did not permit the jury to conclude that Boergert acted with premeditation and deliberation. Accordingly, defendant contends, citing *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), *overruled by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), that defendant and Boergert could not have acted together pursuant to a common plan to commit a first-degree murder.

In *Barnes* the majority of this Court[1] adopted the following statement of the doctrine of acting in concert:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."
>
> [*State v.*] *Erlewine*, 328 N.C. [626,] 637, 403 S.E.2d [280,] 286 [(1991)] (quoting [*State v.*] *Westbrook*, 279 N.C. [18,] 41-42, 181 S.E.2d [572,] 586 [(1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972)] (alterations in original).

Barnes, 345 N.C. at 233, 481 S.E.2d at 71. The evidence in the present case, taken in the light most favorable to the State, tended to show that defendant asked Boergert to help her "rough up" the victim, that Boergert went to the home of the victim's mother with the intent of helping defendant assault the victim, and that defendant and Boergert acted together to beat and stab the victim to death. Defendant provided Boergert with the wooden baton and the knife that Boergert used to beat and stab the victim, defendant personally beat the victim, and defendant personally inflicted the stab wounds that caused the victim's death. The State's evidence tended to show that defendant started a fire after killing the victim, took the lead in concocting and refining the "alibi story," and urged Boergert to "stick" to this story. Boergert helped defendant dispose of evidence and made statements to law enforcement officers indicating that he and defendant were together at the time of the killing. The State presented overwhelming evidence that defendant acted with premeditation and deliberation. Under *Barnes*, the evidence presented at trial was more than ample to permit the jury to conclude that the victim's murder was a natural or probable consequence of defendant's and Boergert's joint purpose to commit a crime. Moreover, the evidence, taken in the light most favorable to the State, was sufficient to show that defendant and Boergert acted together pursuant to a joint purpose to murder the victim. Accordingly, the trial court properly submitted first-degree murder on the basis of acting in concert.

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1. Although the author of this opinion concurred in the majority opinion in *State v. Blankenship* and joined in the dissenting opinion in *State v. Barnes*, she is now bound by *stare decisis* to apply the *Barnes* precedent in the instant case.

[22] We also conclude that the trial court did not err by submitting arson on the basis of acting in concert. The evidence tended to show that Boergert and defendant acted together to kill the victim and that Boergert was present when defendant poured oil over the victim's body and set it on fire. Boergert subsequently drove defendant to defendant's trailer and assisted defendant in disposing of their bloody clothing. Defendant and Boergert agreed on an alibi, and both initially gave statements to the police denying any involvement in the crime. This evidence permitted the jury to find that defendant and Boergert acted together pursuant to a common plan or purpose to commit arson or that arson was a natural and probable consequence of their joint purpose to commit a crime.

This assignment of error is overruled.

[23] In a related assignment of error, defendant contends that the trial court's instructions on acting in concert allowed the jury to convict her of first-degree murder on the basis of premeditation and deliberation without requiring the State to prove that she had the requisite *mens rea* to commit that crime. Defendant argues, citing *Blankenship*, 337 N.C. 543, 447 S.E.2d 727, that the trial court erred by including the phrase "either acting by herself or together with another" in its instructions on each of the elements of first-degree murder relating to specific intent. Defendant argues that the trial court's instructions permitted the jury to find that defendant acted with specific intent to kill based solely on findings that she acted together with Boergert and that Boergert acted with specific intent. Defendant did not object to the form of the instructions at trial and, therefore, relies on plain error.

Under the statement of the doctrine of acting in concert adopted by this Court in *Barnes*, 345 N.C. 184, 481 S.E.2d 44, defendant's argument is without merit. Moreover, even if we were to apply *Blankenship* and its progeny to the present case, after reviewing the instructions given by the trial court in the present case, we would reject defendant's argument. The instructions made it clear that defendant could have acted either alone or with another to commit the crime and that, in order to convict defendant, defendant herself must have had the requisite specific intent.

This assignment of error is overruled.

By her next assignment of error, defendant contends that the trial court committed plain error by giving a reasonable doubt instruction

that reduced the State's burden of proof below the standard required by the Due Process Clause. We disagree.

The trial court defined reasonable doubt in the following manner:

> [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 a lack of that evidence, as the case may be. And proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt as to one or more of these charges to a moral certainty of the truth of the charge. A reasonable doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. A reasonable doubt is not a doubt suggested by ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony nor is it one borne of a merciful inclination or disposition to permit a defendant to escape the penalty of the law, or one prompted by sympathy for [her] . . . or anyone connected with her.

Defendant argues that the instruction given by the court incorrectly charged the jury on the law and unconstitutionally reduced the State's burden of proof. "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. Miller*, 344 N.C. 658, 671, 477 S.E.2d 915, 923 (1996). "[N]o particular formation of words is necessary to properly define reasonable doubt, but rather, the instructions, in their totality, must not indicate that the State's burden is lower than 'beyond a reasonable doubt.' " *State v. Taylor*, 340 N.C. 52, 59, 455 S.E.2d 859, 862-63 (1995). "[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Victor v. Nebraska*, 511 U.S. 1, 6, 127 L. Ed. 2d 583, 591 (1994), *quoted in State v. Bryant*, 337 N.C. 298, 305, 446 S.E.2d 71, 75 (1994). We conclude that the instruction given by the court, taken as a whole, correctly conveyed the concept of reasonable doubt to the jury.

[24] Defendant first argues that the instruction erroneously failed to charge on doubt arising out of insufficiency of the evidence. The instruction on reasonable doubt informed the jury that a reasonable doubt may arise out of "some or all of the evidence that has been

presented, *or a lack of that evidence*, as the case may be" and that a reasonable doubt may be generated by an "*insufficiency of the proof.*" (Emphasis added.) The instruction given by the court, taken as a whole, properly informed the jury that reasonable doubt could arise out of insufficiency of the evidence.

[25] Defendant argues that the court's instruction failed to qualify the words "ingenuity of counsel" with the words "not legitimately warranted by the testimony." The court instructed the jury, in pertinent part, that a "reasonable doubt is not a doubt suggested by ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony." Defendant's suggestion that the court precluded the jury from considering ingenuity of counsel legitimately warranted by the testimony is without merit. We also reject defendant's argument that the court erred by instructing the jury as to what reasonable doubt was "not." This Court has approved instructions containing language virtually identical to this portion of the trial court's instruction, *see, e.g.*, *State v. Baker*, 338 N.C. 526, 563, 451 S.E.2d 574, 596 (1994); and there is nothing in the court's description of what reasonable doubt was "not" that could be interpreted in a manner which would lower the State's burden of proof.

[26] Defendant argues that the court's instruction used the phrases "moral certainty" and "honest substantial misgiving" in a manner that unconstitutionally reduced the State's burden of proof. We disagree. The trial court instructed the jury that it must be fully satisfied or entirely convinced of defendant's guilt "to a moral certainty of the truth of the charge." The term "moral certainty" was placed in context by other portions of the instruction, which informed the jury that reasonable doubt could arise out of the evidence, the lack of evidence, or the "insufficiency of the proof." *See White*, 340 N.C. at 278, 457 S.E.2d at 849. We conclude that the use of the term "moral certainty" did not reduce the State's burden of proof below the constitutional standard.

The use of the term "honest substantial misgiving" similarly did not render the instruction constitutionally infirm. In *Bryant* the trial court instructed the jury, in pertinent part, that

> [a] reasonable doubt, as that term is employed in the administration of criminal law, is *an honest substantial misgiving* generated by the insufficiency of proof. An insufficiency which fails to convince your judgment and confidence and satisfy your reasons as to the guilt of the defendant.

Bryant, 337 N.C. at 302, 446 S.E.2d at 73. We concluded that the term "substantial" had been used to refer to the existence of doubt rather than the magnitude of doubt and that there was "no concern that its use would have been interpreted to overstate the degree of doubt required for acquittal." *Id.* at 306, 446 S.E.2d at 75. The portion of the trial court's instruction using the term "honest substantial misgiving" is similar to the instruction given by the court in *Bryant*, and the instruction did not overstate the degree of doubt required for acquittal.

We conclude that the instruction on reasonable doubt, taken as a whole, correctly conveyed the definition of reasonable doubt and that it is not reasonably likely that the jury applied the instruction in an unconstitutional manner. This assignment of error is overruled.

[27] Defendant next assigns error to the finding of the aggravating factor that the arson involved property damage causing great monetary loss. N.C.G.S. § 15A-1340.4(a)(1)(m) (1988) (repealed effective 1 October 1994; reenacted as N.C.G.S. § 15A-1340.16(d)(14) effective 1 October 1994). Defendant argues that there was insufficient evidence that the arson involved damage causing great monetary loss. In particular, defendant suggests that no evidence showed that the house had any monetary value before the fire. We disagree.

The State presented evidence tending to show that the Paynes' house was a frame, single-story house with two bedrooms, a living room, a kitchen, a den, and a porch. Ava and Vonno Payne resided in the house. Vonno Payne testified that the house had a replacement value of $80,000 and that the house "was a complete loss." An assistant fire marshall testified that it took firemen two hours to suppress the flames and stated that "one-third of the house . . . had flames coming through the roof." The State presented ten photographs showing the house as it appeared before and after the fire. This evidence was more than ample to permit the court to find that the offense involved property damage causing great monetary loss. *See State v. Bryant*, 318 N.C. 632, 350 S.E.2d 358 (1986). Defendant's assignment of error is overruled.

MOTION FOR APPROPRIATE RELIEF

[28] On 5 February 1993 defendant filed with this Court a motion for appropriate relief seeking a new trial on the basis of newly discovered evidence. On 11 March 1993 this Court entered an order remanding defendant's motion to the Superior Court, Buncombe County. An evidentiary hearing on defendant's motion was held at the 13

December 1993 Criminal Session of Superior Court, Buncombe County. On 6 May 1994 Judge Downs entered an order denying defendant's motion for appropriate relief. We conclude that the court's findings of fact support its conclusions of law and that the court did not err in denying defendant's motion.

Ten days after the jury found defendant guilty of murder, Nelson Kelley contacted defendant's attorneys. Kelley claimed that he was an eyewitness to the murder and that Boergert was solely responsible for the victim's killing. At the evidentiary hearing Kelley testified that he was employed as an Encyclopaedia Britannica salesman on 24 July 1988. At 11:15 p.m. on that night, Kelley drove to the Paynes' house to follow-up on information which indicated that the Paynes were interested in purchasing a set of encyclopedias. Defendant's evidence suggested that Kelley was an extremely aggressive and successful salesman and that he frequently made late-night contact with potential customers.

Kelley testified that he walked onto the Paynes' porch, knocked on the front door, and heard a woman screaming. Kelley looked through the living room window and saw Boergert beating the victim while defendant attempted to hold Boergert's arm back. Kelley heard defendant yell, "[p]lease don't, please don't," and "[s]top, stop, you're killing her." Kelley left the scene without attempting to help the victim. As he drove away Kelley tried to use his cellular phone to call for assistance but was unable to use his phone. Kelley did not contact the police or attempt to obtain assistance for the victim on the night of the killing. Kelley testified that he contacted several friends to ask them for advice on how to proceed, and several witnesses testified that Kelley told them that he had seen a domestic assault at about that time.

Kelley made no attempt to contact the police, defendant's attorneys, or anyone else involved in defendant's case until after defendant had been convicted of murder. Kelley claimed that he did not know that he was a witness to a murder until he read about defendant's trial in 1992. Even after realizing that he had witnessed a murder, Kelley declined to contact the authorities. Kelley stated that his reason for not coming forward was that, from what he read in the newspaper, "that overwhelming evidence was in favor of [defendant], the lady that was trying to save the life of [the victim]."

The State's evidence tended to discredit Kelley's testimony. Ava Payne and her stepdaughter gave testimony which tended to show

that Kelley could not have seen the beating from the Paynes' front porch. Payne testified that she owned two sets of encyclopedias and that she had not requested any information concerning Encyclopaedia Britannica. Several witnesses testified that Kelley told them what he claimed to have seen and asked them to sign affidavits that he was selling encyclopedias in the vicinity of the Paynes' house on the night of the killing. Witnesses stated that Kelley was given to "exaggeration" and "distortion," that he "handled the truth recklessly," and that he had a tendency to overdramatize "things."

"The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion." *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993).

> Our usual standard for evaluating motions for a new trial on the grounds of newly discovered evidence requires a defendant to establish seven prerequisites:
>
> 1. That the witness or witnesses will give newly discovered evidence.
>
> 2. That such newly discovered evidence is probably true.
>
> 3. That it is competent, material and relevant.
>
> 4. That due diligence was used and proper means were employed to procure the testimony at the trial.
>
> 5. That the newly discovered evidence is not merely cumulative.
>
> 6. That it does not tend only to contradict a former witness or to impeach or discredit him.
>
> 7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Britt, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987).

We have carefully reviewed the court's findings of fact and its conclusions of law. The court's findings of fact support its conclusions (i) that Kelley's testimony was probably not truthful and (ii) that the testimony was not of such a nature as to show that a different result would probably be reached at another trial. The court

specifically found that the State's cross-examination of Kelley and the testimony of other witnesses "tended to substantially question his character for truthfulness and veracity." This finding is supported by ample evidence in the record, and it supports both the conclusion that Kelley's testimony was not true and that the testimony was not of such a nature as to show that a different result would probably be reached at another trial. Defendant has failed to show that the trial court abused its discretion in denying defendant's motion for appropriate relief. Accordingly, this assignment of error is overruled.

We conclude that defendant received a fair trial, free from prejudicial error, and that the court properly denied defendant's motion for appropriate relief.

NO ERROR.

STATE OF NORTH CAROLINA v. RUSSELL HOLDEN, JR.

No. 460A91-2

(Filed 24 July 1997)

1. Evidence and Witnesses § 1694 (NCI4th)— capital sentencing—photographs of victim at scene—admissible

The trial court did not abuse its discretion in a capital resentencing hearing by admitting into evidence three photographs of the victim's body where the photographs were admitted to illustrate testimony describing the appearance of the victim's body when it was found.

Am Jur 2d, Evidence §§ 327, 963; Homicide §§ 417, 419.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

2. Criminal Law § 1342 (NCI4th Rev.)— capital resentencing—four prior unadjudicated sexual assaults—admissible

The trial court did not abuse its discretion during a capital resentencing proceeding by admitting testimony relating to four prior unadjudicated sexual assaults where the evidence was rele-

vant to establishing the aggravating circumstance that the murder was committed while defendant was engaged in an attempt to commit rape. The circumstances of the four prior unadjudicated assaults were virtually identical to the circumstances surrounding the attempted rape of the victim here.

Am Jur 2d, Criminal Law § 598; Evidence §§ 408, 421, 450; Rape § 71.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense. 88 ALR3d 8.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

3. Criminal Law § 1335 (NCI4th Rev.)— capital resentencing—evidence of aggravating circumstance—defendant's offer to stipulate—evidence admissible

Evidence of prior sexual assaults was admissible in a capital resentencing in support of the aggravating circumstance that the murder was committed while defendant was engaged in an attempt to commit rape even though defendant offered to stipulate to intent. Defendant's offer to stipulate to intent did not preclude the State from introducing evidence which tended to establish defendant's intent to rape the victim.

Am Jur 2d, Criminal Law §§ 598, 599, 628; Homicide §§ 72, 442.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense. 88 ALR3d 8.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

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.

4. Criminal Law § 1335 (NCI4th Rev.)— capital resentencing—aggravating circumstance—murder committed while engaged in other crime—conviction for other crime in guilt phase—evidence admissible in sentencing phase

Evidence of defendant's prior sexual misconduct was admissible in a capital resentencing in support of the aggravating circumstance that the murder was committed while defendant was engaged in an attempt to commit rape even though defendant argued that the evidence was inadmissible because he had been found guilty of attempted rape. The evidence presented during the guilt-innocence phase of defendant's first trial was not before this resentencing jury and the State was required to resubmit the evidence from the original trial to have it considered. Furthermore, the State was entitled to present additional competent evidence that tended to show that defendant attempted to rape the victim. N.C.G.S. § 15A-2000(a)(3).

Am Jur 2d, Criminal Law § 527; Evidence §§ 328, 421; Rape §§ 73, 75.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense. 88 ALR3d 8.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

5. Criminal Law § 1336 (NCI4th Rev.)— capital resentencing—physical evidence—admission not prejudicial

There was no prejudice in a capital resentencing hearing in the admission of a pocketknife, a fillet knife, and a pair of scissors where the evidence at trial tended to show that the victim suffered a cut in her neck which officers initially believed was the cause of death and that the items were seized the next day from defendant's residence and the car he had been driving. Assuming error, the evidence tended to show that defendant shot the victim and caused her death and forensic evidence linked cartridges from the scene to defendant's handgun. Defendant cannot show a reasonable possibility that a different outcome would have been reached had the knives and scissors not been admitted. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Appellate Review §§ 713, 753; Criminal Law § 598; Homicide §§ 273, 554.

Prejudicial effect of prosecuting attorney's misconduct in physically exhibiting to jury objects or items not introduced as evidence. 46 ALR2 1423.

6. Criminal Law § 1345 (NCI4th Rev.)— capital resentencing—instructions—necessity for jury to keep open mind

There was no error in a capital resentencing hearing where the trial court instructed the jury that it must not have any preconceived ideas as to whether defendant should receive life or death and that a juror's mind must not be closed on either of those propositions. The court's statement properly informed the jury that it should not decide the case until after it had heard the evidence presented at trial and the court did not state that a juror's feelings about a life sentence or the death penalty, standing alone, could render the juror unqualified to serve.

Am Jur 2d, Trial §§ 1120-1175.

7. Criminal Law § 372 (NCI4th Rev.)— capital resentencing—judge's comment—role of jury

There was no error in a capital resentencing hearing entitling defendant to a new sentencing hearing where, out of the presence of the jury and after granting defendant's pretrial motion to preclude the district attorney and any witness from mentioning that defendant had been previously sentenced to death, the court expressed its opinion that juries should not be permitted to sentence capital defendants. The court did not express any opinion on the merits of the case, did not make any comment expressing contempt for defendant or defendant's counsel, and the comments were not in the presence of the jury.

Am Jur 2d, Criminal Law §§ 295, 483, 919; Judges § 170; New Trial § 150; Trial §§ 284, 288, 289.

Indoctrination by court of persons summoned for jury service as prejudicial error. 89 ALR2d 197.

Pretrial comments indicating fixed view as to proper punishment for particular type of crime as basis for judge's disqualification under 28 USCS § 144. 29 ALR Fed. 588.

8. Criminal Law § 402 (NCI4th Rev.)— capital resentencing— court's introductory comments to prospective jurors— Simpson trial

There was no error in a capital resentencing proceeding where the court told prospective jurors that the O.J. Simpson murder trial was not the way court should be run, that the media would not be in the courtroom because that was how Judge Ito "lost his hammer," and that capital sentencing required a lot of study and ought not to be assigned to laymen. The court's opinions with respect to how the Simpson trial was conducted and whether lay juries should make the capital sentencing decision were extraneous but were made in the context of admonishing the jury that both the State and defendant were entitled to a fair trial and of charging the jury not to read, watch, or listen to any media accounts relating to the case. Nothing in the court's comments constituted an expression of opinion on any fact to be decided by the jury in the present case and did not denigrate defendant or defendant's trial counsel.

Am Jur 2d, Criminal Law §§ 295, 483, 919; Judges § 170; New Trial § 150; Trial §§ 284, 288, 289.

Indoctrination by court of persons summoned for jury service as prejudicial error. 89 ALR2d 197.

Pretrial comments indicating fixed view as to proper punishment for particular type of crime as basis for judge's disqualification under 28 USCS § 144. 29 ALR Fed. 588.

9. Criminal Law § 402 (NCI4th Rev.)— capital resentencing— court's introductory comments to jurors

There was no error in a capital resentencing proceeding where the court, in comments after swearing in the venire members, stated that jurors did not know much about the court system, that jurors did not know much about the trial court specifically or their elected officials in general, that the Oklahoma bombing was a terrible thing, that "[s]omething is bad wrong and it's us," and gave a lengthy discourse expressing its disdain for the use of the term "African-American." These comments did not include an opinion on any fact to be decided by the jury and did not disparage defendant or defendant's counsel.

Am Jur 2d, Criminal Law §§ 295, 483, 919; Judges § 170; New Trial § 150; Trial §§ 284, 288, 289.

Indoctrination by court of persons summoned for jury service as prejudicial error. 89 ALR2d 197.

Pretrial comments indicating fixed view as to proper punishment for particular type of crime as basis for judge's disqualification under 28 USCS § 144. 29 ALR Fed. 588.

10. Jury § 146 (NCI4th)— capital sentencing—court's statement to venire—not an expression of opinion

There was no error in a capital sentencing proceeding where the court made a statement to the venire which defendant contended expressed the court's disdain for a life sentence but which was part of a more lengthy discourse apparently in response to a prospective juror having attempted to speak with a court reporter during the lunch recess. The import of the entire statement was to assure jurors that all of the information they needed would be given to them in the courtroom and to inform them of their responsibility; the court did not express a disdain for a life sentence.

Am Jur 2d, Trial § 1633.

Pretrial comments indicating fixed view as to proper punishment for particular type of crime as basis for judge's disqualification under 28 USCS § 144. 29 ALR Fed. 588.

11. Evidence and Witnesses § 125 (NCI4th)— capital resentencing—sexual behavior of victim—not admissible

In a capital resentencing for a first-degree murder where defendant had also been convicted of rape, the trial court did not err by excluding evidence that the victim had engaged in sexual intercourse with a third party on the night of the killing. The evidence did not relate to any aspect of defendant's character, his record, or any other circumstance which a jury could deem to have mitigating value. There was no evidence that defendant was aware that the victim had engaged in sexual intercourse on the night in question and, even considering defendant's limited intellectual capacity, the evidence did not shed any light on whether defendant believed that the victim had consented to having sexual intercourse with him or on his capacity to appreciate the criminality of his conduct.

Am Jur 2d, Criminal Law §§ 598, 599; Evidence § 504; Rape § 86.

Constitutionality of rape shield statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

12. Criminal Law § 690 (NCI4th)— capital resentencing—mitigating circumstances—directed verdict—peremptory instruction—not given

The trial court did not err in a capital resentencing by refusing to grant defendant's motions for a directed verdict on three statutory mitigating circumstances. A peremptory instruction rather than a directed verdict is the appropriate device for submitting to the jury uncontradicted evidence supporting a mitigating circumstance, but even where all of the evidence supports finding a mitigating circumstance and a peremptory instruction is given, the jury may reject the evidence and not find that fact if it does not believe the evidence. Although there was an exception in *State v. Flippen*, 344 N.C. 689, entitling a defendant to a mandatory peremptory instruction where the State and defendant had stipulated to a mitigating circumstance, the mitigating circumstances at issue here were not established by stipulation.

Am Jur 2d, Trial §§ 841, 865, 1883.

Propriety and prejudicial effect of counsel's argument or comment as to trial judge's refusal to direct verdict against him. 10 ALR 3d 1330.

13. Jury § 99 (NCI4th)— capital resentencing—reopening voir dire—peremptory challenge—no error

The trial court did not abuse its discretion in a capital resentencing hearing by reopening *voir dire* after the jury was impaneled and permitting the State to exercise a peremptory challenge where the prosecutor informed the court after the close of all the evidence that he had learned from "an officer of the court" that a juror had in the last few years presented an argument against the death penalty; the juror was brought into the courtroom for questioning and stated that she currently believed that some people should receive the death penalty, that she had never stated that the death penalty was not being fairly administered or that the death penalty should not be imposed, and that her responses on *voir dire* were correct; and the trial court declined to excuse the juror for cause but the prosecutor exercised one of his remaining

peremptory challenges. The information provided by the prosecutor established good reason to reopen *voir dire* to inquire into whether the juror made the statements attributed to her, whether she continued to hold these beliefs and whether her beliefs would prevent or substantially impair the performance of her duties as a juror.

Am Jur 2d, Jury § 243.

Comment note on beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

14. Criminal Law § 461 (NCI4th Rev.)— capital resentencing—prosecutor's argument—comfortable life in prison

The trial court did not err in a capital resentencing by allowing the prosecutor to comment, over defendant's objection, on the quality of life defendant would have in prison where a prison guard had testified that defendant was permitted to watch television, play cards, lift weights, play basketball, go to the music room, and eat lunch with other inmates. It was reasonable to infer that defendant would continue to enjoy these privileges if sentenced to life imprisonment.

Am Jur 2d, Criminal Law §§ 291, 917; Homicide §§ 463, 464; Trial §§ 496, 582.

15. Criminal Law § 460 (NCI4th Rev.)— capital resentencing—prosecutor's argument—mitigating circumstances—no error

The trial court did not err in a capital resentencing hearing by overruling defendant's objection to an argument which defendant contended improperly told jurors that circumstances not sufficient to excuse the killing or to reduce it to a lesser included offense did not have mitigating value. The prosecutor did not state that mitigating circumstances were limited to facts which would justify the killing or to facts which would be sufficient to reduce the crime to a lesser included offense of murder, the argument that the victim did not provoke the killing was supported by the evidence, and the prosecutor was entitled to argue that no mitigating circumstances existed.

Am Jur 2d, Criminal Law § 917; Homicide §§ 463, 464; Trial §§ 496, 568.

16. Criminal Law § 440 (NCI4th Rev.)— capital resentencing— prosecutor's argument—prior rapes by defendant

There was no gross error requiring the trial court to intervene *ex mero motu* in a capital resentencing where defendant contended that the prosecutor made improper use of defendant's prior unadjudicated sexual assaults where the prosecutor briefly mentioned testimony relating to the prior assaults, commented that it is unfortunate that all rapes are not reported, reminded the jury that defendant had been convicted of attempted rape and noted that this conviction was possible only because the victim had reported defendant's actions to the police, and argued that defendant had learned a lesson and decided to kill his next victim to prevent her from testifying against him. The prosecutor's argument was supported by the evidence presented in the sentencing proceeding.

Am Jur 2d, Criminal Law § 917; Evidence § 421; Homicide §§ 463, 464; Trial § 496.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense. 88 ALR3d 8.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

17. Criminal Law § 460 (NCI4th Rev.)— capital resentencing— prosecutor's argument—prior unadjudicated rapes

There was no gross error requiring intervention *ex mero motu* in a capital resentencing where the prosecutor related the facts of four prior unadjudicated sexual assaults after telling the jury , "We have to prove his intent at the time he killed [the victim] was to commit rape . . . ." The prosecutor was entitled to argue that these facts supported the conclusion that defendant intended to rape the victim and that the jury should find the aggravating circumstance that the murder was committed while in the attempt to commit a rape, and the argument was consistent with the limiting instruction given by the trial court.

Am Jur 2d, Criminal Law § 917; Evidence § 421; Homicide §§ 463, 464; Trial § 496.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense. 88 ALR3d 8.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

18. Criminal Law § 460 (NCI4th Rev.)— capital resentencing—prosecutor's argument—prior sexual assaults

The trial court was not required to intervene *ex mero motu* in a capital resentencing hearing where the prosecutor argued that defendant being good to the elderly did not allow him to do what he had done to "all these" women. In context, the prosecutor was arguing that the mitigating circumstances did not have great weight, did not outweigh the aggravating circumstances, and that the jury should recommend death.

Am Jur 2d, Criminal Law §§ 598, 599, 917; Homicide §§ 463, 464; Trial § 496.

19. Criminal Law § 473 (NCI4th Rev.)— capital resentencing—prosecutor's argument—life not sacred to defense attorneys

There was no gross impropriety requiring intervention *ex mero motu* in a capital resentencing where the prosecutor argued that life was not sacred to defendant and his attorneys. The argument was improper but not abusive, vituperative, or opprobrious, and the prosecutor did not repeatedly attempt to diminish defense counsel before the jury. The prosecutor also stated that defendant had two fine attorneys who had done an excellent job; a careful review of the argument permits the inference that the improper reference to defense counsel was not intended.

Am Jur 2d, Appellate Review § 713; Criminal Law § 917; Homicide §§ 463, 464; Trial § 496.

20. Criminal Law § 460 (NCI4th Rev.)— capital resentencing—prosecutor's argument—Biblical passage

The trial court did not abuse its discretion by not intervening *ex mero motu* in a capital resentencing where the prosecutor argued that the Biblical injunction prohibited murder and quoted the New Testament in what defendant contends was an argument that Jesus would have hung a millstone around defendant's neck

and drowned him in the depths of the sea for harming this victim. This argument did not suggest that the law enforcement powers of the state are divinely inspired or ordained and did not suggest that the death penalty is divinely required. The prosecutor anticipated that defense counsel would refer to the Bible in arguing against a death penalty recommendation and attempted to counter any such attempt.

Am Jur 2d, Appellate Review § 713; Criminal law § 917; Homicide §§ 463, 464; Trial 572.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 ALR4th 664.

21. Criminal Law § 1364 (NCI4th Rev.)— capital resentencing—instructions—previous felony involving violence—no plain error

There was no plain error in a capital resentencing proceeding where the court omitted "or threat" from its instruction on the aggravating circumstance of a previous felony involving violence or the threat of violence where defendant had a prior conviction for attempted second-degree rape. Although it has been held that such a conviction requires submission of this circumstance, it has not been held that attempted second-degree rape is always a crime involving the use of violence. There was error because the State did not present any evidence in support of the circumstance other than the judgment and commitment, but attempted second degree rape standing alone is sufficient to establish the existence of the circumstance and the error did not reduce the State's burden of proof or favor the State in any way, and there is no reasonable probability that the jury would have reached a different result had the words "or threat" been included in the instruction. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law § 918; Homicide § 553.

22. Criminal Law § 1378 (NCI4th Rev.)— capital resentencing—mitigating circumstances—peremptory instructions—credible and convincing

There was no error in a capital resentencing where the defendant contended that the trial court's peremptory instructions on the mitigating circumstances of emotional disturbance

and impaired capacity heightened his burden of proof by requiring the jury to find the uncontradicted evidence to be credible and convincing. In the context of the entire charge, the jury would have applied the credible and convincing requirement to mean that it must believe the evidence to find that the mitigating circumstances existed and that it could reject the circumstances if it did not find the evidence to be credible and convincing. Although not a model of clarity, the court's instructions did not place a more stringent burden of proof on defendant.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 115, 516; Trial § 841.

Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

23. Constitutional Law § 370 (NCI4th)— death sentence—defendant mentally retarded—organic brain damage

There was no state or federal constitutional violation in sentencing to death a mentally retarded defendant with organic brain damage where defendant was permitted to present evidence of his mental retardation and organic brain damage and the trial court submitted nonstatutory mitigating circumstances permitting the jury to consider whether defendant was retarded, whether he was suffering from organic brain damage, and whether either of these circumstances had mitigating value.

Am Jur 2d, Criminal Law §§ 40, 628.

Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues. 17 ALR4th 575.

24. Criminal Law § 1402 (NCI4th Rev.)— death sentence—proportionate

A sentence of death was proportionate where the evidence supported the aggravating circumstances, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and this case was not substantially similar to any of the cases in which death was found disproportionate. A death sentence has never been found disproportionate in a first-degree murder case where the victim was sexually assaulted or where

the murder was committed for the purpose of eliminating a witness. The evidence here strongly tended to show that defendant coldly and callously planned to rape and kill the victim and that he killed her to prevent her from testifying against him.

Am Jur 2d, Criminal Law §§ 527, 628; Homicide §§ 46, 464, 555, 556; Trial §§ 572, 841, 1760.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

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.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Stevens (Henry L., III), J., at the 24 April 1995 Criminal Session of Superior Court, Duplin County, upon a prior jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 November 1996.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Marshall Dayan, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant was indicted on 1 July 1985 for one count of murder and one count of first-degree rape. In August 1985 he was tried capitally and found guilty of first-degree murder and attempted rape. The conviction for first-degree murder was based on both premeditation and deliberation and felony-murder. He was sentenced to death for the murder and to twenty years' imprisonment for the attempted rape. We found no error in the trial and sentences in *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987) (*Holden I*), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

In 1989 defendant filed a motion for appropriate relief in the Superior Court, Duplin County. In December 1990 the court granted partial relief by vacating defendant's death sentence and ordering a new capital sentencing proceeding based on the opinion of the Supreme Court of the United States in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Following the second capital sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment in accordance with that recommendation. In *State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994) (*Holden II*), we found error in defendant's second capital sentencing proceeding.

Following the third capital sentencing proceeding, which is the subject of this appeal, the jury recommended a sentence of death; and the trial court entered judgment accordingly. For the reasons discussed herein, we conclude that defendant's third capital sentencing proceeding was free from prejudicial error and uphold his sentence of death.

The evidence presented during defendant's original trial is summarized in *Holden I*, 321 N.C. at 131-32, 362 S.E.2d at 519-20. The evidence presented during defendant's second capital sentencing proceeding is summarized in *Holden II*, 338 N.C. at 397-402, 450 S.E.2d at 879-882. The issues presented by this appeal relate only to defendant's third capital sentencing proceeding.

The State's evidence tended to show the following. In the early morning hours of 16 March 1985, defendant and Levon Hicks returned to a disco near Warsaw, North Carolina, after giving several friends a ride home. At the disco Johnnie Pat Barden asked defendant to take him and Vanessa Jones ("victim") home. Defendant agreed; Barden got in the front passenger seat of defendant's car, and the victim got into the back. The victim lived between the disco and downtown Warsaw. As defendant drove past the victim's house, Barden told defendant to stop and let the victim get out of the car. Defendant responded that he was going to take Barden home first and refused to stop the car.

Hicks testified that after they took Barden home, defendant stopped the car by the side of the road. The victim was heavily intoxicated, and she was passed out in the backseat of the car at this time. Defendant found some suspenders in the backseat and tied the suspenders around the victim's legs. Defendant then returned to the

front seat, drove the car towards Clinton, turned the car off the highway, and drove down a dirt path road.

Hicks testified that defendant stopped the car, joined the victim in the backseat, and began touching the victim's breasts. Defendant unzipped the victim's pants and told Hicks that defendant "was going to get some meat." Hicks remained outside the car while defendant and the victim were in the backseat. Upon inquiry, Hicks testified that he did not think defendant had sex with the victim, noting that defendant later told him that defendant was scared that the victim might yell and that someone might hear. According to Hicks, defendant and the victim were alone in the backseat for thirty to forty minutes.

After telling Hicks that he was afraid that the victim might yell, defendant took Hicks home. Hicks testified that the victim remained in the backseat during the drive and that the victim did not say or do anything on the way to Hicks' home. When defendant let Hicks out of the car at Hicks' home, defendant told Hicks that defendant "was going to get some meat" and that he would "[p]robably have to kill [the victim] so she won't tell anybody."

The following day Henry Sutton discovered the victim's body on a dirt path road leading to the Samuel Miller Cemetery. The victim's body was partially clothed, her pants were unzipped and partially down, and one of her shoes was removed. The autopsy revealed that the victim died of a gunshot wound to the throat, and forensic testimony linked a spent casing found at the scene to a .25-caliber gun owned by defendant. In addition to the gunshot wound, there was a six-inch cut wound across the left side of the victim's neck.

Additional facts will be presented as needed to discuss specific issues.

[1] By his first assignment of error, defendant contends that the trial court erred by admitting into evidence certain photographs; testimony with respect to four prior unadjudicated sexual assaults; and several items of real evidence, including a pocketknife, a fillet knife, and a pair of scissors.

"The Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Any evidence the court 'deems relevant to sentence' may be introduced at this stage." *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); *accord*

N.C.G.S. § 15A-2000(a)(3) (1988) (amended 1994). During a capital sentencing proceeding, the State must be permitted to present any competent evidence supporting the imposition of the death penalty. *Daughtry,* 340 N.C. at 517, 459 S.E.2d at 762.

Defendant first contends that the court erred by admitting three photographs of the victim's body. Defendant argues that the photographs were not relevant. "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." *State v. Heatwole,* 344 N.C. 1, 25, 473 S.E.2d 310, 322 (1996), *cert. denied,* —— U.S. ——, 137 L. Ed. 2d 339 (1997). In the present case the photographs at issue were admitted to illustrate testimony describing the appearance of the victim's body when it was found. We conclude that the trial court did not abuse its discretion by admitting three photographs for this purpose.

[2] Defendant next contends that the trial court erred by admitting into evidence testimony relating to four prior unadjudicated sexual assaults. Defendant argues that this evidence was not relevant to any issue at sentencing.

The first unadjudicated sexual assault involved an acquaintance of defendant who was married and eight months pregnant when she accepted a ride from defendant in 1981. As he was driving, defendant unexpectedly turned off the highway and drove down the dirt path road leading to the Samuel Miller Cemetery. The woman asked defendant what he was doing, and he responded by asking her whether she had ever met the devil. He then "pulled" a knife on the woman, threatened the woman's life and the life of her unborn baby, and demanded that she get into the back of his station wagon and have sex with him. The woman testified that she complied only because defendant had threatened her life.

The victim of the second unadjudicated sexual assault testified that she and two friends accepted a ride from defendant on a rainy day in 1979. Defendant took her friends home first. Then, as he was taking her home, defendant unexpectedly turned his car off the highway, drove the car down the dirt path road leading to the Samuel Miller Cemetery, stopped the car, and "pulled" a knife. The woman opened the car door, screamed, and jumped out of the car. Defendant tried to grab the woman's sweater, but she was able to flee. Two men who lived nearby heard the woman's screams, picked her up, and took her home.

A third woman gave testimony with respect to a 1985 incident in which defendant agreed to give her a ride to a friend's residence. During the ride defendant told the woman that he wanted to "make love" to her. Defendant then turned the car off the highway, drove down a little dirt path road, pulled a gun, and told the woman to get into the backseat. The woman attempted to run, but defendant caught her and tried to force her into the backseat. The woman successfully broke defendant's grasp and fled.

Curtis Glaspie gave testimony with respect to a fourth incident. Defendant, Larry Parker, Glaspie, and a female acquaintance were riding in a car driven by defendant. Defendant turned onto the dirt path road leading to the Samuel Miller Cemetery and stopped the car. Glaspie, Parker, and defendant exited the car. Defendant approached the passenger side of the car and told the woman to get into the backseat. When the woman refused defendant walked around the car, reached into the console, and retrieved a .25-caliber handgun. As defendant was doing this, the woman got into the backseat of the car and removed all of her clothes. Defendant ordered Glaspie to get into the backseat with the woman, but Glaspie declined. Defendant fired the gun at the feet of Glaspie, who responded by getting into the car with the woman and pretending to have sex with her. After Glaspie got out of the car, Parker entered and pretended to have sex with the woman. When Parker exited the backseat, defendant got into the backseat with the woman for a short period of time. Glaspie's testimony suggested that defendant and the woman did not engage in sexual intercourse.

The trial court gave the jury a limiting instruction with respect to the testimony relating to the four prior unadjudicated sexual assaults. The court told the jury that the evidence with respect to the alleged prior sexual assaults

> shall not be received or considered by you to show []or prove that this defendant had the disposition or propensity to commit sexual assaults, []or to show that he acted in conformity therewith. Nevertheless, such evidence may be received and considered by you to show or prove a state of mind, if any, of the defendant, specifically, the element of intent . . . .

The court further instructed the jury that it must be

> satisfied that there are substantial circumstances presented, including particular acts sufficiently similar in each case to logi-

cally connect and support an inference that the same person committed both offenses with similar intent. Moreover, the passage of time between the commission of the individual sexual acts slowly erodes the commonality between them.

The State argues that the challenged evidence was admissible to show that defendant intended to rape the victim and that it was thus relevant to establishing the aggravating circumstance that the murder was committed while defendant was engaged in the attempt to commit a rape, N.C.G.S. § 15A-2000(e)(5). We agree. The circumstances of the four prior unadjudicated assaults were virtually identical to the circumstances surrounding the attempted rape of the victim in this case. In each of the prior incidents, a woman who was at least casually acquainted with defendant accepted a ride from him. None of the women expected defendant to take her to the dirt path road leading to the Samuel Miller Cemetery. Defendant "pulled" a gun or a knife on all four women and ordered three of the women to get into the backseat of his car. Defendant raped one of the women and physically assaulted at least two others. In one of the four prior incidents, defendant took the woman's friends home before he drove to the dirt path road. We conclude that the facts surrounding these assaults were sufficiently similar to the case at hand to permit the jury to conclude that defendant intended to rape the victim and that the testimony at issue was properly admitted for this purpose. *See State v. Yelverton*, 334 N.C. 532, 548-49, 434 S.E.2d 183, 192 (1993); *State v. White*, 331 N.C. 604, 611-13, 419 S.E.2d 557, 561-62 (1992).

[3] Defendant argues that the evidence of defendant's prior sexual conduct was not admissible on the basis that defendant offered to stipulate to intent. We have stated that the "better rule . . . is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation." *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), *quoted in State v. Rose*, 339 N.C. 172, 201, 451 S.E.2d 211, 228 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). Defendant's offer to stipulate to intent did not preclude the State from introducing evidence which tended to establish defendant's intent to rape the victim.

[4] Defendant also argues that the evidence of defendant's prior sexual conduct was not admissible on the basis that defendant was found guilty of attempted rape at the guilt-innocence phase of the

original trial. This argument is without merit. Section 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 impanelled, 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.

N.C.G.S. § 15A-2000(a)(3); *accord State v. McLaughlin*, 341 N.C. 426, 458, 462 S.E.2d 1, 18 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879 (1996). In *McLaughlin* we stated that "N.C.G.S. § 15A-2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding in the same case." *McLaughlin*, 341 N.C. at 458, 462 S.E.2d at 18-19. The evidence presented during the guilt-innocence phase of defendant's first trial was not before the sentencing jury in this case, and the State was required to resubmit the evidence presented in the original trial to have it considered. Further, the State was entitled to present any additional competent evidence that tended to show that defendant attempted to rape the victim. The evidence relating to the four prior unadjudicated sexual assaults was competent to show that defendant intended to rape the victim and was, therefore, admissible during the capital sentencing proceeding.

[5] Defendant next contends that the court erred by admitting into evidence the following items of real evidence: (i) a pocketknife, (ii) a fillet knife, and (iii) a pair of scissors. Defendant argues that there was no evidence to suggest that these items were used in the murder and attempted rape of the victim. The evidence at trial tended to show that the victim suffered a six-inch cut to the left side of her neck, that the initial investigation did not reveal the gunshot wound, and that officers initially believed that the cut wound was the cause of death. On the day after the killing, officers searched defendant's residence and the car that he had been driving and seized the knives and the pair of scissors. These officers saw a .25-caliber handgun but declined to seize it. Even if we were to assume *arguendo* that the

knives and scissors were not relevant to any issue at defendant's sentencing, their admission did not prejudice defendant. The evidence at trial tended to show that defendant shot the victim with a .25-caliber handgun and that the resulting wound caused the victim's death. Forensic evidence linked spent cartridges found at the scene of the murder to defendant's .25-caliber handgun. Defendant cannot show that there is a reasonable possibility that, had the knives and the scissors not been admitted into evidence, a different outcome would have been reached at trial. *See* N.C.G.S. § 15A-1443(a) (1988).

This assignment of error is overruled.

[6] Defendant next argues that the trial court's instructions to prospective jurors and extraneous comments during the proceedings entitle him to a new capital sentencing proceeding. We disagree.

He first contends that the court improperly instructed prospective jurors that any preconceived notions about the propriety of a life sentence or a death sentence rendered them unqualified to serve. The record shows that the court made the following comment:

> Moreover, the jury must not have any preconceived ideas as to whether the defendant should receive a sentence of life or death .... [A] juror's mind must not be closed out on either one of these propositions.

The court made this comment immediately after instructing the jury that defendant did not have to present any evidence and that the State had this burden. The court subsequently instructed the jury that it must keep an open mind and listen carefully to the evidence before forming an opinion as to punishment. We conclude that the court's statement properly informed the jury that it should not decide the case until after it had heard the evidence presented at trial. The court did not state that a juror's feelings about a life sentence or the death penalty, standing alone, could render the juror unqualified to serve.

[7] Defendant next contends that extraneous and irrelevant comments by the trial court entitle him to a new capital sentencing proceeding. N.C.G.S. § 15A-1222 provides that the trial court "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1988). "Any expression as to the merits of the case, or any intimation of contempt for a party or for counsel, may be highly deleterious to that party's position in the eyes of the jury." *State v.*

Staley, 292 N.C. 160, 162, 232 S.E.2d 680, 682 (1977); *accord State v. White*, 340 N.C. 264, 297, 457 S.E.2d 841, 860, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 436 (1995).

The first comment to which defendant assigns error occurred prior to jury selection and outside the presence of the jury. After granting defendant's pretrial motion to preclude the district attorney and any witness from mentioning that defendant had been previously sentenced to death, the court made a statement in which it expressed its opinion that juries should not be permitted to sentence capital defendants. The court did not express any opinion on the merits of the case and did not make any comment expressing contempt for defendant or defendant's counsel. Moreover, the comments at issue were not made in the presence of the jury.

[8] Defendant next complains about assertions made during the court's introductory comments to prospective jurors. Referring to the O.J. Simpson murder trial, the court told prospective jurors that "this is far from that California case and it's no semblance of how court ought to be run out there. I won't tolerate it for a minute and so don't get yourself in bad shape." The court again referred to the Simpson trial in comments made after the first panel of venire members had been selected. The court described the "California" case as ridiculous and stated that as

> a lawyer and judge, it makes me want to cry. It is just a guarantee that neither the state [n]or the defendant can get a fair trial in the state of California. It is a holocaust of errors starting with the judge. He surrenders his gavel and the robe to the media who the lawyers and defense took it away from and the jury took it away from them.

Later during jury selection the court made the following comments to venire members:

> Do not read, watch or listen to any media accounts of jury selection of this trial. Well, you're not going to watch any because I ain't going to let them in the courtroom because I don't believe in it for this purpose. It is a bad thing. That's the way Judge Ito lost his hammer out there in California and he turned that media out there and they took his gavel and the robe and the defense and the prosecution lawyer and they got them. Just a disgrace to the American Judicial [system] and I cried for it because that's not the way it works.

The court also made a statement suggesting that capital sentencing required a lot of study and ought not to be assigned to laymen.

The court's opinions with respect to how the Simpson trial was conducted and whether lay juries should make the sentencing decision in capital cases were extraneous. However, the court's remarks were made in the context of admonishing the prospective jury that both the State and defendant were entitled to a fair trial and of charging the jury not to read, watch, or listen to any media accounts relating to the case. Nothing in the court's comments constituted an expression of an opinion on any fact to be decided by the jury in the present case, and the court's comments did not denigrate defendant or defendant's trial counsel.

[9] Defendant next argues that the court prejudiced defendant by making a series of comments after swearing in a group of venire members. During its comments the court stated that jurors did not know much about the court system, that the jurors did not know much about the trial court specifically or their elected officials in general, that the Oklahoma bombing was a terrible thing, and that "[s]omething is bad wrong and it's us." The court also gave a lengthy discourse expressing its disdain for the use of the term "African-American." These comments did not include an opinion on any fact to be decided by the jury and did not disparage defendant or defendant's counsel.

[10] Finally, defendant contends that the trial court erroneously expressed an opinion to the venire on the outcome of this case by giving the following explanation to prospective jurors:

> If you think it's justifiable of the death sentence taking and considering all factors that we have been over and over again, then you're going to recommend death. If you don't think so, then you're going to recommend life. You're going to do one or the other, *but you can't say I'm going to kill him every time. I'm going to turn him loose every time because that would be wrong.*

(Emphasis added.) Defendant argues that the court expressed its disdain for a life sentence by making the emphasized portion of this statement. This comment was part of a more lengthy discourse by the judge apparently in response to a prospective juror's having attempted to speak with a court reporter during the lunch recess. In context the import of the entire statement was to assure the jurors

that all information that they needed would be given to them in the courtroom and to inform the prospective jurors again of their responsibility in the proceeding. The judge cautioned the jurors to keep an open mind. The judge had repeatedly informed the jurors that they would consider the aggravating and mitigating circumstances and would recommend a death sentence if justified by the evidence and the law or would recommend a life sentence if justified by the evidence and the law. We conclude the trial court did not express a disdain for a life sentence by making the complained-of statement.

This assignment of error is overruled.

[11] By his next assignment of error, defendant contends that the trial court erred by excluding evidence that the victim had engaged in sexual intercourse with Johnnie Pat Barden on the night of the killing. The offer of proof tended to show that Barden and the victim knew each other, that they were not dating, and that they had sexual intercourse on the night of the murder. Defendant argues that this evidence was relevant to rebut the State's contention that defendant intended to commit rape and to show that the victim consented to have sex with defendant. Defendant argues that, in conjunction with the evidence of defendant's mental retardation and organic brain damage, the victim's sexual conduct on the evening in question was relevant to defendant's perception of whether the victim consented to have sex with him and to defendant's capacity to appreciate the criminality of his conduct.

"The Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Any evidence the court 'deems relevant to sentence' may be introduced at this stage." *Daughtry*, 340 N.C. at 517, 459 S.E.2d at 762; *accord* N.C.G.S. § 15A-2000(a)(3). A capital defendant must be permitted to present any aspect of the defendant's character, record, or any other circumstance which a jury could deem to have mitigating value. *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978).

We conclude that the evidence that the victim had sexual intercourse with Barden on the night of the killing was not relevant to any issue at defendant's capital sentencing hearing. The evidence that the victim had sexual intercourse with a third party did not relate to any aspect of defendant's character, his record, or any other circumstance which a jury could deem had mitigating value. This evidence did not have any tendency to show that the victim consented to having sexual intercourse with defendant. No evidence in the record sug-

gests that defendant was even aware that Barden and the victim had engaged in sexual intercourse on the night in question. Even when considered in conjunction with the evidence of defendant's limited intellectual capacity, the evidence that the victim had sexual intercourse with a third party on the night of the murder did not shed any light on whether defendant believed that the victim had consented to having sexual intercourse with him or on his capacity to appreciate the criminality of his conduct. This assignment of error is overruled.

[12] By his next assignment of error, defendant contends that the trial court erred by refusing to grant defendant's motions for directed verdict on three statutory mitigating circumstances. Defendant argues that the evidence in support of these statutory mitigating circumstances was substantial, manifestly credible, and uncontradicted, thereby entitling him to a directed verdict based on *State v. Rouse*, 339 N.C. 59, 108, 451 S.E.2d 543, 571 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 60 (1995). The three circumstances were that at the time of the crime defendant was under the influence of a mental or emotional disturbance, that at the time of the crime defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, and defendant's age at the time of the crime. "In a capital sentencing proceeding, when submitting to the jury uncontradicted evidence supporting a mitigating circumstance, the appropriate device is a peremptory instruction." *State v. Carter*, 342 N.C. 312, 325, 464 S.E.2d 272, 280 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 957 (1996). A directed verdict is not an appropriate device under such a circumstance. *Id.*

A capital defendant is entitled to a peremptory instruction when a mitigating circumstance is supported by uncontradicted evidence. *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). "A peremptory instruction tells the jury to answer the inquiry in the manner indicated by the trial court *if it finds* that the fact exists as all the evidence tends to show." *State v. Alston*, 341 N.C. 198, 256, 461 S.E.2d 687, 719 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996). The general rule is that "even where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence." *Id.* at 256, 461 S.E.2d at 719-20. Accordingly, the trial court properly declined to grant defendant's motions for directed verdict.

In *State v. Flippen*, 344 N.C. 689, 477 S.E.2d 158 (1996), cited by defendant, we identified an exception to the general rule and held

that the defendant was entitled to a mandatory peremptory instruction where the State and the defendant had stipulated that the defendant had no significant history of prior criminal activity. *Flippen*, 344 N.C. at 701-02, 477 S.E.2d at 165-66. We reasoned that the stipulation established the existence of the mitigating circumstance and concluded that the trial court erred by permitting the jury to disregard the stipulation. *Id.* This case is distinguishable from *Flippen* in that the mitigating circumstances at issue were not established by a stipulation. Accordingly, the court properly declined to give mandatory peremptory instructions. This assignment of error is overruled.

[13] By his next assignment of error, defendant contends that the trial court erred by reopening *voir dire* after the jury was impaneled and by permitting the State to exercise a peremptory challenge to excuse a juror after the jury was impaneled.

After the close of all the evidence, the prosecutor informed the court that he had received information concerning juror Boykin. The prosecutor advised the court that he had learned that Boykin had in the last few years presented an argument against the death penalty in which she had asserted that no person had the right to take the life of another person, that too many black defendants were receiving the death penalty, and that something should be done about this. The prosecutor told the court that his source was "an officer of the court."

The prosecutor asked the court to reopen *voir dire* to permit him to ask Boykin about the statements which had been attributed to her. Over defendant's objection the trial court granted the prosecutor's request and brought Boykin to the courtroom for questioning.

Responding to questions asked by the court, the prosecutor, and defense counsel, Boykin stated that she currently believed that some persons should receive the death penalty, that she had never stated that the death penalty was not being fairly administered or that the death penalty should not be imposed, and that her responses on *voir dire* were correct. The trial court declined to excuse Boykin for cause, but the prosecutor exercised one of his remaining peremptory challenges.

Defendant contends that the trial court abused its discretion by reopening *voir dire*. He specifically contends that it was an abuse of discretion to reopen the examination of Boykin on the basis of information received from an unnamed third-party identified only as "an officer of the court."

> Section 15A-1214(g) of the North Carolina General Statutes permits the trial court to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. N.C.G.S. § 15A-1214(g) (1988). The decision whether to reopen the examination of a passed juror is within the sound discretion of the trial court.

State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 719 (1997). While not addressed by statute, this Court has held that the trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court. *State v. McLamb*, 313 N.C. 572, 575-76, 330 S.E.2d 476, 479 (1985); *State v. Kirkman*, 293 N.C. 447, 452-54, 238 S.E.2d 456, 459-60 (1977). "[O]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror." *Womble*, 343 N.C. at 678, 473 S.E.2d at 297.

The statements attributed to Boykin raised the possibility that Boykin had not been candid when she told the court on *voir dire* that she could consider the death penalty. The information provided by the prosecutor established good reason to reopen *voir dire* to inquire into whether Boykin made the statements attributed to her and, if so, whether she continued to hold to these beliefs and whether her beliefs would prevent or substantially impair the performance of her duties as a juror. The court was entitled to consider information provided by "an officer of the court" in determining whether to reopen *voir dire*, and doing so did not amount to an abuse of discretion. This assignment of error is overruled.

[14] By his next assignment of error, defendant contends the prosecutor's closing argument amounted to gross prosecutorial misconduct. He contends that the court erred both by failing to sustain his objections to certain arguments and by failing to intervene *ex mero motu* in others. After carefully considering each of defendant's contentions, we find them to be without merit.

"A prosecutor in a capital trial is entitled to argue all the facts submitted into evidence as well as any reasonable inferences therefrom." *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). "Counsel are afforded wide latitude in arguing hotly contested cases, and the scope of this latitude lies within the sound discretion of the trial

court." *Id.* In cases where the defendant failed to object at trial, "the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979), *quoted in Gregory*, 340 N.C. at 424, 459 S.E.2d at 672.

Defendant contends that the court erred by permitting the prosecutor to comment, over defendant's objection, on the quality of life defendant would have in prison. The prosecutor argued that if the jury recommended life imprisonment, defendant would be able to watch television, play cards, play basketball, listen to music, and eat lunch with fellow inmates. Defendant contends that argument describing future prison conditions is irrelevant and speculative. We have previously approved a similar argument with respect to prison conditions on the basis that it "served to emphasize the State's position that the defendant deserved the penalty of death rather than a comfortable life in prison." *Alston*, 341 N.C. at 252, 461 S.E.2d at 717. In the present case a prison guard testified that defendant was permitted to watch television, play cards, lift weights, play basketball, go to the music room, and eat lunch with other inmates. It is reasonable to infer that defendant would continue to enjoy these privileges if sentenced to life imprisonment. We conclude that the trial court did not err by overruling defendant's objection.

[15] Next, defendant contends that the court erred by overruling his objection to the following argument:

> This is not a case . . . [where defendant] was provoked by someone to do this crime. [It] [i]s not a barroom killing where people get in an argument. This is not a case where the defendant finds someone has taken his wife away from him or hurt one of his children. There is no mitigating factor involving this crime, members of the jury.

Defendant contends that the prosecutor's argument improperly told jurors that circumstances not sufficient to excuse the killing or to reduce it to a lesser included offense did not have mitigating value. We do not agree with defendant's interpretation of the prosecutor's argument. In the argument at issue, the prosecutor did not state that mitigating circumstances were limited to facts which would justify the killing or to facts which would be sufficient to reduce the crime to a lesser included offense of murder. The argument that the victim

did not provoke the killing was supported by the evidence, and the prosecutor was entitled to argue that no mitigating circumstances existed. We conclude that the prosecutor's argument was well within the wide latitude afforded counsel in capital cases.

[16] Defendant failed to object to any of the remaining prosecutorial 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 prosecutor made improper use of the evidence of defendant's prior unadjudicated sexual assaults. Defendant contends the prosecutor improperly argued that defendant should be sentenced for acting in conformity with these prior bad acts and asserts that the prosecutor's argument exceeded the scope of the limiting instruction.

The prosecutor first mentioned the prior unadjudicated sexual assaults early in his closing argument. After briefly mentioning the testimony relating to the prior assaults, the prosecutor commented that it is unfortunate that women do not report all rapes. He then reminded the jury that defendant had been convicted of attempted rape in 1984 and noted that this conviction was possible only because the victim of that crime had reported defendant's actions to the police. The prosecutor argued that defendant had "learned a lesson" from this conviction and had decided to kill his next victim to prevent her from testifying against him. The prosecutor's argument was supported by the evidence presented in the sentencing proceeding. After considering this portion of the prosecutor's argument in its entirety, we conclude that the brief reference to the four prior unadjudicated sexual assaults was not improper and did not require the intervention of the trial court *ex mero motu*.

[17] Later in his closing argument, the prosecutor related the facts of the four prior unadjudicated sexual assaults after telling the jury, "We have to prove his intent at the time he killed [the victim] was to commit rape . . . ." The prosecutor was entitled to argue that these facts supported the conclusion that defendant intended to rape the victim and that the jury should find the aggravating circumstance that the murder was committed while defendant was engaged in the attempt to commit a rape. The prosecutor's argument was consistent with the limiting instruction given by the trial court and was proper.

[18] Defendant next contends that the prosecutor improperly used the prior unadjudicated sexual assault evidence by making the following statement: "He was good to elderly people apparently, but you have to decide whether or not him [sic] being nice to an elderly person is going to allow him to do what he's done to all these women . . . ." The prosecutor made this statement after listing each of the mitigating circumstances; and it is apparent in context that he was arguing that the mitigating circumstances did not have great weight, that the mitigating circumstances did not outweigh the aggravating circumstances, and that the jury should recommend the death penalty. We conclude that the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[19] Defendant next contends that the prosecutor improperly attacked defendant's counsel by arguing, "[Y]ou realize how sacred life is, members of the jury. It's not sacred to this defendant and his attorneys, his two attorneys." Defendant argues that the prosecutor's arguments questioned defense counsel's humanity and religious beliefs.

"It is well-established that a trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). We agree with defendant that it was improper for the prosecutor to argue that life was not sacred to defense counsel. However, the prosecutor's comment did not rise to the level of gross impropriety. The prosecutor did not use abusive, vituperative, or opprobrious language and did not repeatedly attempt to diminish defense counsel before the jury. In fact, careful review of the prosecutor's argument permits the inference that the improper reference to defendant's attorneys was not intended. Shortly after making the improper comment, the prosecutor stated that defendant "has two fine attorneys representing him in this case. They have done an excellent job." We conclude that the prosecutor's reference to defendant's attorneys was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[20] Defendant contends that the trial court erred by permitting the prosecutor to make the following argument:

> They might want to quote from the [B]ible. . . . Talk about the tenth commandment and thou shall not kill. I contend and submit . . . [that] what the [B]ible really means is thou shalt not commit murder. In fact, if you look at Matthew One, Chapter Eighteen. It says, at the same time came the disciples unto Jesus saying who is the greatest in the kingdom of heaven. And Jesus called a little child unto him and set him in the midst of them and said verily I say unto you, except ye be converted and become as little children, ye shall not enter into the kingdom of heaven. Whosoever therefore shall humble himself as this little child, the same is greatest in the kingdom of heaven and [whosoever] shall receive one such little child in my name receiveth me, but [whosoever] shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck and that he were drowned in the depth of the sea.

Defendant argues that this argument told jurors that Jesus would have hung a millstone around defendant's neck and drowned him in the depths of the sea for harming a seventeen-year-old girl.

> 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). However, this Court "has found biblical arguments to fall within permissible margins more often than not." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

The prosecutor's argument in this case did not suggest that the law-enforcement powers of the State were divinely inspired or ordained by God or Jesus Christ. The argument did not suggest that the death penalty was divinely required. The plain language of the argument demonstrates that the prosecutor anticipated that defense counsel would refer to the Bible in arguing that the jury should not recommend the death penalty and that the prosecutor's argument was made to counter any such attempt. We conclude that the trial

court did not abuse its discretion by failing to intervene *ex mero motu*.

This assignment of error is overruled.

[21] By his next assignment of error, defendant contends that the trial court erred in instructing the jury on the 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). The trial court instructed the jury, in pertinent part, as follows:

> Number one, had [defendant] been previously convicted of a felony involving the use of violence to the person? . . . All right, now attempted rape is by definition a felony involving the use of violence to the person.

On the "Issues and Recommendation as to Punishment" form, the court framed the (e)(3) circumstance in the following manner: "Had [defendant] been previously convicted of a felony involving the use of violence to the person?"

Defendant contends that the trial court erred by omitting the words "or threat" from its instructions. Defendant argues that the evidence was insufficient to establish that he had been previously convicted of a felony involving the "use of violence" and that a juror might give more weight to an aggravating circumstance involving the "use of violence" than a circumstance involving the "use or threat of violence."

Initially, we must address the standard of review. Rule 10(b)(2) sets forth the procedures for preserving instructional errors on appeal.

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2).

Defendant did not object or call the omission of the words "or threat" to the trial court's attention or otherwise object to the form of

the trial court's instruction on this circumstance. He also failed on appeal to contend "specifically and distinctly" that the form of the trial court's instruction amounted to plain error. *See* N.C. R. App. P. 10(c)(4). Accordingly, defendant has waived appellate review of this assignment of error. *See State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995). Nevertheless, in the exercise of our discretion under Rule 2 of the Rules of Appellate Procedure, we elect to consider defendant's contention based on plain error.

In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). We conclude that the error in the trial court's instructions did not rise to the level of plain error.

We agree with defendant that the trial court erred by omitting the term "or threat" from its instruction on the (e)(3) circumstance. Under N.C.G.S. § 15A-2000(e)(3), the required prior felony

> can be either one which has as an element the involvement of the use or threat of violence to the person, such as rape or armed robbery, *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981), or a felony which does not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission.

State v. McDougall, 308 N.C. 1, 18, 301 S.E.2d 308, 319, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). In *Holden II* we stated "that for purposes of N.C.G.S. § 15A-2000(e)(3), rape is a felony which has as an element the use *or threat* of violence to the person" and "that where rape is deemed to have as an element the use *or threat* of violence, the 'felony of attempt to commit rape is therefore by nature of the crime a felony which *threatens violence*.' " *Holden II*, 338 N.C. at 404-05, 450 S.E.2d at 883-84 (emphasis added) (quoting *State v. Green*, 336 N.C. 142, 170, 443 S.E.2d 14, 30, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)). We concluded that "the judgment showing that the defendant had previously been convicted of attempted second-degree rape was sufficient, standing alone, to require that the trial court submit the aggravating circumstance that the defendant had committed a prior felony involving the use *or threat* of violence to the person." *Id.* at 405, 450 S.E.2d at 884 (emphasis added). We did

not hold that attempted second-degree rape always constitutes a crime involving the use of violence.

In the sentencing proceeding from which this appeal is taken, the State introduced the judgment and commitment showing defendant's prior conviction of attempted second-degree rape. This evidence was sufficient to require the court to submit the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3). However, the State did not present any other evidence in support of the (e)(3) circumstance; and we are thus constrained to conclude that the trial court erred by omitting the "or threat" language from its instructions.

The trial court's error, however, did not rise to the level of plain error. *See White*, 340 N.C. at 299, 457 S.E.2d at 862. The State presented uncontroverted evidence that defendant had been previously convicted of attempted second-degree rape. Attempted second-degree rape is a crime involving the use or threat of violence to the person; and a conviction of attempted second-degree rape, standing alone, is sufficient to establish the existence of the circumstance. The error in the instruction did not reduce the State's burden of proof or favor the State in any way; and we conclude that a reasonable probability does not exist that the jury would have reached a different result had the words "or threat" been included in the instruction. Accordingly, the omission of the words "or threat" from the jury instructions on the (e)(3) aggravating circumstance did not rise to the level of plain error.

This assignment of error is overruled.

[22] By his next assignment of error, defendant contends that the trial court's peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) and (f)(6) mitigating circumstances erroneously heightened his burden of proof by requiring the jury to find the uncontradicted evidence supporting the circumstances to be "credible and convincing."

Defendant requested the following peremptory instruction with respect to both the (f)(2) and the (f)(6) circumstances:

> All of the evidence tends to prove that this statutory mitigating circumstance exists. If one or more of you finds the evidence to be *credible and the circumstance to be true*, as all the evidence tends to show, you will answer "yes" . . . .

(Emphasis added.) The trial court did not give the peremptory instructions requested by defendant and instead gave the peremptory instructions to which defendant assigns error. After carefully reviewing the entirety of the trial court's instructions on the (f)(2) and (f)(6) mitigating circumstances, we conclude that it is not reasonably likely that the jury applied the peremptory instructions given by the court in a way that prevented the jury from considering constitutionally relevant evidence. *See Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990).

Prior to instructing the jury on each of the mitigating circumstances, the trial court instructed the jury that mitigating circumstances must be established by a preponderance of the evidence:

> 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. If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the issues and recommendation form.

The court subsequently instructed the jury on each of the mitigating circumstances, and the trial court's instructions with respect to the (f)(2) and (f)(6) mitigating circumstances reiterated that defendant had the burden of establishing each by a preponderance of the evidence. In instructing on the (f)(2) mitigating circumstance, the trial court charged:

> You would find this mitigating circumstance if you find the defendant is mentally retarded or suffers from organic brain damage and that as a result the defendant was under the influence of a mental or emotional disturbance when he killed the victim. Now, the defendant here has the burden of establishing this mitigating circumstance by the preponderance of the evidence as I have explained to you. Accordingly, I charge that if one or more of you find the facts to be as all the evidence tends to show that this mitigating circumstance existed is uncontradicted, let me start again. To show this mitigating circumstance existence is uncontroverted and further find it to be credible and convincing, you will so indicate by having your foreman write yes in the space provided after mitigating circumstance number one on the issues and recommendation form.

The pertinent portion of the trial court's peremptory instruction on the (f)(6) mitigating circumstance is as follows:

> You would find this mitigating circumstance if you find that the defendant was mentally retarded or suffered from organic brain damage and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Now again the defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence as I have explained it to you. Accordingly, I charge that if one or more of you find the facts to be as all the evidence tends to show this mitigating circumstance's existence is uncontradicted and further find it to be credible and convincing, you will so indicate by having your foreman write yes in the space provided after this mitigating circumstance number two on the issues and recommendation form.

Defendant argues that the court erred by requiring the jury to find the evidence supporting the circumstances to be "credible and convincing." Although admittedly not a model of clarity, the instructions did not, in our judgment, place a more stringent burden of proof on defendant.

The correct burden of proof for establishing the existence of mitigating circumstances is by a "preponderance of the evidence." *State v. Payne*, 337 N.C. 505, 531, 448 S.E.2d 93, 108 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). The trial court's instructions on the mitigating circumstances at issue correctly informed the jury that defendant's burden of proof was by a preponderance of the evidence. In reviewing the instructions challenged by defendant to determine whether any ambiguity prejudiced him, our inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, 108 L. Ed. 2d at 329; *accord Estelle v. McGuire*, 502 U.S. 62, 72, 116 L. Ed. 2d 385, 399 (1991); *see also State v. Spruill*, 338 N.C. 612, 657, 452 S.E.2d 279, 303 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 63 (1995).

"[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. Hartman*, 344 N.C. 445, 467, 476 S.E.2d 328, 340 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 708, 65 U.S.L.W. 3727 (1997). "[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), *quoted in Hartman*, 344 N.C. at 467, 476 S.E.2d at 340.

"A peremptory instruction tells the jury to answer the inquiry in the manner indicated by the trial court *if it finds* that the fact exists as all the evidence tends to show." *Alston*, 341 N.C. at 256, 461 S.E.2d at 719. The general rule is that "even where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence." *Id.* at 256, 461 S.E.2d at 719-20. We have stated that "even where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury is still free to reject the circumstance if it does not find the evidence credible or convincing." *State v. Lyons*, 343 N.C. 1, 17, 468 S.E.2d 204, 211, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996). Jurors have a right to reject uncontradicted evidence supporting a mitigating circumstance "if they lack faith in its credibility." *Carter*, 342 N.C. at 322, 464 S.E.2d at 279. The record shows that the court repeatedly instructed the jury that defendant's burden of proof was by a preponderance of the evidence. In the context of the entire charge, we are satisfied the jury would have applied the "credible and convincing" requirement in the peremptory instructions to mean that it must believe the evidence to find that the circumstances existed and that it could reject the circumstance if it did not find the evidence to be credible or convincing. We conclude that there is no reasonable likelihood that the jury applied the court's peremptory instructions in a way that prevented the jury from considering constitutionally relevant evidence. This assignment of error is overruled.

By his next assignment of error, defendant contends that the trial court erred by requiring the jury to find that nonstatutory mitigating circumstances had mitigating value. As defendant concedes, we have previously considered and rejected his contention. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). Defendant has advanced no persuasive argument for this Court to reconsider its opinion on this issue.

Defendant next contends that the trial court's instructions with respect to sentencing issues three and four violated the Eighth

Amendment to the United States Constitution. He concedes that we have previously considered and rejected his contention. *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995).

[23] By his next assignment of error, defendant contends that sentencing to death a mentally retarded person with moderate organic brain damage violates state and federal constitutional provisions. The Eighth Amendment to the United States Constitution does not forbid the execution of mentally retarded persons. *Penry v. Lynaugh*, 492 U.S. 302, 335, 106 L. Ed. 2d 256, 289 (1989); *State v. Best*, 342 N.C. 502, 515, 467 S.E.2d 45, 53, *cert. denied*, — U.S. —, 136 L. Ed. 2d 139 (1996). We have similarly refused to hold that the North Carolina Constitution categorically prohibits the execution of mentally retarded persons. *State v. Norwood*, 344 N.C. 511, 531, 476 S.E.2d 349, 357 (1996), *cert. denied*, — U.S. —, 137 L. Ed. 2d 500 (1997).

> So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether "death is the appropriate punishment" can be made in each particular case.

Penry, 492 U.S. at 340, 106 L. Ed. 2d at 292. In the present case defendant was permitted to present evidence of his mental retardation and organic brain damage; and the trial court submitted nonstatutory mitigating circumstances permitting the jury to consider whether defendant was retarded, whether he was suffering from organic brain damage, and whether either of these circumstances had mitigating value. The jury was thus permitted to consider and give effect to the evidence of defendant's mental retardation and organic brain damage. This assignment of error is overruled.

PROPORTIONALITY

[24] Having found no error in the capital sentencing proceeding, we must undertake our statutory duty to determine whether (i) the evidence supports the aggravating circumstances found by the jury; (ii) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (iii) the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

Defendant was found guilty of first-degree murder under the theories of premeditation and deliberation and felony murder. Following the capital sentencing proceeding, the jury found the

aggravating circumstances that (i) defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); (ii) the murder was committed for the purpose of avoiding a lawful arrest, N.C.G.S. § 15A-2000(e)(4); and (iii) the murder was committed while defendant was attempting to commit rape, N.C.G.S. § 15A-2000(e)(5). The jury found the statutory mitigating circumstance that the murder was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). The jury rejected the statutory mitigating circumstances (i) that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6), and (ii) the age of defendant at the time of the murder, N.C.G.S. § 15A-2000(f)(7). The jury also found the statutory catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9), and all five of the nonstatutory mitigating circumstances submitted for its consideration.

We have reviewed the evidence supporting each of the aggravating circumstances and conclude that the evidence supported each of them. 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 aberrant jury." *Holden I*, 321 N.C. at 164-65, 362 S.E.2d at 537. Another purpose is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We compare this case to others in the pool, which we defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), that "are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

"In 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, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 409

(1996). This Court has determined that the sentence of death was disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). The instant case is not substantially similar to any of the cases in which this Court has found the death penalty disproportionate. Most notably, we have never found a death sentence disproportionate in a first-degree murder case where the victim was sexually assaulted, *State v. Kandies*, 342 N.C. 419, 455, 467 S.E.2d 67, 87, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996), or where the murder was committed for the purpose of eliminating a witness, *State v. Bishop*, 343 N.C. 518, 561, 472 S.E.2d 842, 865 (1996), *cert. denied*, — U.S. —, 136 L. Ed. 2d 723 (1997).

The most significant distinguishing feature of this case is that the murder was committed for the purpose of eliminating a witness.

> [W]e have never found a death sentence to be disproportionate in witness-elimination cases. The reason is clear: "Murder can be motivated by emotions such as greed, jealousy, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion." *State v. Oliver*, 309 N.C. 326, 375, 307 S.E.2d 304, 335 (1983). . . . The purposeful and deliberate killing of witnesses or possible witnesses strikes a blow at the entire public—the body politic—and directly attacks our ability to apply the rule of law and to bear witness against the transgressors of law in our society.

State v. McCarver, 341 N.C. 364, 407, 462 S.E.2d 25, 49 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 482 (1996). We have recognized that juries have frequently imposed the death penalty in cases involving witness elimination. *See id.* at 408-09, 462 S.E.2d at 50.

The evidence tended to show that in 1984 defendant told Johnnie Lee Williams that he was going to kill the next girl he raped to keep her from talking. In March of 1984 defendant told Jessie Sutton, Jr. that defendant had just been released from prison for rape and that if he had known "that girl was going to tell on me, I would have killed her." On the night of the killing, defendant told Levon Hicks that

defendant "was going to get some meat" and that he would "[p]robably have to kill [the victim] so she won't tell anybody." This evidence strongly tended to show that defendant coldly and callously planned to rape and kill the victim and that he killed her to prevent her from testifying against him. 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 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. DARRELL EUGENE STRICKLAND

No. 483A95

(Filed 24 July 1997)

1. Jury § 132 (NCI4th)— jury selection—note from prospective jurors—questions by defendant not permitted

The trial court did not prohibit defendant from obtaining adequate information about any biases or preconceived fears held by prospective jurors in a first-degree murder prosecution when it refused to permit defendant to question prospective jurors about their submission of a note to the trial court in which they questioned whether defendant kept notes including jurors' names and addresses taken during jury selection where the jury-selection transcript shows that the trial court permitted defense counsel to question prospective jurors in detail about any bias they may have had against defendant. It was proper for the trial court to protect the jurors' ability to ask questions during the jury-selection process by protecting them from multiple, and perhaps intimidating, inquiries.

Am Jur 2d, Jury §§ 264-266.

2. Constitutional Law § 309 (NCI4th)— jury selection—admission defendant holding gun—not concession of guilt—not ineffective assistance of counsel

Defense counsel's statements during jury selection in a first-degree murder case that defendant was holding the gun that killed the victim at the time the victim was shot did not amount to a concession of guilt to which defendant had not agreed in violation of defendant's right to the effective assistance of counsel where the uncontroverted evidence showed that defendant was holding the gun when the victim was shot, and counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge.

Am Jur 2d, Criminal Law §§ 985-987.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

3. Constitutional Law § 310 (NCI4th)— opening statement—unsupported assertion—admission of criminal record—not ineffective assistance of counsel

Defense counsel's opening statement in a first-degree murder prosecution did not violate defendant's Sixth Amendment right to effective assistance of counsel because it allegedly included assertions for which there was no supporting evidence and an admission that defendant had a criminal record where statements of which defendant complains suggested that the victim entered defendant's home with a weapon, that the victim acted in a belligerent manner, and that defendant unintentionally shot the victim while attempting to evict him from his home; such a depiction of the incident was a reasonable tactic used by counsel in an attempt to explain why defendant pointed a gun at the victim and why the gun went off, and defense counsel could have thought his statements would be supported by the testimony of the two eyewitnesses; and defense counsel reasonably could have decided to admit the prior criminal record in order to lessen the impact when it came out during the trial. Even if it is assumed that defense counsel's performance was deficient, the result would not have been different in the absence of counsel's alleged errors in light of the overwhelming evidence of defendant's guilt.

Am Jur 2d, Criminal Law §§ 985-987.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

4. Evidence and Witnesses § 284 (NCI4th)— prior assault by victim—irrelevancy to show fear by defendant

Testimony that a murder victim had assaulted his wife a few months prior to the murder and that defendant knew of this assault was not admissible under Rule 404(b) to show that defendant was fearful of the victim at the time of the killing where there was no allegation or evidence that defendant shot the victim in self-defense, defendant's theory of the case was that defendant pointed a gun at the victim to persuade him to leave defendant's home and that the gun accidentally fired, and evidence of the victim's prior assault against his wife was thus not relevant to the killing of the victim. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 404 et seq.

5. Constitutional Law § 244 (NCI4th)— defendant's statement to individual—failure to compel disclosure of name—no Brady violation

The trial court's failure to compel the State to disclose to a defendant charged with first-degree murder the name of an individual to whom defendant had stated that the gun had gone off accidentally did not violate defendant's due process rights under *Brady v. Maryland*, 373 U.S. 83, because (1) defendant is presumed to know to whom he spoke about the murder, and nothing in N.C.G.S. § 15A-903(a)(2) requires the prosecutor to disclose the name of an individual to whom defendant made oral statements relevant to the case or the facts and circumstances surrounding defendant's oral statements, and (2) defendant's statement was not material within the meaning of *Brady* since the overwhelming evidence at trial, including defendant's confession, tended to show that defendant intended to kill the victim, and there was no reasonable probability that the outcome of the case would have been different if the name of the individual had been disclosed to defendant.

Am Jur 2d, Criminal Law §§ 770 et seq., 998 et seq.

6. Evidence and Witnesses § 1083 (NCI4th)— refusal to put statement in writing—testimony by SBI agent—not self-incrimination

The admission of testimony by an SBI agent that defendant refused to make a written statement after he had made his oral statement to the police did not violate defendant's right against compulsory self-incrimination where defendant was advised of his *Miranda* rights and knowingly and willingly waived them; defendant then made a detailed statement; and no attempt was made to construe defendant's decision not to put the statement he had given into written form as an admission of his guilt.

Am Jur 2d, Evidence § 717.

7. Evidence and Witnesses § 284 (NCI4th)— defendant's prior violent acts—no claim of self-defense—inadmisibility

The trial court in a first-degree murder trial did not err by excluding testimony by defendant's girlfriend about defendant's past violent conduct against his wife or about the victim's threats to "whip [defendant's] tail" on the night of the murder where defendant did not claim self-defense but claimed that the killing was an accident.

Am Jur 2d, Evidence §§ 404 et seq.

8. Criminal Law § 467 (NCI4th Rev.)— closing arguments—inferences from evidence—no misstatement of law

Statements made by the prosecutors in closing arguments in a first-degree murder trial were reasonable inferences taken from the evidence, and the prosecutors did not misrepresent the law concerning provocation as grounds for murder.

Am Jur 2d, Trial §§ 554, 555, 609, 632-639.

9. Criminal Law § 1364 (NCI4th Rev.)— capital sentencing—aggravating circumstance—prior violent felony—combativeness with police at arrest—admissibility

Evidence that defendant was uncooperative and combative with police officers when they sought to apprehend him for a prior assault in which defendant cut the victim down the back with a knife was admissible in a capital sentencing proceeding in support of the (e)(3) aggravating circumstance that defendant

had previously been convicted of a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Trial §§ 554, 555, 609.

10. Criminal Law § 1364 (NCI4th Rev.)— capital sentencing—aggravating circumstance—prior violent felony—witness's observations—fear of defendant and effect on life

Testimony by a witness concerning her observations of defendant's prior assault on her husband with a knife was properly admitted in a capital sentencing proceeding in support of the (e)(3) aggravating circumstance. Testimony by the witness that she was afraid that defendant would have cut her with the knife if given the chance and that she is reminded daily of the assault served to establish for the jury the severity of defendant's attack on her husband and the fear which defendant inflicted and was also properly admitted in support of the (e)(3) aggravating circumstance.

Am Jur 2d, Criminal Law §§ 527, 533.

11. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—mitigating evidence—hearsay—exclusion by court

The trial court in a capital sentencing hearing did not err in excluding an officer's hearsay testimony that defendant's victim in a prior voluntary manslaughter conviction had left a bar before defendant where the testimony was offered in response to the State's evidence of the (e)(3) aggravator; this evidence had no direct mitigating value and was not relevant to whether defendant had been convicted of a prior felony; the testimony required the jury to speculate about defendant's role in a case that had already been decided against him; and the trial court could properly have determined that the tendered testimony was outweighed by the danger of confusing or distracting the jury.

Am Jur 2d, Criminal Law §§ 598 et seq.

12. Criminal Law § 1364 (NCI4th Rev.)— capital sentencing—aggravating circumstance—prior violent felony—appeal of conviction pending—question not considered

The Supreme Court need not consider defendant's argument that his voluntary manslaughter conviction should not have been submitted in support of the (e)(3) aggravating circumstance, conviction of a prior violent felony, because an appeal of the con-

viction was pending at the time of the capital sentencing proceeding in this case where the conviction has been upheld by the Court of Appeals, and the Supreme Court dismissed defendant's appeal of a constitutional question and denied his petition for discretionary review, thus completing the appeals process.

Am Jur 2d, Criminal Law §§ 527, 533.

13. Criminal Law § 1384 (NCI4th Rev.)— capital sentencing—mitigating circumstances—mental or emotional disturbance—insufficient evidence

The trial court did not err by refusing to submit to the jury in a capital sentencing proceeding the statutory mental or emotional disturbance mitigating circumstance where there was evidence that defendant was agitated because of the victim's belligerent conduct, including his calling defendant a "punk Indian son-of-a-bitch," that defendant was angry when he shot the victim, and that the shooting occurred some time after the victim had used the derogatory racial slur or had talked of fighting defendant. The inability to control one's temper is neither mental nor emotional disturbance as contemplated by this mitigator. N.C.G.S. § 15A-2000(f)(2).

Am Jur 2d, Criminal Law §§ 598, 599, 609.

14. Criminal Law § 1389 (NCI4th Rev.)— capital sentencing—impaired capacity mitigating circumstance—insufficient evidence

The trial court did not err by declining to submit the impaired capacity mitigating circumstance to the jury in a capital sentencing proceeding where the evidence tended to show only that defendant had consumed about six beers and a few drinks of liquor prior to the killing, and there was evidence that the consumption of this alcohol did not so impair defendant as to prevent him from understanding the criminality of his conduct or to affect his ability to control his actions. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Criminal Law §§ 598, 599, 609.

15. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstance—completion of probation—insufficient evidence

The trial court did not err by refusing to submit to the jury in a capital sentencing proceeding the nonstatutory mitigating cir-

cumstance that defendant had successfully completed probation following a prior assault conviction where defendant objected to the State's introduction of the court file for his assault conviction; the court ruled that the State could present to the jury only the indictment, plea, and judgment; defendant did not request that records concerning his completion of probation be admitted and did not call his probation officer as a witness to testify about his conduct during probation; and there was thus no evidence from which the jury could have found the existence of this mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599, 606 et seq.

16. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstance—refusal to submit—subsumption by submitted circumstance

Any error in the trial court's refusal to submit to the jury in a capital sentencing proceeding the nonstatutory mitigating circumstance that defendant "feels that he owes it to his children and his people to refuse any kind of mitigating defense and instead to be a good strong Indian" was harmless beyond a reasonable doubt where this circumstance was subsumed by the submitted nonstatutory mitigating circumstance that "the defendant has great personal pride and belief in the values of his Native American Heritage," and the jurors were allowed to consider any other circumstance arising from the evidence that any of them deemed to have mitigating value under the catchall mitigating circumstance. N.C.G.S. § 15A-2000(f)(9).

Am Jur 2d, Criminal Law §§ 598, 599, 606 et seq.

17. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—no gross impropriety

Statements by the prosecutor in his closing argument in a capital sentencing proceeding were similar to statements previously reviewed by the Supreme Court and found to be proper and did not require intervention by the trial court *ex mero motu*.

Am Jur 2d, Trial §§ 533 et seq.

Propriety and prejudicial effect of prosecuting attorney's arguing new matter or points in his closing summation in criminal case. 26 ALR3d 1409.

18. Criminal Law § 468 (NCI4th Rev.)— capital sentencing—closing argument—comment not supported by evidence

The trial court properly sustained an objection to defense counsel's closing argument in a capital sentencing proceeding that the victim in defendant's prior conviction of voluntary manslaughter had fired a gun during the incident because the argument was not supported by the evidence where only hearsay evidence tended to show that a gun containing four spent shells was found in the victim's possession, and no evidence tended to show when those shells had been fired.

Am Jur 2d, Trial § 609.

19. Criminal Law § 1402 (NCI4th Rev.)— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the sentence imposed in similar cases where defendant was found guilty of premeditated and deliberate murder; defendant had been convicted of two prior violent felonies, and the jury found the (e)(3) conviction of a prior violent felony aggravating circumstance; the case has aspects of a lying-in-wait case because defendant, unaware to the victim, stood behind the victim and shot him at close range with a shotgun; and the present case is more similar to cases in which the Supreme Court has found the sentence of death proportionate than to those in which the Court has found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

Am Jur 2d, Criminal Law §§ 598, 599, 609.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Steelman, J., on 26 October 1995 in Superior Court, Union County, upon a jury verdict of first-degree murder. Heard in the Supreme Court 19 March 1997.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Sam J. Ervin, IV, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant Darrell Eugene Strickland was tried capitally upon an indictment charging him with the first-degree murder of Henry

Brown. The jury returned a verdict of guilty of first-degree murder on the basis of premeditation and deliberation. Following a separate capital sentencing proceeding, the jury recommended a sentence of death, and the trial court sentenced defendant accordingly.

The State's evidence tended to show *inter alia* that on 1 January 1995, the victim, Henry Brown, went with his wife, Gail Brown, and her six-year-old child to the home of defendant, who lived with Sherri Jenkins and their two-year-old son in Marshville, North Carolina. Mrs. Brown had formerly worked with both Ms. Jenkins and defendant at Cuddy Foods in Marshville and had been "good friends" with Ms. Jenkins for about six years. Ms. Jenkins had been dating defendant for thirteen years, had mothered his two-year-old son, and had been cohabiting with defendant for about six months at the time of the murder.

The Browns arrived at the residence of defendant and Ms. Jenkins at approximately 8:00 p.m. Mr. Brown had been drinking but was not drunk. Mr. Brown and defendant went into the kitchen, while Mrs. Brown and Ms. Jenkins stayed in the living room. The children were sent into the bedroom to play, and the adults began drinking alcoholic beverages. Ms. Jenkins testified at trial that they shared a marijuana joint and that all four adults drank from a half-gallon bottle of gin. The four adults continued drinking and talking for several hours. During this time, a shotgun owned by defendant was passed around. Everyone was talking about shooting it and joking about shooting each other, but there were no serious threats. There were two shells in the gun and no other shells in the house. Ms. Jenkins took the gun outside and fired it once.

At approximately 1:30 a.m., Mrs. Brown and Ms. Jenkins were in the kitchen preparing food for everyone to eat. The men were in the living room. Mrs. Brown testified that, while in the kitchen, she looked into the living room, where she saw her husband sitting on an ottoman with his head in his hands. Defendant was standing to the back and side of Mr. Brown with the gun in his hand pointed at Mr. Brown. Mrs. Brown saw defendant's lips move but could not hear what he said. She then heard the gun being fired, smelled burning flesh, and saw her husband fall over.

Ms. Jenkins testified that she witnessed the victim sitting on the ottoman with defendant standing behind him. The victim was mumbling something that she could not hear. She stepped outside to feed the cats, during which time she heard the gun go off. She came back

inside and saw the victim fall over. According to Ms. Jenkins, the victim's behavior that evening was obnoxious and loud. He was cursing at intervals and drinking alcohol throughout the night.

Immediately following the shooting, defendant left in his truck. He drove to the house of his ex-wife, Ms. Betty Sanders, in Marshville. Defendant asked Ms. Sanders to drive him in his truck to his uncle's house in Rockingham. At approximately 2:45 a.m., Ms. Sanders and defendant were stopped in Rockingham by Officer Poston and Officer Grant of the Rockingham Police Department, which had been notified to be on the lookout for defendant. Officer Grant transported defendant to the Rockingham Police Department.

At the Police Department, after being advised of his constitutional rights, defendant spoke to Special Agent Tony Underwood of the State Bureau of Investigation (SBI) and Detective Bill Tucker of the Union County Sheriff's Department. Defendant told them that he shot Henry Brown because "he pissed me off" and because "he called me a punk Indian son-of-a-bitch." Defendant said that no one else had anything to do with the shooting. He said that he "meant to kill" the victim. He denied that alcohol had caused him to commit the murder. Defendant said that he had not planned to kill the victim. He did however say that he had to cock the gun in order to get it to shoot.

Detective Easley of the Union County Sheriff's Department examined the crime scene during the early morning hours of 2 January 1995. Detective Easley found the body of Henry Brown lying on the living room floor on its left side. Blood was coming from the victim's nose and mouth and a hole in the back shoulder area. There was no weapon on or around the victim's body. In the gun cabinet, Detective Easley found one Ithaca twelve-gauge pump shotgun which contained one spent Winchester "double aught" buckshot casing in the chamber. He also found one spent "double aught" buckshot shell outside on the ground about eleven inches from the front doorstep.

Michael Gavin of the forensic firearms and tool marks unit of the SBI laboratory tested the shotgun and found that the gun functioned properly. Gerald Long, owner of Long's Sporting Goods and Pawn Shop, testified that he had experience in selling, firing, and repairing Ithaca twelve-gauge pump shotguns. He testified that, in his opinion, the Ithaca shotgun, in the hands of someone not experienced with it, would go off faster than any other shotgun on the market and is susceptible to accident.

[1] By his first assignment of error, defendant contends that the trial court's refusal to permit him to question prospective jurors about their submission of a note to the trial court was error. In the note submitted at the conclusion of the first day of jury selection, the prospective jurors questioned whether defendant kept notes including jurors' names and addresses taken during jury selection. Defendant argues that the trial court's ruling unduly restricted the scope of his questioning and prohibited him from obtaining adequate information about any biases or preconceived fears held by prospective jurors.

"The trial court has the duty to supervise the examination of prospective jurors. Regulation of the manner and extent of questioning of prospective jurors rests largely in the trial court's discretion." *State v. Jaynes*, 342 N.C. 249, 265, 464 S.E.2d 448, 458 (1995), *cert. denied*, —— U.S. ——, 135 L. Ed. 2d 1080 (1996). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27 (1994), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). We have examined the jury-selection transcript and find that the trial court permitted defense counsel to question prospective jurors in detail about any bias they may have had against defendant. The trial court appropriately exercised its discretion in limiting defense counsel's questions concerning the circumstances that gave rise to the jurors' note. It was proper for the trial court to protect the jurors' ability to ask questions concerning the jury-selection process by protecting them from multiple, and perhaps intimidating, inquiries. Accordingly, this assignment of error is overruled.

[2] By another assignment of error, defendant contends that defense counsel repeatedly made concessions of guilt during the jury-selection process without his permission in violation of this Court's decision in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). In particular, defendant argues that defense counsel's repeated statements during jury selection that defendant was holding the gun that killed the victim at the time the victim was shot amounted to a concession of guilt to which defendant had not agreed.

In *Harbison*, defense counsel in a first-degree murder case asked the jury to convict the defendant of involuntary manslaughter instead of first- or second-degree murder, without first receiving permission from the defendant to make such argument. This Court wrote that

"[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." *Id.* at 180, 337 S.E.2d at 507. We concluded that counsel's admission of defendant's guilt without his permission was a denial of the defendant's Sixth Amendment right to effective assistance of counsel. *Id.*

In the present case, the prosecutor expressed concern at trial that defense counsel's statements could violate the rule in *Harbison* if defendant had not agreed to them. When the prosecutor attempted to make a record showing that defendant had consented to the statements, defense counsel responded

> [t]hat [the victim] was shot with a shotgun and at the time it was in my client's hands. That, your honor, is not an admission of guilt and we don't intend for it to be an admission of guilt. To the extent that it can be interpreted as admission of guilt, and it shouldn't be, we do not intend that that in any way be interpreted as an admission of guilt. We intend it to be an accurate statement of the circumstances that occurred at the time of the incident in question.

We are persuaded that the statements made by defense counsel did not amount to an admission of defendant's guilt. The uncontroverted evidence in this case was that defendant had been holding the gun when Mr. Brown was shot. Defense counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge, and therefore, *Harbison* does not control. *See, e.g., State v. Harvell*, 334 N.C. 356, 361, 432 S.E.2d 125, 128 (1993); *State v. Greene*, 332 N.C. 565, 572, 422 S.E.2d 730, 733-34 (1992). Accordingly, we overrule this assignment of error.

[3] By another assignment of error, defendant contends that defense counsel's opening statement violated his Sixth Amendment right to effective assistance of counsel because it included numerous assertions for which there was no supporting evidence and an unnecessary admission that defendant had a criminal record. Defendant argues that by promising proof of a defense for which no evidence was presented, defense counsel lost his credibility with the jury, thereby prejudicing defendant.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*,

312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In determining whether a defendant has been denied the effective assistance of counsel, we apply the two-part test set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Therefore, to prevail under this assignment of error, defendant must prove that counsel's performance was so deficient as to deprive him of his right to be represented and that absent the deficient performance by defense counsel, there would have been a different result at trial. *State v. Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248. Having reviewed defense counsel's opening statement and the evidence in this case, we conclude that defendant has not met his burden of proof. Those statements by defense counsel of which defendant complains suggested that the victim entered defendant's home with a weapon, that the victim acted in a belligerent manner, and that defendant unintentionally shot the victim while attempting to evict him from his home. Such a depiction of the incident was a reasonable tactic used by defense counsel in an attempt to explain why defendant pointed a gun at the victim and why the gun went off. Defense counsel could have thought that his statements would be supported by the testimony of the two eyewitnesses, the victim's wife and defendant's girlfriend.

As to comments concerning defendant's prior criminal record, defense counsel reasonably could have decided to admit this fact during his opening statement in order to lessen the impact when it came out during the course of the trial. Further, even if we assume *arguendo* that counsel's performance was deficient, it is apparent that the result would not have been different in the absence of counsel's alleged errors. The evidence in this case was overwhelming. Two eyewitnesses saw defendant holding the gun pointed at the victim's back while the victim was sitting with his head in his hands, heard the gun go off, and saw the victim fall over on his side. Defendant bragged to police officers that he had killed the victim and admitted to having intended to do so. We detect no likelihood that absent the complained-of performance during defense counsel's opening statement, the result in this trial would have been different. We overrule this assignment of error.

[4] By another assignment of error, defendant contends that the trial court erred by precluding testimony during cross-examination of the victim's wife that the victim had assaulted his wife and that defendant knew of this assault. Defendant argues that this evidence was relevant as it tended to show that defendant was aware that the victim

could be violent if made angry. Defendant submits that this evidence shed light upon defendant's mental state of fearing an assault by the victim and that it should have been admitted pursuant to Rule 404(b) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 404(b) (1992). We disagree.

Where, as in this case, a defendant seeks under Rule 404(b) to use evidence of a prior violent act by the victim to prove the defendant's state of mind at the time he killed the victim, the defendant must show that he was aware of the prior act and that his awareness somehow was related to the killing. *See State v. Smith*, 337 N.C. 658, 666, 447 S.E.2d 376, 380 (1994). Defendant in this case sought to have admitted during the State's case-in-chief evidence that the victim had physically abused his wife a few months prior to the murder and that defendant had been told of this alleged abuse. Defendant submits that this evidence tended to show that defendant was fearful of the victim at the time of the killing. However, there was no evidence, and defendant did not allege, that defendant shot the victim in self-defense. Defendant's theory of the case was that defendant had pointed the gun at the victim to persuade him to leave defendant's home and that the gun accidentally fired. Under these circumstances, evidence of the victim's prior assault against his wife was not relevant to the killing of the victim. *See State v. Leazer*, 337 N.C. 454, 458, 446 S.E.2d 54, 56-57 (1994). The trial court did not err in excluding this testimony. Accordingly, we overrule this assignment of error.

[5] By another assignment of error, defendant argues that it was plain error for the trial court not to compel the State to disclose the name of an individual to whom defendant had stated that the gun had gone off accidentally. Defendant contends that the trial court, within its discretion, could have required the State to disclose this information at trial. According to defendant, the trial court's failure to compel the release of the requested information violated his constitutional guarantees as set out by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

In *Brady*, the United States Supreme Court held that suppression by the prosecution of favorable evidence which is material to the guilt or punishment of a defendant violates due process. *Id.* Favorable evidence is material if there is a "reasonable probability" that its disclosure to the defense would result in a different outcome in the jury's deliberation. *Kyles v. Whitley*, 514 U.S. 419, —, 131 L. Ed. 2d 490, 496 (1995). We conclude that the trial court's failure to compel disclosure of the name of the person to whom defendant allegedly said he acci-

dentally shot the victim did not violate principles of due process explained in *Brady* and its progeny.

First, we find it of paramount importance that defendant was aware of the substance of the statement and that it was made by him. Defendant complains only that he was not given the name of the individual to whom he said that the gun fired accidentally. Defendant is presumed to know to whom he spoke about the murder. N.C.G.S. § 15A-903(a)(2) requires the trial court, upon motion of the defendant in a criminal case, to order the prosecutor to divulge the *substance* of any oral statements made by the defendant that are relevant to the case. N.C.G.S. § 15A-903(a)(2) (1988). Nothing in the statute requires the prosecutor to disclose the name of the individual to whom the defendant has made such a statement. There is no requirement that the trial court compel disclosure of the facts and circumstances surrounding the defendant's oral statement. *See State v. Bruce*, 315 N.C. 273, 278, 337 S.E.2d 510, 514 (1985); *accord State v. Harris*, 323 N.C. 112, 122, 371 S.E.2d 689, 695 (1988).

Even assuming *arguendo* that the trial court's refusal to order the prosecution to divulge the name of the individual to whom defendant spoke prevented defendant from presenting this favorable evidence at trial, we do not find that defendant's oral statement that the gun went off accidentally was material within the Supreme Court's meaning under *Brady*. Defendant made a full statement to Officers Poston and Grant and to SBI Agent Underwood on the morning following the murder in which he repeatedly said that he meant to kill the victim. Further, the State's evidence tended to show that defendant intentionally removed the gun from the cabinet where it was stored and pointed it at the victim's back at close range. Defendant admitted to police that he knew the gun was loaded and that he slid the pump mechanism on the gun, causing a shell to enter the firing chamber. The evidence was uncontroverted that the gun was operating properly and that the trigger had to be pulled for it to fire. In light of this overwhelming evidence, we do not find a reasonable probability that the outcome of the proceeding would have been different if the prosecution had disclosed the name of the individual to whom defendant spoke.

The trial court's refusal to compel divulgence of the requested information was not error as it did not violate defendant's due process right set out under *Brady*. Accordingly, this assignment of error is overruled.

[6] By another assignment of error, defendant contends that the trial court erred in admitting testimony by SBI Agent Underwood that defendant refused to make a written statement after he had made his oral statement to police. Defendant argues that admitting this testimony violated defendant's right against compulsory self-incrimination.

Defendant in this case made an oral statement to law enforcement officers during the course of about an hour of interrogation on the morning following the murder. At the end of the interview, the officers asked defendant if he wished to put into written form what he had told them. Defendant indicated that he did not wish to make a written statement. At that time, the officers asked no further questions. Defendant does not argue that the officers failed to advise him of his constitutional rights in compliance with *Miranda* nor that he did not voluntarily answer the law enforcement officers' questions. Instead, defendant argues that it was error for the trial court to allow testimony by Agent Underwood that defendant declined to make a written statement.

Before a trial court may admit over objection statements made by a defendant to police officers while in custody, the trial court must determine that the defendant was made aware of his right not to incriminate himself and his right to counsel prior to being questioned. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Under the dictates of *Miranda*, this Court has long held that a defendant's decision to maintain his silence may not be construed as an admission of guilt. *See State v. Williams*, 305 N.C. 656, 674, 292 S.E.2d 243, 254-55, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

This Court addressed a contention similar to defendant's in *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243. In *Williams*, the trial court admitted testimony that after having answered a few questions by law enforcement officers, the defendant had asked for a lawyer. The defendant argued on appeal that admission of his request for a lawyer during his interrogation violated his right to remain silent, his right to counsel, and his right to due process of law. In rejecting this argument, we found it of paramount importance that the defendant had been advised of his *Miranda* rights and had voluntarily answered the officers' questions, and that the State did not use the defendant's request for an attorney to suggest his guilt. *Id.* at 674, 292 S.E.2d at 254-55.

Having reviewed the trial transcript, we do not find that admission of this remark by Agent Underwood during his summary of

defendant's interview violated defendant's rights against self-incrimination. Defendant was advised of his *Miranda* rights and knowingly and willingly waived them. Defendant then proceeded to make a long and detailed statement. Once defendant indicated that he did not wish to make a written statement, the law enforcement officers did not ask any further questions. No attempt was made to construe defendant's decision not to put the statement he had given into written form as an admission of his guilt. The testimony that he declined to put his statement into writing in no way prejudiced defendant. Accordingly, we overrule this assignment of error.

[7] By another assignment of error, defendant contends that the trial court erred by not allowing defendant's girlfriend, Sherri Jenkins, to testify *inter alia* as to the victim's past violent conduct against his wife, about the victim's threats to "whip [defendant's] tail" on the night of the murder, or about defendant's having asked the victim to leave prior to the shooting. Defendant asserts that testimony of the victim's violent character should have been admitted to negate evidence that defendant committed the murder with premeditation and deliberation. As we have previously noted, evidence of prior violent acts by the victim or of the victim's reputation for violence may, under certain circumstances, be admissible to prove that a defendant had a reasonable apprehension of fear of the victim. *State v. Smith*, 337 N.C. at 666, 447 S.E.2d at 380. However, as we have already discussed in this case, defendant did not claim self-defense, nor did he present any alternate theory under which this testimony would have been relevant at trial. To the contrary, he claimed that the killing was an accident. Therefore, the trial court did not err in excluding testimony by defendant's girlfriend concerning the victim's allegedly violent tendencies. Accordingly, we overrule this assignment of error.

[8] By another assignment of error, defendant contends that the trial court erred by not intervening *ex mero motu* during the prosecutors' closing arguments at the guilt-innocence phase of the trial. We disagree.

"Since defendant made no objection during closing arguments, he must demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995). Defendant contends that the two prosecutors made several statements in their closing arguments for which no evidence was presented at trial and that one misstated the law concerning provocation

as grounds for murder. After reviewing the transcript, we are convinced that all of the statements made by the prosecutors were reasonable inferences taken from the evidence presented at trial and that they did not misrepresent the law. As such, the prosecutors' arguments did not rise to the level of such gross impropriety as to require intervention by the trial court on its own motion. We therefore overrule this assignment of error.

[9] By another assignment of error, defendant contends that the trial court erred in the capital sentencing proceeding by admitting testimony offered in support of the aggravating circumstance that "defendant had previously been convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (Supp. 1994) (amended 1995). The State introduced evidence to the effect that defendant had been uncooperative and combative with police when they sought to apprehend him for a prior assault on an individual named Mr. Todd Kendall in which defendant cut Mr. Kendall down the back with a knife. Defendant argues that his conduct towards the police following his assault on Mr. Kendall was not relevant to support the submission of or the weight to be given to this statutory aggravating circumstance.

We recently rejected a similar argument in *State v. Heatwole*, 344 N.C. 1, 19, 473 S.E.2d 310, 319 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997), and see no reason to revisit the issue here. This assignment of error is overruled.

[10] By another assignment of error, defendant contends that the trial court committed plain error in the capital sentencing proceeding by not excluding certain testimony of Mr. Kendall's wife concerning defendant's prior assault on Mr. Kendall. Defendant argues that Mrs. Kendall's testimony was filled with opinions and highly emotional statements which were unreliable and irrelevant. For reasons that follow, we reject defendant's argument.

The Rules of Evidence, although not applicable to capital sentencing proceedings, nevertheless may be relied upon for guidance when determining questions of reliability and relevance. *State v. Bond*, 345 N.C. 1, 31, 478 S.E.2d 163, 179 (1996). Under the Rules of Evidence, a witness may testify as to any relevant matter about which he has personal knowledge. N.C.G.S. § 8C-1, Rule 602 (1992). Furthermore, a lay witness may testify as to his or her opinion, provided that the opinion is rationally based upon his or her percep-

tion and is helpful to the jury's understanding of the testimony. N.C.G.S. § 8C-1, Rule 701 (1992). Using these two evidentiary rules as guidelines, we conclude that the testimony by Mrs. Kendall was competent. Most of her testimony about which defendant complains simply described the circumstances surrounding defendant's assault on her husband and arose from Mrs. Kendall's observations at the time of the assault. Mrs. Kendall's statements that she was afraid that defendant would have cut her with the knife if given the chance and that she is reminded daily of the assault served to establish for the jury the severity of defendant's attack on Mr. Kendall and the fear which defendant inflicted.

In *State v. Mosely*, 336 N.C. 710, 445 S.E.2d 906 (1994), *cert. denied*, 513 U.S. 1120, 130 L. Ed. 2d 802 (1995), we rejected the defendant's argument that a victim's graphic testimony of the prior sexual assault committed by defendant upon her, offered in support of the (e)(3) aggravator, should have been excluded as being highly prejudicial and as creating a mini-trial of the prior felony conviction. In so doing, we restated the principle that the State was entitled to present the circumstances surrounding the prior felony conviction to support the submission of the (e)(3) aggravator. *Id.* at 720, 445 S.E.2d at 912. In the case *sub judice*, the testimony given by Mrs. Kendall was no more highly emotional than that which we approved in *Mosely*. We conclude that Mrs. Kendall's statements, including those expressing her fear of defendant and the effect that defendant's attack has had on her life, were properly admitted by the trial court. This assignment of error is overruled.

[11] By another assignment of error, defendant contends that the trial court erred in the capital sentencing proceeding by excluding testimony of an investigating officer tendered in response to the State's evidence in support of the (e)(3) aggravator. Defendant argues the testimony had relevant mitigating value. We disagree.

As previously noted, the North Carolina Rules of Evidence do not apply to capital sentencing proceedings, but may be used as guidelines in the determination of whether certain evidence may be admitted. *State v. Bond*, 345 N.C. at 31, 478 S.E.2d at 179. The trial court's determination of admissibility of evidence in a capital sentencing proceeding should be based upon considerations of whether the evidence is pertinent and reliable. *State v. Rose*, 339 N.C. 172, 200, 451 S.E.2d 211, 227 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995).

In the instant case, defendant sought to introduce evidence of supposed mitigating value to contrast the State's evidence of a prior conviction of voluntary manslaughter in support of the (e)(3) aggravator. In particular, defendant wanted Deputy Clemmons, an officer who investigated the prior manslaughter incident, to testify that defendant's victim, Mr. Skipper, had left the bar before defendant and had a gun in his possession at the time defendant shot him. Defendant was allowed to establish that a .32-caliber gun with four discharged rounds was found at the scene and that Deputy Clemmons had testified at the probable cause hearing that witnesses told him that this gun was in the possession of Mr. Skipper at the time he was killed. The trial court sustained the State's objection to the testimony of whether Mr. Skipper had left the bar first. The record reflects that the trial judge excluded this testimony based on his determination that Deputy Clemmons had no firsthand knowledge of this fact and that Deputy Clemmons' testimony in this regard would be hearsay.

This Court has upheld the admission of otherwise inadmissible hearsay in capital sentencing proceedings where the hearsay statements were reliable and provided evidence which was relevant to sentencing and helpful to the sentencing jury in reaching a decision. *See id.* at 202, 451 S.E.2d at 228; *State v. Roper*, 328 N.C. 337, 364, 402 S.E.2d 600, 615-16, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). A defendant is entitled to present any evidence in a capital sentencing proceeding which has mitigating value so long as it is pertinent to sentencing and is reliable. *State v. Rose*, 339 N.C. at 200, 451 S.E.2d at 227. However, the testimony of Deputy Clemmons concerning whether defendant or Mr. Skipper left the bar first had no direct mitigating value and was not relevant to whether defendant had been convicted of a prior felony. Instead, this evidence required that the jury speculate about defendant's role in a case that had already been adjudicated and decided against him. The State's evidence in the manslaughter trial tended to show that defendant, once outside the bar, shot Mr. Skipper several times, including firing the gun while standing directly over Mr. Skipper after he had fallen in the street. The jury in that case rejected any theory of self-defense. The trial court could properly have determined that any mitigating value that the tendered testimony of Deputy Clemmons may have had was outweighed by the danger of confusing or distracting the jury. Because of the undependable nature of the evidence, its limited mitigating value, and its potential to distract the jury, we conclude that the trial court did not err in excluding the testimony. Therefore, this assignment of error is overruled.

[12] In another assignment of error, defendant contends that his voluntary manslaughter conviction should not have been submitted to support the (e)(3) aggravating circumstance, conviction of a prior violent felony, because an appeal of the conviction was pending at the time of the capital sentencing proceeding in this case. We are not required to consider defendant's argument that a conviction is not final for purposes of the (e)(3) aggravator until all avenues of appeal have been exhausted. Defendant's appeal of his voluntary manslaughter conviction was heard in the Court of Appeals on 27 May 1996, and the conviction was upheld on 4 June 1996. *State v. Strickland*, 122 N.C. App. 580, 475 S.E.2d 259 (1996) (unpublished). This Court dismissed defendant's appeal of a constitutional question and denied his petition for discretionary review on 5 December 1996, 345 N.C. 182, 479 S.E.2d 208 (1996), completing the appeals process. The conviction having been upheld on appeal, we need not address its reliability prior to the completion of the appeals process. We overrule this assignment of error.

[13] By another assignment of error, defendant argues that the trial court erred by refusing to submit the statutory mitigator that the murder was committed while defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2). Defendant contends that there was substantial evidence from which a reasonable juror could have found this circumstance to exist. Defendant's evidence tended to show that defendant was in an agitated state due to the victim's belligerent conduct, including his calling defendant a "punk Indian son-of-a-bitch" and that defendant was "pissed off" when he shot the victim.

A trial court must submit only those mitigating circumstances which are supported by substantial evidence. *State v. Chandler*, 342 N.C. 742, 756, 467 S.E.2d 636, 644, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 133 (1996). The evidence in this case did not support defendant's contention that he suffered from a mental or emotional disturbance at the time of the murder. Although expert testimony is not always necessary to support a finding of this mitigator, *see, e.g.*, *State v. Ali*, 329 N.C. 394, 421-22, 407 S.E.2d 183, 199 (1991), the absence of such testimony may be considered when determining whether the (f)(2) mitigator is supported by substantial evidence. In this case, the only evidence that defendant contends tends to show that he was under a mental or emotional disturbance at the time of the shooting is testimony concerning the victim's conduct and the statement by defendant that he shot the victim because defendant

was angry. We have previously stated that an inability to control one's temper is neither mental nor emotional disturbance as contemplated by this mitigator. *State v. Ward*, 338 N.C. 64, 112, 449 S.E.2d 709, 736 (1994), *cert. denied*, U.S. , 131 L. Ed. 2d 1013 (1995). The State's evidence tended to show that defendant shot the victim while he was seated on an ottoman with his head in his hands. The shooting occurred some time after the victim had used any derogatory racial slur or had talked of fighting defendant. Taking all the evidence as a whole, we conclude that there was insufficient evidence to permit submission of the (f)(2) mitigator to the jury and that therefore the trial court did not err in failing to submit this mitigator. This assignment of error is overruled.

[14] In another assignment of error, defendant contends that the trial court erred by not submitting the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6). Defendant argues that evidence that defendant had been drinking and smoking marijuana at the time of the murder was sufficient to support submission of this mitigating circumstance. We disagree.

As previously stated, a trial court is required to submit only those statutory mitigating circumstances for which there is substantial evidence. *State v. Chandler*, 342 N.C. at 756, 467 S.E.2d at 644. Mere evidence that a defendant has consumed alcohol or drugs prior to the murder does not constitute substantial evidence supporting the (f)(6) mitigating circumstance. *State v. DeCastro*, 342 N.C. 667, 689, 467 S.E.2d 653, 664, *cert. denied*, — U.S. —, 136 L. Ed. 2d 170 (1996). Before the (f)(6) mitigating circumstance applies, a defendant's faculties must have been so impaired as to affect his ability to understand or control his actions. *State v. Jones*, 342 N.C. 457, 480, 466 S.E.2d 696, 707, *cert. denied*, — U.S. —, 135 L. Ed. 2d 1058 (1996). The evidence in this case tended to show that defendant had consumed about six beers and a few drinks of liquor. There was no evidence that consumption of this alcohol so impaired defendant as to prevent him from understanding the criminality of his conduct or that it affected his ability to control his actions. In fact, there was direct evidence to the contrary. At the time defendant made his statement to the police, he was asked whether alcohol had caused him to shoot the victim. Defendant responded that it had not. At the capital sentencing proceeding, expert witness Dr. Worthen testified that when he asked defendant how intoxicated he had been at the time of the murder,

defendant responded that he was "[h]igh, but not out of control." Given the nature of the evidence in this case, we conclude that the trial court did not err in declining to submit the (f)(6) mitigating circumstance. This assignment of error is overruled.

By another assignment of error, defendant contends that the trial court erred in the capital sentencing proceeding by denying his request to submit to the jury two nonstatutory mitigators for their consideration. We disagree.

To prevail on this assignment of error, defendant must first show that "(1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury." *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988). If defendant satisfies this threshold requirement, a federal constitutional violation is established. *Id.* This Court must then determine if the State has carried its burden of proof to show that failure to submit the nonstatutory mitigating circumstance was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *State v. Green*, 336 N.C. 142, 183, 443 S.E.2d 14, 39. If the State has not carried that burden, defendant must receive a new capital sentencing hearing. *State v. Green*, 336 N.C. at 103, 443 S.E.2d at 39.

[15] The first nonstatutory mitigating circumstance that defendant sought to have submitted was that he had successfully completed probation following his prior assault conviction. We find that defendant has failed to establish that there was sufficient evidence presented at trial to support submission of this nonstatutory mitigating circumstance. Although the State entered into evidence the court file concerning defendant's prior assault conviction, defendant admits that he did not introduce the documents showing defendant's completion of his probation. During the capital sentencing proceeding, defendant objected to the introduction of the court file into evidence. As a result of defendant's objection, the court ruled that the State could present to the jury only the bill of indictment, the plea, and the judgment. The record reflects that defendant approved of the introduction of the file for these limited purposes and did not request that the records concerning his completion of probation be admitted. Defendant did not call as a witness his probation officer, who could have testified as to his conduct during probation. Because there was no evidence introduced from which the jury could have found the existence of this nonstatutory mitigating circumstance, the trial court

properly refused to submit the nonstatutory mitigating circumstance that defendant successfully completed his probation following his assault conviction. *See State v. Hill*, 331 N.C. 387, 415, 417 S.E.2d 765, 779 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993).

[16] Defendant also contends that the trial court erred by denying his request to submit to the jury the nonstatutory mitigating circumstance that defendant "feels that he owes it to his children and his people to refuse any kind of mitigating defense and instead to be a good strong Indian." During the capital sentencing proceeding, Dr. Worthen testified that defendant had told him that he did not want to beg for his life; that he would rather be executed than spend his life in prison; that he wanted his children to be proud of him; and that he wanted to be a good, strong Indian for his family. Assuming *arguendo* that such evidence was sufficient to support submission of this circumstance and that the jury reasonably could have found it to have mitigating value, we nevertheless conclude that any error here was harmless beyond a reasonable doubt.

We have previously held that failure to submit a nonstatutory mitigating circumstance is harmless beyond a reasonable doubt where the requested nonstatutory mitigating circumstance was subsumed by another submitted nonstatutory mitigating circumstance. *State v. Green*, 336 N.C. at 183, 443 S.E.2d at 38. The jury was allowed to consider in this case the nonstatutory mitigating circumstance that "the defendant has great personal pride and belief in the values of his Native American Heritage." The jurors were also allowed to consider any other circumstance arising from the evidence that any of them deemed to have mitigating value under the catchall statutory mitigating circumstance. N.C.G.S. § 15A-2000(f)(9). It is clear that the jury was able to consider and did consider the mitigating value of the statements made by defendant to Dr. Worthen. Therefore, any error in failing to submit this mitigating circumstance was harmless beyond a reasonable doubt. *State v. Green*, 336 N.C. at 183, 443 S.E.2d at 38.

[17] By another assignment of error, defendant contends that the trial court erred by not intervening *ex mero motu* to prevent portions of the prosecutor's closing argument during the capital sentencing proceeding. We disagree.

Because defendant failed to object during the State's closing argument, our review is limited to a determination of whether the argument was so grossly improper that the trial court should have

intervened on its own motion. *State v. McLaughlin*, 341 N.C. 426, 442, 462 S.E.2d 1, 9 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 879 (1996). In reviewing the prosecutor's argument, we are mindful that trial counsel are allowed wide latitude in jury arguments and that the prosecutor of a capital case has a duty to zealously attempt to persuade the jury that, upon the facts presented, the death penalty is appropriate. *State v. Gibbs*, 335 N.C. 1, 64-65, 436 S.E.2d 321, 357-58 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). We have reviewed each of the prosecutor's statements about which defendant complains. We do not find them to be so grossly improper as to have required the intervention of the trial court *ex mero motu*. In fact, each statement complained of is similar to one that this Court has previously reviewed and found to be proper. *See State v. Bishop*, 343 N.C. 518, 552, 472 S.E.2d 842, 861 (1996) (prosecutor's statement that a circumstance is mitigating if it reduces moral culpability found to be correct statement of the law), *cert. denied*, — U.S. —, 136 L. Ed. 2d 723 (1997); *State v. McLaughlin*, 341 N.C. at 443, 462 S.E.2d at 10 (argument emphasizing defendant's responsibility for his fate did not unconstitutionally diminish the jury's responsibility in the sentencing decision); *State v. Conaway*, 339 N.C. 487, 528, 453 S.E.2d 824, 850 (statements by prosecutor about victim's family relationships and the loss suffered by the victim's family held proper), *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995); *State v. Rouse*, 339 N.C. at 93, 451 S.E.2d at 561-62 (not improper for the prosecutor to discourage the jurors from allowing emotion or sympathy to cloud their judgment); *State v. McNeil*, 324 N.C. 33, 52-53, 375 S.E.2d 909, 920-21 (1989) (argument that jury must help in enforcement of the laws and that police cannot do it alone held proper), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990). Accordingly, we overrule this assignment of error.

[18] By another assignment of error, defendant contends that the trial court erred by sustaining an objection to that portion of defense counsel's closing argument where he stated that the victim in defendant's conviction of voluntary manslaughter, Mr. Skipper, had fired a gun during the incident. We have long held that counsel is prohibited from arguing facts which are not supported by the evidence. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Hearsay evidence only tended to show that a gun containing four spent shells was found in Mr. Skipper's possession. No evidence tended to show when those shells had been fired. There was no direct testimony that supported defense counsel's remark that the victim, Mr. Skipper, had

fired a gun at the time he was killed. This assignment of error is without merit.

Defendant raises twenty-three additional issues that he concedes have been decided contrary to his position previously by this Court. He raises these issues to provide this Court with the opportunity to reconsider its prior holdings and for the purpose of preserving them for any possible future judicial review. We have carefully reviewed defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

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).

In the present case, defendant was convicted of first-degree murder based on premeditation and deliberation. During the capital sentencing proceeding, the jury found the aggravating circumstance that defendant had been previously convicted of a violent felony. N.C.G.S. § 15A-2000(e)(3). The sole statutory mitigating circumstance submitted was the catchall, N.C.G.S. § 15A-2000(f)(9), which the jury rejected. In addition, the jury failed to find the two nonstatutory mitigating circumstances that were submitted: that defendant was the father of three children and that defendant has great personal pride and belief in the values of his Native American Heritage. After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

[19] 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*, 512 U.S. 1254, 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; *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. Gaines*, — N.C. —, 483 S.E.2d 396 (1997), *and 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 sentence of death is disproportionate, defendant submits that the jury found only the (e)(3) aggravating circumstance (conviction of a prior violent felony) as a reason to impose the death penalty. Defendant contends that the present case is distinguishable from five cases in which the only aggravating circumstance was the conviction of a prior violent felony and in which the sentence of death was found proportionate. Two cases, *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), and *State v. Wooten*, 344 N.C. 316, 474 S.E.2d 360 (1996), *cert. denied*, — U.S. —, — L. Ed. 2d —, 65 U.S.L.W. 3630 (1997), involve guilt based on a lying in wait theory, and the other three, *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 860 (1995); *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995); and *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996), involve a higher level of violence. We find these cases substantially similar to the present case.

In this case, defendant committed premeditated and deliberate murder. "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). Furthermore, this case has aspects of a lying-in-wait case because defendant, unaware to the victim, stood behind the victim and shot him at close range with a shotgun. The fact that the cases in which we found death proportionate had a higher level of violence than the present case does not preclude a finding of proportionality. The absence of excessive brutality beyond that required to kill does not mean defendant is any

less deserving of the death penalty. In reviewing these cases presented by defendant, we find that the present case is not clearly distinguishable.

Furthermore, in the present case, defendant was convicted of two prior violent felonies. This Court has upheld a death sentence where the (e)(3) aggravating circumstance was the sole aggravating circumstance found by the jury. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *State v. McCollum*, 334 N.C. 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*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). For the foregoing reasons, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate. We hold that defendant received a fair trial, free of prejudicial error, and that the sentence of death entered in the present case must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. RONALD EUGENE PIERCE

No. 475A96

(Filed 24 July 1997)

1. Indigent Persons § 19 (NCI4th)— child abuse and murder—funds for defense psychiatrist—denied—no error

The trial court did not abuse its discretion in a capital prosecution for murder by torture, felony murder, and felonious child abuse which resulted in a life sentence by denying defendant's motion for funds for a psychiatrist. Indigent defendants are entitled to psychiatric experts upon a threshold showing that sanity is likely to be a significant factor in their defense. Defendant testified that he was twenty-two years old; that he had been placed in a program for the socially and emotionally disturbed in the seventh grade and remained in this program until the tenth grade; that he saw a psychiatrist during those years and had trouble with juvenile court which involved assaults and drinking; that his psychologist had told him that he had an anger control problem; that he had been placed in a juvenile facility where he had been required to see a psychologist; he was diagnosed at Dorothea Dix as suffering from polysubstance dependence and a personality disorder; the report from Dix stated that defendant did not suffer from "a severe mental disease or defect which would prevent him from understanding the difference between right and wrong at the time of the alleged offense"; he was cooperative, his thought processes were logical, he did not appear to be delusional, and his intellectual functioning appeared to be "fair to impaired"; he reported occasional hallucinations and suicidal thoughts during his stay at the hospital; he was on psychotropic medications; and it was recommended that he continue to receive those medications while awaiting trial. The evidence presented by this defendant does not approach the showing found sufficient in *Ake v. Oklahoma*, 470 U.S. 68, or *State v. Gambrell*, 318 N.C. 249.

Am Jur 2d, Criminal Law §§ 771, 985, 1006.

2. Indigent Persons § 21 (NCI4th)— child abuse and murder—funds for defense pathologist—denied

There was no abuse of discretion in a prosecution for murder by torture, felony murder, and felonious child abuse in the denial of defendant's motion for funds to retain a pathologist where

defendant's pretrial statements that the victim had been attacked by the family dog and assaulted by other children in the neighborhood and that she bruised easily were overwhelmingly refuted by the evidence presented by the State. Defendant presented nothing more than an undeveloped assertion that the assistance of a pathologist would be beneficial to the preparation of his defense.

Am Jur 2d, Criminal Law §§ 771, 985, 1006.

3. Indigent Persons § 21 (NCI4th)— child abuse and murder—funds for child abuse expert—denied

There was no abuse of discretion in a prosecution for murder by torture, felony murder, and felonious child abuse where the trial court denied defendant's request for funds for a medical expert in child abuse, determining that defendant had failed to make a particularized showing that he would be deprived of a fair trial without the assistance of a medical expert. All of the evidence suggested that the victim's injuries had been incurred as the result of child abuse and defendant did not present the court with anything other than speculation that an expert witness might testify that the victim had not been the victim of child abuse.

Am Jur 2d, Criminal Law §§ 771, 985, 1006.

4. Evidence and Witnesses § 1268 (NCI4th)— child abuse and murder—defendant's statement—prior reading of rights

The trial court did not err in a prosecution for murder by torture, felony murder, and felonious child abuse by denying defendant's motion to suppress his statement to an SBI agent where defendant had twice been advised of his rights and the agent did not readvise him. A detective and another SBI agent who had spoken with defendant earlier had fully and properly advised defendant of his rights and defendant waived his rights before giving statements to them; defendant was advised of his rights the second time five hours before this statement was taken; all three officers interviewed defendant with respect to the same subject matter; all three testified that defendant understood what they were saying and that he appeared to be alert and not under the influence of any substance; and nothing suggests that anything occurred to dilute the efficacy of the prior warnings or that defendant forgot his rights.

Am Jur 2d, Criminal Law §§ 794, 797, 974; Evidence § 749; Homicide § 338.

What constitutes assertions of right to counsel following Miranda warnings. 80 ALR Fed. 622.

5. Evidence and Witnesses § 1694 (NCI4th)— child abuse and murder—photos of victim admissible

There was no abuse of discretion in a prosecution for murder by torture, felonious child abuse, and felony murder in the admission of 26 photographs of the victim given the number, nature, and extent of the victim's injuries where each photograph illustrated testimony presented by the State and the testimony relating to the victim's injuries was unquestionably relevant.

Am Jur 2d, Evidence §§ 327, 963, 970; Homicide §§ 417-419; Trial § 507.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

6. Evidence and Witnesses § 1679 (NCI4th)— child abuse and murder—photo of defendant—appearance on day of arrest—admissible

There was no error in a prosecution for murder by torture, felonious child abuse, and felony murder in the introduction of a photograph of defendant taken on the day of his arrest which shows tattoos and long hair. The photograph was not inflammatory and, even assuming error, there was no reasonable possibility of a different result had the photograph been excluded.

Am Jur 2d, Evidence §§ 630, 963, 973; Trial § 507.

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.

7. Criminal Law § 535 (NCI4th Rev.)— child abuse and murder—defendant's statement—copy provided to jury—detective's collateral notation—mistrial denied

There was no abuse of discretion in a prosecution for murder by torture, felonious child abuse, and felony murder in not declar-

ing a mistrial where copies of defendant's pretrial statement containing a detective's collateral notation that there were no bruises on defendant's girlfriend's child were provided to the jury. The prosecutor discovered the notation, brought it to the attention of the court, the copies were retrieved, a *voir dire* revealed that three jurors had seen the notation, the court denied defendant's motion for a mistrial, and the court instructed the jury to disregard the content of the page containing the notation. Evidence at trial showed that the girlfriend abused the victim and any suggestion that she did not abuse her children is unlikely to have prejudiced defendant. The court's instruction was sufficient to cure any prejudice which defendant may have suffered.

Am Jur 2d, Appellate Review §§ 716, 724, 753; Criminal Law § 974.

8. Evidence and Witnesses §§ 351, 337 (NCI4th)— child abuse and murder—mistreatment of another child—relevant

The trial court did not err in a prosecution for murder by torture, felonious child abuse, and felony murder by admitting testimony concerning defendant's alleged mistreatment of one his girlfriend's children. The testimony was relevant under N.C.G.S. § 8C-1, Rule 404(b) to establish defendant's motive and intent and to show the absence of mistake in that his conduct was sufficiently similar to contradict his suggestion that the injuries to this victim were inflicted while attempting to revive her. Even assuming the testimony was not admissible under N.C.G.S. § 8C-1, Rule 404(b), there was no prejudice from its admission because the State presented overwhelming evidence that defendant and his girlfriend abused this victim over a three or four week period and that defendant and his girlfriend inflicted numerous injuries on the victim during this period of time. There is no reasonable possibility that a different result would have been reached had the evidence been excluded. The fact that the trial court conducted a *voir dire* suggests that it carefully weighed the probative value of the evidence against the danger of unfair prejudice to defendant and the court gave an appropriate limiting instruction.

Am Jur 2d, Evidence §§ 381, 408, 421.

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.

9. Homicide § 261.1 (NCI4th)— murder by torture—sufficiency of evidence

The evidence was sufficient to support the submission of first-degree murder by torture to the jury where, viewed in the light most favorable to the State, it tended to show that defendant and his girlfriend punished the two-and-a-half-year-old victim by shaking her with their hands and by beating her with their fists, a belt, a metal tray, a broken antenna, and a pair of tennis shoes; the girlfriend in defendant's presence punished the victim by making her hang from a dresser by her forearms and chin; both the girlfriend and defendant punished the victim by making her wear soiled pants on her head; and defendant admitted smacking the victim ten times in the three weeks prior to her death, slapping her on the night she was taken to the hospital, and shaking her very hard on that night. The evidence permitted the jury to conclude that defendant engaged in a course of conduct in which he intentionally inflicted grievous pain and suffering upon the victim, that he did this to punish her, and that the torture was a proximate cause of her death.

Am Jur 2d, Criminal Law § 598; Homicide §§ 48, 534, 544.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR2d 854.

What constitutes murder by torture. 83 ALR3d 1222.

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. Infants or Minors § 20 (NCI4th)— felonious child abuse—evidence sufficient

The trial court properly denied defendant's motion to dismiss a charge of felonious child abuse where the State's evidence tended to show that defendant was the victim's uncle, that he and his girlfriend had custody of the victim for three or four weeks prior to her death, that the victim was two and one-half years of

age at the time of her death, and that defendant intentionally committed an assault upon the victim resulting in her death.

Am Jur 2d, Homicide § 85; Infants § 16.

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.

11. Homicide § 263 (NCI4th)— felony murder—based on felonious child abuse—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of felony murder based on felonious child abuse where the evidence that defendant caused a small child's death by shaking her with his hands was sufficient for the jury to conclude that defendant committed felonious child abuse and that he used his hands as deadly weapons.

Am Jur 2d, Homicide §§ 47, 72, 265, 574.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR2d 854.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 ALR4th 1268.

12. Criminal Law § 806 (NCI4th Rev.)— acting in concert—instructions—general intent crimes— no plain error

There was no plain error in a prosecution for murder by torture, felonious child abuse, and felony murder in the trial court's acting in concert instruction or reinstruction. Although defendant argued that the instruction permitted the jury to convict him without determining that he possessed the requisite specific intent to commit these crimes, none of these crimes requires specific intent. Moreover, defendant's argument is without merit under the statement of acting in concert adopted in *State v. Barnes*, 345 N.C. 184.

Am Jur 2d, Criminal Law § 167; Homicide §§ 29, 72, 445, 507; Trial § 1256.

What constitutes murder by torture. 83 ALR3d 1222.

13. Criminal Law § 805 (NCI4th Rev.)— child abuse and murder—acting in concert—evidence sufficient

The trial court did not err by giving acting in concert instructions with respect to first-degree murder by torture, felony murder, and felonious child abuse where the evidence, viewed in the light most favorable to the State, tended to show that defendant and his girlfriend physically abused the two-and-one-half-year-old victim for three weeks prior to her death; she had been beaten with a belt, a broken antenna, a metal tray, a pair of tennis shoes, and fists; the girlfriend in defendant's presence punished the victim by making her hang by her forearms and chin from a dresser; both the girlfriend and defendant punished the victim by making her wear soiled pants on her head; and both defendant and the girlfriend struck and shook the child on the night that they took her to the hospital. The evidence was more than ample to show that defendant and his girlfriend acted together with the joint purpose to commit acts constituting felonious child abuse and torture and that the victim's death was a natural and probable consequence of their actions.

Am Jur 2d, Criminal Law § 167; Homicide §§ 29, 72, 445, 507; Trial § 1256.

What constitutes murder by torture. 83 ALR3d 1222.

14. Criminal Law § 467 (NCI4th Rev.)— child abuse and murder—prosecutor's argument—bruises on victim—no plain error

There was no plain error in a prosecution for first-degree murder by torture, felony murder, and felonious child abuse where the trial court did not intervene *ex mero motu* in the prosecutor's argument where the prosecutor showed the jury a pair of tennis shoes and argued that, while he couldn't say it was these shoes, the two-and-a-half-year-old victim had been hit or kicked with a shoe. A pathologist testified that the pattern bruise was consistent with the pattern on the soles of the shoes, although he also said that he could not definitely say that a shoe caused the injury or be certain that the shoes seized from defendant's home caused any injuries to the victim. The prosecutor's comments were a reasonable inference from the evidence.

Am Jur 2d, Expert and Opinion Evidence §§ 244, 261; Homicide § 442.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

What constitutes imminently dangerous act within homicide statute. 67 ALR3d 900.

What constitutes murder by torture. 83 ALR3d 1222.

15. Criminal Law § 471 (NCI4th Rev.)— child abuse and murder—prosecutor's argument—victim shaken and thrown

The trial court did not err in a prosecution for first-degree murder by torture, felony murder, and felonious child abuse by not intervening *ex mero motu* in the prosecutor's argument that the two-and-a-half-year-old victim was shaken and thrown and that the back of her head hit a wall where the pathologist testified that a crack in the drywall at defendant's house was similar in appearance to an abrasion or scrape on the back of the victim's head, the State's evidence tended to show that the victim suffered severe head injuries, and the cause of death was brain injuries. This supports the inference that defendant threw the victim and that the back of her head hit the wall.

Am Jur 2d, Expert and Opinion Evidence §§ 244, 261; Homicide § 442.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

What constitutes imminently dangerous act within homicide statute. 67 ALR3d 900.

What constitutes murder by torture. 83 ALR3d 1222.

16. Criminal Law § 475 (NCI4th Rev.)— child abuse and murder—prosecutor's argument—lapsus linguae

The trial court did not abuse its discretion by not intervening *ex mero motu* in a prosecution for first-degree murder by torture, felony murder, and felonious child abuse in the prosecutor's argument where the prosecutor misstated the evidence, but the misstatement was a *lapsus linguae* and there was no reasonable possibility of a different outcome had the trial court taken corrective action.

Am Jur 2d, Homicide § 463; Trial §§ 499, 611.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Allen (C. Walter), J., at the 16 October 1995 Special Session of Superior Court, Wilkes County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for felonious child abuse was allowed on 15 November 1996. Heard in the Supreme Court 14 April 1997.

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

Margaret Creasy Ciardella for defendant-appellant.

PARKER, Justice.

Defendant was indicted 30 January 1995 for first-degree murder and felonious child abuse. In October 1995 he was tried capitally and found guilty of first-degree murder on the basis of torture and under the felony murder rule. He was also found guilty of felonious child abuse. Following a capital sentencing proceeding, the jury recommended a sentence of life imprisonment; and the trial court entered judgment accordingly. The trial court also sentenced defendant to ten years' imprisonment for felonious child abuse. For the reasons stated herein, we conclude that defendant's trial was free from prejudicial error.

The victim, Tabitha Pierce, was two and one-half years old at the time of her death. Defendant Ronald Pierce was the victim's uncle. In August 1994 defendant and his girlfriend, Melanie Anderson, visited Tabitha's parents in Pennsylvania. With the consent of Tabitha's parents, defendant and Anderson took Tabitha to North Carolina for a short stay. Three or four weeks after taking custody of Tabitha, defendant and Anderson brought Tabitha to Wilkes Regional Medical Center. Tabitha was unconscious; and her body was covered with bruises, grab marks, pinch marks, scratches, nicks, bumps, and other injuries. The severe nature of her injuries necessitated transferring Tabitha to Baptist Hospital in Winston-Salem. On 25 August life support was withdrawn, and Tabitha died.

Defendant initially explained Tabitha's injuries by stating that a dog had knocked her down, that children in the neighborhood had assaulted her, and that she bruised easily. Defendant also stated that he had found Tabitha in the yard and that he had spanked and shaken her in an attempt to revive her. In subsequent statements to law

enforcement officers, defendant described various methods that he and Anderson had used to punish Tabitha during the short time that she had been in their care. Both Anderson and defendant had punished Tabitha for wetting her pants, wetting her bed, and refusing to eat. Anderson had punished Tabitha by making her hang from a dresser by her forearms and chin and by making her wear soiled pants on her head. Defendant had punished Tabitha by making her stand close to a wall, place her head on the wall, and hold her leg out in the air for two or three minutes with soiled pants on her head. Defendant admitted "smacking" Tabitha approximately ten times in the three weeks prior to her death. Defendant also admitted striking Tabitha with a belt, stating that this was normal punishment when she wet her pants or refused to eat.

Defendant stated that he heard Anderson striking Tabitha at approximately 8:00 p.m. on 24 August. Forty-five minutes later, while he was taking a shower, defendant heard Anderson bring Tabitha into the bathroom and chastise her for saying that she had to urinate when she did not. Defendant said that he saw Anderson strike Tabitha in the side of the head while Anderson asked, "What are you, dumb? Are you stupid. Can you not understand what I'm saying?" Anderson then put her hands on Tabitha's shoulder and began to shake her. Defendant then approached Tabitha, slapped her, and shook her hard for approximately one minute. The child went "limp" as he was shaking her. After Tabitha went "limp" defendant and Anderson took Tabitha to the hospital.

The State's evidence tended to show that bruises, grab marks, pinch marks, scratches, nicks, bumps, and other injuries covered Tabitha's body. She had severe head injuries; a torn frenulum, the piece of tissue between the upper lip and the teeth; bruises on the inside of her lips and around the gum line; a human bite mark on her thigh; and many other injuries. Tabitha's death was caused by severe injuries to her brain. Dr. Patrick Lantz, the State's pathologist, and Dr. Sara Sinal, a child-abuse expert and one of the doctors who treated Tabitha at Baptist Hospital, testified that all of Tabitha's injuries had been inflicted during the four-week period that she had been entrusted to the care of defendant and his girlfriend. Her injuries were not caused by the family dog, were not the result of normal childhood activity, and were not accidental. Dr. Lantz and Dr. Sinal opined that Tabitha was a victim of both the battered-child syndrome and the shaken-baby syndrome.

Additional facts will be presented as needed to discuss specific issues.

[1] In his first assignment of error, defendant contends that the trial court erred by denying his motions for funds to retain expert witnesses.

> An indigent defendant is entitled to the assistance of an expert in preparation of his defense when he makes a "particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992). "The particularized showing demanded by our cases is a flexible one and must be determined on a case-by-case basis." *Id.* at 656-57, 417 S.E.2d at 471. "The determination of whether a defendant has made an adequate showing of particularized need lies within the trial court's discretion." *State v. Rose*, 339 N.C. 172, 187, 451 S.E.2d 211, 219 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

State v. McCullers, 341 N.C. 19, 34, 460 S.E.2d 163, 172 (1995).

Defendant first contends that the trial court erred by denying his motion for funds to retain a psychiatrist. Prior to trial defendant filed a motion requesting commitment to Dorothea Dix Hospital for a determination on his competency to proceed, filed a notice of his intention to raise an insanity defense, and filed a request to hire a psychiatrist to assist him in the preparation of his defense. Dr. Nicole F. Wolfe subsequently examined defendant at Dorothea Dix and found him competent to proceed. In her report Dr. Wolfe stated that defendant suffered from polysubstance dependence and an unspecified personality disorder. On the basis of Dr. Wolfe's report, defendant asserted that his personality disorder diagnosis entitled him to funds for an independent psychiatrist.

An indigent defendant is entitled to the assistance of a psychiatric expert if the defendant makes a "threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." *Ake v. Oklahoma*, 470 U.S. 68, 82-83, 84 L. Ed. 2d 53, 66 (1985). In determining whether an indigent defendant has made this threshold showing, "the trial 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). At an *ex parte* hearing on defendant's motion, defendant testified that he was twenty-two years old, that he had been placed in a program for the socially and emotionally disturbed in the seventh grade and remained in this program until the tenth grade, that he saw a psychiatrist during those years, that he had "trouble with juvenile court" which involved "[a] lot of assaults and drinking [and] drugs," that his psychologist had told him that he had an anger control problem, and that he had been placed in a juvenile facility where he had been required to see a psychologist. Defendant also introduced Dr. Wolfe's report into evidence. Dr. Wolfe diagnosed defendant as suffering from polysubstance dependence and a personality disorder. In her report Dr. Wolfe stated that defendant did not suffer from "a severe mental disease or defect which would prevent [defendant] from understanding the difference between right and wrong at the time of the alleged offense." Dr. Wolfe found that defendant was cooperative, that his thought processes were logical, that he did not appear to be delusional, and that his intellectual functioning appeared to be "fair to impaired." Defendant reported occasional hallucinations and suicidal thoughts during his stay at the hospital. Dr. Wolfe stated in her report that defendant was on psychotropic medications and recommended that defendant should continue to receive these medications while awaiting trial. At the conclusion of the *ex parte* hearing, the trial court found that defendant had not shown that his sanity was likely to be a significant factor in his defense and that fundamental fairness did not require the appropriation of funds for a private psychiatrist or psychologist.

The evidence presented by defendant in this case is similar to the evidence presented by the defendants in *State v. Hood*, 332 N.C. 611, 422 S.E.2d 679 (1992), *cert. denied*, 507 U.S. 1055, 123 L. Ed. 2d 659 (1993), and *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990). In *Hood* the psychiatrist who examined the defendant at Dorothea Dix Hospital diagnosed the defendant as suffering from a personality disorder. *Hood*, 332 N.C. at 619-20, 422 S.E.2d at 683-84. The psychiatrist found that the defendant's intelligence level was low-average; that the defendant's thought processes were slow, that the defendant's concentration, orientation, and memory functions were normal; and that the defendant's judgment and insight were fair. *Id.* Information in the psychiatrist's report indicated that the defendant denied any mental impairment at the time the alleged events occurred. *Id.* While the psychiatrist stated that he could not accurately determine the defendant's mental state at the time of the offense, he found that "available

information" included " 'no evidence of confusion or impairment at the time of the incident in question.' " *Id.* at 620, 422 S.E.2d at 684. After thoroughly reviewing this evidence, the Court held in *Hood* that the trial court properly denied the defendant's request for the appointment of a psychiatric expert. *Id.*

In *Robinson*, the defendant's evidence consisted of the report filed with the trial court by the psychiatrist who had evaluated the defendant's capacity to stand trial. *Robinson*, 327 N.C. at 353, 395 S.E.2d at 406. The psychiatrist diagnosed the defendant as having an alcohol abuse problem and a personality disorder. *Id.* at 352, 395 S.E.2d at 405. In the report the psychiatrist observed that the defendant had a cooperative attitude, clear speech, and coherent and organized thought processes. *Id.* at 351, 395 S.E.2d at 405. The psychiatrist found "no 'evidence of mental illness that could have impaired [the defendant's] ability to recognize right from wrong' at the time the crimes were committed" and "expressed an opinion that defendant presented 'no evidence of psychosis or other severe mental illness.' " *Id.* at 352, 395 S.E.2d at 405. This Court held that the trial court did not err by denying the defendant's motion for the appointment of a psychiatric expert. *Id.* at 355, 395 S.E.2d at 407.

Like the reports introduced into evidence by the defendants in *Hood* and *Robinson*, the report introduced by defendant in the present case not only fails to show that defendant's sanity at the time of the offense would be a factor at trial but also provides affirmative evidence that defendant's mental state at the time of the offense would not be a factor. *See Hood*, 332 N.C. at 620, 422 S.E.2d at 684; *Robinson*, 327 N.C. at 353, 395 S.E.2d at 406. Furthermore, defendant's testimony at the *ex parte* hearing did not show that his sanity at the time of the offense would be a factor at trial.

This case is easily distinguishable from *Ake*, 470 U.S. 68, 84 L. Ed. 2d 53, and *Gambrell*, 318 N.C. 249, 347 S.E.2d 390. In *Ake* the defendant's sole defense was insanity; the defendant's behavior at arraignment prompted the trial court, *sua sponte*, to have him examined by a psychiatrist; a psychiatrist subsequently found the defendant not competent to stand trial; when defendant was found competent to stand trial six weeks later, it was on the condition that he be sedated with large doses of Thorazine, an antipsychotic drug; and psychiatrists described to the trial court the severity of the defendant's mental illness less than six months after the offense. *Ake*, 470 U.S. at 86, 84 L. Ed. 2d at 68. This Court in *Gambrell* noted that

the evidence before the trial court tended to show that physicians two months after the shooting determined that the defendant needed psychiatric examination and treatment; that the defendant's behavior in open court was bizarre; that the defendant was ordered to undergo a psychiatric examination after the court observed this behavior; that on admission to the hospital the defendant was experiencing hallucinations and delusions, was suffering from depression and anxiety, and was thought to have an acute psychosis; and that the defendant was found competent to stand trial only after being administered the psychotropic drug Haldol in the highest recommended daily dosage. *Gambrell*, 318 N.C. at 257-58, 347 S.E.2d at 395. We conclude that the evidence presented by defendant does not approach the showing found sufficient by the Supreme Court of the United States in *Ake* or by this Court in *Gambrell*.

[2] Defendant next contends that the trial court erred by denying his motion for funds to retain a pathologist. In making this motion defense counsel stated that the independent pathologist would review the report of the State's pathologist and inform defense counsel of any possible defenses. Defendant argues that a pathologist could have assisted defendant in determining how Tabitha's injuries were inflicted. The " '[m]ere hope or suspicion' of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of specific necessity for expert assistance." *State v. Tucker*, 329 N.C. 709, 719-20, 407 S.E.2d 805, 811-12 (1991) (quoting *State v. Tatum*, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976)). "Similarly, undeveloped assertions that the requested expert assistance would be beneficial or even essential to the preparing of an adequate defense are insufficient to satisfy this threshold requirement." *State v. Moseley*, 338 N.C. 1, 20-21, 449 S.E.2d 412, 425 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Both Dr. Lantz and Dr. Sinal testified that Tabitha was a victim of the battered-child syndrome and the shaken-baby syndrome. All the evidence at trial suggested that Tabitha's death was caused by the injuries to her brain and that these injuries were incurred as a result of child abuse. Defendant's pretrial statements that Tabitha had been attacked by the family dog and assaulted by other children in the neighborhood and that she bruised easily were overwhelmingly refuted by the evidence presented by the State. We conclude that defendant presented the court with nothing more than an undeveloped assertion that the assistance of a pathologist would be beneficial to the preparation of

his defense and that the trial court did not abuse its discretion by denying defendant's motion for funds to retain a pathologist.

[3] Defendant next contends that the trial court erred by denying his motion for funds to retain a medical expert in child abuse. At the pretrial hearing on this motion, defense counsel stated that this expert could "enlighten the defense more and testify at trial [] as to whom the possible perpetrators of [the child abuse] are if it's found that there is battered child syndrome present in this case." Defendant argues that experts could disagree as to whether Tabitha died as a result of battered-child syndrome or shaken-baby syndrome and that an expert could have determined whether Tabitha had been subjected to extensive child abuse.

The evidence at trial tended to show that defendant and Anderson had custody of Tabitha in the weeks prior to her death. Another adult, Roger Delp, lived with defendant and Anderson at that time. Defendant did not need the assistance of an expert to narrow down the list of possible perpetrators. Further, as discussed previously, all the evidence suggested that Tabitha's injuries had been incurred as a result of child abuse, and defendant did not present the trial court with anything other than speculation suggesting that an expert witness might testify that Tabitha had not been a victim of child abuse. On the facts of this case, we conclude the trial court did not abuse its discretion by determining that defendant failed to make a particularized showing that he would be deprived of a fair trial without the assistance of a medical expert in child abuse.

This assignment of error is overruled.

[4] By his next assignment of error, defendant contends that the trial court erroneously denied his motion to suppress his statement to SBI Agent Michael Brown.

Defendant made two statements to law enforcement officers prior to speaking with Agent Brown. Late in the evening of 24 August, defendant spoke with Detective David Pendry of the Wilkes County Sheriff's Department. This interview began some time after 11:00 p.m. at Wilkes Regional Medical Center. Pendry advised defendant of his *Miranda* rights at the hospital, and defendant acknowledged and waived his rights at that time. At approximately 3:30 a.m. defendant accompanied Pendry to the Sheriff's Department, where Pendry continued to speak with defendant until approximately 6:00 a.m. At 6:05 a.m. SBI Agent Pamela Tully introduced herself to defendant. Tully

advised defendant of his constitutional rights; and defendant signed a form stating that he understood his rights, that he did not want a lawyer, that no promises or threats had been made to him, and that he had not been coerced. Tully's interview lasted until approximately 9:45 a.m.

Agent Brown's interview with defendant began at 11:17 a.m. and lasted until 12:45 p.m. Brown did not readvise defendant of his rights before taking defendant's statement. Defendant contends that, under the totality of the circumstances, Agent Brown was required to readvise defendant of his *Miranda* rights.

> "The consensus is that although *Miranda* warnings, once given, are not to be accorded 'unlimited efficacy or perpetuity,' where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required."

State v. Harris, 338 N.C. 129, 140, 449 S.E.2d 371, 375 (1994) (quoting *State v. McZorn*, 288 N.C. 417, 433, 219 S.E.2d 201, 212 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976)), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995). "The ultimate question is whether the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquished them." *Id.* In *Harris* the defendant had been properly advised of his *Miranda* rights twelve hours before making the statement which he sought to have suppressed. In that case we concluded that it had not been necessary to readvise the defendant of his rights and rejected the defendant's assignment of error. We reach the same conclusion here.

The trial court found that defendant had been properly advised of his rights and that he waived those rights before speaking with Detective Pendry and Agent Tully. The court found that defendant's waiver was knowing, intelligent, and voluntary and that defendant was in control of his faculties and not under the influence of any substance at all relevant times. The record provides ample support for the trial court's findings. Pendry and Tully fully and properly advised defendant of his rights, and defendant waived his rights before giving statements to them. Tully advised defendant of his rights five hours before Brown took defendant's statement. Pendry, Tully, and Brown all interviewed defendant with respect to the same subject matter. All

three testified that defendant understood what they were saying to him, that defendant appeared to be alert, and that defendant did not appear to be under the influence of any substance. Nothing in the record suggests that anything occurred between the second and third statements to dilute the efficacy of the prior warnings or that defendant forgot his rights during this short time period. We conclude that the trial court did not err by denying defendant's motion to suppress the statement at issue. This assignment of error is overruled.

[5] By his next assignment of error, defendant contends that the trial court erred by overruling his objections to the introduction of twenty-six photographs of the victim's body.

> Whether to admit photographic evidence requires the trial court to weigh the probative value of the photographs against the danger of unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403 (1992); *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). This determination lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 526-27.

State v. Gregory, 340 N.C. 365, 387, 459 S.E.2d 638, 650 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996).

" '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." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526.

Over defendant's objection the State introduced twenty-six photographs of the victim's body to illustrate the testimony describing Tabitha's injuries. This testimony established that Tabitha had been severely beaten and that she had bruises, grab marks, pinch marks, scratches, nicks, bumps, and other injuries on almost every inch of her body. The State's witnesses described distinct injuries to Tabitha's head, her shoulders, her chin, her mouth, her legs, her back,

her torso, and other portions of her body. Some of the injuries to Tabitha's body were linked to items seized in defendant's residence. Each of the photographs illustrated testimony presented by the State, and the testimony relating to Tabitha's injuries was unquestionably relevant. Given the number, nature, and extent of the victim's injuries, we conclude that the trial court did not abuse its discretion by admitting twenty-six photographs of the victim's body.

[6] In this assignment of error, defendant also contends that the trial court erred by admitting a photograph of defendant which was taken on the day of his arrest. Defendant argues that the photograph was not relevant and that any probative value was outweighed by the danger of unfair prejudice. At trial Agent Brown identified the photograph at issue and testified that it accurately represented defendant's appearance at the time of his arrest. The photograph which reveals that defendant has tattoos and that he had long hair at the time of his arrest is not inflammatory. Moreover, even assuming *arguendo* that the photograph should not have been admitted, we conclude that defendant has not shown that there is a reasonable possibility that, had the photograph been excluded, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

[7] Defendant next contends that the trial court erred by denying his motion for a mistrial after inadmissible evidence was inadvertently provided to the jury. Defendant's pretrial statement to Detective Pendry had been placed in the form of a writing by Pendry. After Pendry read his statement into evidence, the writing was admitted into evidence and copies were provided to the jury. The copies provided to the jury contained a collateral notation made by Pendry. The notation, which was based on information obtained from a social worker, related the names and ages of Anderson's two children and contained the following assertion: "No bruises at all on [Anderson's] kids."

The prosecutor discovered the collateral notation after the writing had been published to the jury and immediately brought this fact to the attention of the court. The copies provided to the jury were retrieved, and the court conducted a *voir dire* which revealed that three jurors had seen the page containing the notation. Defendant moved for a mistrial. The trial court denied this motion and instructed the jurors to disregard the content of the page containing the notation.

The decision whether to order a mistrial lies within the sound discretion of the trial court. *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996).

> "When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). " 'In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict.' " *State v. Hunt*, 287 N.C. 360, 374, 215 S.E.2d 40, 49 (1975) (quoting *State v. Strickland*, 229 N.C. 201, 207, 49 S.E.2d 469, 473 (1948)). "Whether instructions can cure the prejudicial effect of such statements must depend in large measure upon the nature of the evidence and the particular circumstances of the individual case." *Id.* at 375, 215 S.E.2d at 49.

State v. Rowsey, 343 N.C. 603, 627, 472 S.E.2d 903, 916 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 221 (1997).

Defendant argues that the collateral notation permitted the inference that Anderson did not abuse her children and that the notation, therefore, implied that defendant inflicted Tabitha's injuries. The evidence at trial tended to show that Anderson abused Tabitha and that Anderson struck and shook Tabitha on the night her fatal injuries were inflicted. For this reason any suggestion that Anderson did not abuse her children is unlikely to have prejudiced defendant in this trial. We conclude that the trial court's instruction was sufficient to cure any prejudice which defendant may have suffered and that the trial court did not abuse its discretion by declining to declare a mistrial. This assignment of error is overruled.

[8] By his next assignment of error, defendant contends that the trial court erred by admitting testimony concerning defendant's alleged mistreatment of one of Anderson's children. Over defendant's objection Debra Thompson testified that defendant on one occasion became angry with Anderson's four-year-old son, Roger. Thompson stated that defendant picked Roger up, shook him hard, and threw him down on a wooden chair with enough force to make the chair slide and hit the wall. This incident occurred six months before Tabitha's death. The trial court admitted this testimony pursuant to Rule 404(b) and gave the jury a limiting instruction pursuant to this rule. Defendant contends that this evidence was not admissible pursuant to Rule 404(b).

Rule 404(b) of the North Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1994).

> This rule is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. [268,] 278-79, 389 S.E.2d [48,] 54 [(1990)]. The list of permissible purposes for admission of "other crimes" evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

State v. White, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 436 (1995).

In statements made after defendant took Tabitha to the hospital, defendant implied that he shook Tabitha in an attempt to revive her. The testimony that defendant shook and threw a four-year-old boy on a prior occasion is sufficiently similar to defendant's conduct in this case to contradict the suggestion that defendant inflicted Tabitha's injuries while attempting to revive her. Defendant's relatively recent treatment of Roger Anderson is thus relevant to establish defendant's motive and intent in shaking Tabitha and to show absence of mistake on defendant's part. *See State v. Crawford*, 329 N.C. 466, 486-87, 406 S.E.2d 579, 590-91 (1991). We hold that Thompson's testimony was relevant under Rule 404(b) for these purposes.

Defendant also argues that the trial court erred by failing to exclude this testimony under Rule 403. "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). The record shows that the court conducted a *voir dire* to consider Thompson's testimony and that the court excluded the evidence relating to defendant's treatment of Roger

Anderson until the State introduced the statement in which defendant admitted shaking Tabitha on the night she was taken to the hospital. The fact that the trial court conducted a *voir dire* suggests that it carefully weighed the probative value of the evidence against the danger of unfair prejudice to defendant. *See Crawford*, 329 N.C. at 486-87, 406 S.E.2d at 590-91. We also note that the trial court gave an appropriate limiting instruction. *See id.* On this record we conclude that the trial court did not abuse its discretion by refusing to exclude the testimony with respect to defendant's treatment of Anderson's four-year-old son.

Even if we assume *arguendo* that the testimony with respect to defendant's treatment of Roger Anderson was not admissible pursuant to Rule 404(b), we conclude that its admission did not prejudice defendant. The State presented overwhelming evidence that defendant and Melanie Anderson abused Tabitha over a three- or four-week period and that defendant and Anderson inflicted numerous injuries upon Tabitha during this period of time. Defendant told Agent Brown that he shook Tabitha very hard for approximately one minute on the night she was fatally injured and that Tabitha went "limp" while he was shaking her. We conclude that defendant has not shown that there is a reasonable possibility that, had the evidence at issue been excluded, a different result would have been reached at trial. *See* N.C.G.S. § 15A-1443(a).

This assignment of error is overruled.

[9] By his next assignment of error, defendant contends that the trial court erred by denying his motions to dismiss the charges at the close of all the evidence. Defendant refers this Court to other, unspecified, assignments of error and contends that, absent these errors, the evidence was insufficient to convict defendant of first-degree murder on the basis of torture, first-degree murder on the basis of felony murder, or felonious child abuse. After careful examination of each of the assignments relating to the admission of evidence, we have concluded that none amounted to prejudicial error. Moreover, in ruling on a motion to dismiss for insufficiency of the evidence, the trial court considers all the evidence, both competent and incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. *McCullers*, 341 N.C. at 28-29, 460 S.E.2d at 168. Defendant does not argue that the evidence admitted at trial was insufficient to support the submission of the offenses of which he was found guilty. For

this reason this assignment of error is deemed abandoned. *See* N.C. R. App. P. 28(b)(5). We nevertheless review the evidence supporting defendant's convictions.

First-degree murder by torture requires the State to prove that the accused "intentionally tortured the victim and that such torture was a proximate cause of the victim's death." *State v. Stroud*, 345 N.C. 106, 112, 478 S.E.2d 476, 479 (1996); *accord Crawford*, 329 N.C. at 479-81, 406 S.E.2d at 586-88. We have approved an instruction defining "torture" as "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." *Crawford*, 329 N.C. at 484, 406 S.E.2d at 589; *accord State v. Anderson*, 346 N.C. 158, 161, 484 S.E.2d 543, 545 (1997). "Course of conduct" has been defined as "the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another." *Crawford*, 329 N.C. at 484, 406 S.E.2d at 589; *accord Anderson*, 346 N.C. at 161, 484 S.E.2d at 545. A specific intent to kill is not an element of first-degree murder by torture. *Anderson*, 346 N.C. at 161, 484 S.E.2d at 545; *Crawford*, 329 N.C. at 480, 406 S.E.2d at 587.

When viewed in the light most favorable to the State, the evidence supported the submission of first-degree murder by torture. The evidence tended to show that defendant and Anderson punished Tabitha by shaking her with their hands and by beating her with their fists, with a belt, with a metal tray, with a broken antenna, and with a pair of tennis shoes. Anderson in defendant's presence punished Tabitha by making her hang from a dresser by her forearms and chin, and both Anderson and defendant punished Tabitha by making her wear soiled pants on her head. Defendant admitted "smacking" Tabitha ten times in the three weeks prior to her death, slapping Tabitha on the night she was taken to the hospital, and shaking her very hard on that night. The evidence at trial permitted the jury to conclude that defendant engaged in a course of conduct in which he intentionally inflicted grievous pain and suffering upon Tabitha, that he engaged in this conduct to punish Tabitha, and that the torture was a proximate cause of her death. Accordingly, the trial court properly denied defendant's motion to dismiss the charge of first-degree murder on the basis of torture.

[10] In order to sustain a conviction for felonious child abuse, the State must 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." *State v. Elliott*, 344 N.C. 242, 278, 475 S.E.2d 202, 218-19 (1996) (quoting N.C.G.S. § 14-318.4(a) (1993)), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997). The State's evidence tended to show that defendant was Tabitha's uncle, that he and Anderson had custody of Tabitha for three or four weeks prior to her death, that Tabitha was two and one-half years of age at the time of her death, and that defendant intentionally committed an assault upon Tabitha resulting in her death. The trial court properly denied defendant's motion to dismiss this charge.

[11] "First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994); *accord* N.C.G.S. § 14-17 (1993). Felony murder on the basis of felonious child abuse requires the State to prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon. *See* N.C.G.S. § 14-17. When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons. *Cf. Elliott*, 344 N.C. at 268-69, 475 S.E.2d at 213 (stating that malice may be inferred from the willful blow by an adult on the head of an infant); *State v. Lang*, 309 N.C. 512, 527, 308 S.E.2d 317, 325 (1983) (stating that the trial court could have instructed the jury that it could infer malice if it found "that the defendant intentionally assaulted the deceased with his hands, fists, or feet, *which were then used as deadly weapons*"). Defendant is an adult male who weighed approximately 150 pounds at the time of his arrest. The evidence that he caused a small child's death by shaking her with his hands was sufficient to permit the jury to conclude that defendant committed felonious child abuse and that he used his hands as deadly weapons. Thus, the trial court did not err by refusing to grant defendant's motion to dismiss the charge of first-degree murder under the felony murder rule.

This assignment of error is overruled.

[12] By his next assignment of error defendant contends that the trial court's acting-in-concert instructions with respect to the offenses of first-degree murder by torture, first-degree murder under

the felony murder rule, and felonious child abuse constituted plain error. Defendant argues that the trial court erred by inserting the phrase "acting in concert" after defendant's name in its instructions on acting in concert. He argues that this permitted the jury to convict him without determining that he possessed the requisite specific intent to commit these offenses.

The State argues that murder by torture, felonious child abuse, and felony murder on the basis of felonious child abuse are general-intent crimes. Specific-intent crimes are "crimes which have as an essential element a specific intent that a result be reached." *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). General-intent crimes are "crimes which only require the doing of some act." *Id.* Felonious child abuse requires the State to prove "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." *Elliott*, 344 N.C. at 278, 475 S.E.2d at 218-19 (emphasis added). The State is not required to prove that the defendant "specifically intend[ed] that the injury be serious." *State v. Campbell*, 316 N.C. 168, 172, 340 S.E.2d 474, 476 (1986). Felony murder on the basis of felonious child abuse requires the State to prove that the victim was killed during the perpetration or attempted perpetration of felonious child abuse with the use of a deadly weapon. *See* N.C.G.S. § 14-17. This crime does not require the State to prove any specific intent on the part of the accused.

First-degree murder by torture requires the State to prove that the accused "intentionally tortured the victim and that such torture was a proximate cause of the victim's death." *Stroud*, 345 N.C. at 112, 478 S.E.2d at 479; *accord Crawford*, 329 N.C. at 479-81, 406 S.E.2d at 586-88. A specific intent to kill is not an element of first-degree murder by torture. *Anderson*, 346 N.C. at 161, 484 S.E.2d at 545; *Crawford*, 329 N.C. at 480, 406 S.E.2d at 587. In order to find a defendant guilty of this offense, the jury is required to find "the intentional infliction of grievous pain and cruel suffering resulting in death." *Crawford*, 329 N.C. at 485, 406 S.E.2d at 589. In *State v. Baldwin*, 330 N.C. 446, 412 S.E.2d 31 (1992), we stated:

> [L]ying in wait is a physical act. Like poison, imprisonment, starving, and torture—the other physical acts specified in N.C.G.S. § 14-17—lying in wait is a method employed to kill. It does not require a finding of any specific intent.

Baldwin, 330 N.C. at 461-62, 412 S.E.2d at 40-41 (citations omitted); *accord State v. Aikens*, 342 N.C. 567, 575-76, 467 S.E.2d 99, 104-05 (1996).

Defendant argues that the court's instructions did not require the jury to find that defendant possessed the requisite specific intent to commit these crimes. Since none of these crimes requires specific intent, defendant's argument must fail. Moreover, defendant's argument is without merit under the statement of the doctrine of acting in concert adopted by this Court in *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), in which a majority of this Court overruled *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), relied upon by defendant.

Defendant also contends that the trial court erred in reinstructing the jury on the doctrine of acting in concert with respect to the offenses of first-degree murder by torture, first-degree murder under the felony murder rule, and felonious child abuse. We have carefully reviewed these instructions. They are consistent with the court's initial instructions and are similarly without error.

[13] In a related assignment of error, defendant contends that the trial court erred by instructing the jury that it could find defendant guilty of first-degree murder and felonious child abuse under the doctrine of acting in concert. Defendant argues that the evidence was not sufficient to support a finding that he was guilty of these offenses on the basis of acting in concert. When viewed in the light most favorable to the State, the evidence tended to show that defendant and Anderson physically abused Tabitha for three weeks prior to her death. She had been beaten with a belt, a broken antenna, a metal tray, a pair of tennis shoes, and fists. Anderson in defendant's presence punished Tabitha by making her hang by her forearms and chin from a dresser, and both Anderson and defendant punished Tabitha by making her wear soiled pants on her head. Both defendant and Anderson struck and shook the child on the night that they took Tabitha to the hospital. This evidence tended to show that defendant and Anderson acted together with the joint purpose to commit murder by torture. The evidence was more than ample to show that defendant and Anderson acted together with the joint purpose to commit acts constituting felonious child abuse and torture and that Tabitha's death was a natural and probable consequence of their actions. Under the circumstances the trial court did not err by giving acting-in-concert instructions with respect to first-degree murder by

torture, first-degree murder under the felony murder rule, and felonious child abuse. This assignment of error is overruled.

[14] By his next assignment of error, defendant contends that the trial court erred by failing to intervene *ex mero motu* in arguments made by the prosecutor during his guilt-innocence phase closing argument.

"A prosecutor in a capital trial is entitled to argue all the facts submitted into evidence as well as any reasonable inferences therefrom." *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672. As defendant failed to object at trial to any of the arguments at issue, "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." *Id.*

Defendant contends that three arguments were grossly improper. In the first the prosecutor showed the jury a pair of tennis shoes that had been removed from the defendant's house and told the jury that "[a]t some point along the way, [the victim] was either hit or kicked with a shoe. We can't say it's these shoes, but these were the only ones that couldn't be eliminated." Defendant contends that this argument is a clear misstatement of the record. The record shows that the tennis shoes had been seized at defendant's residence and examined by the State's pathologist, Dr. Lantz. Prior to trial Dr. Lantz compared a pattern bruise on the victim's back with the "zig-zag like pattern on the soles" of these shoes, and he testified that the pattern bruise was consistent with the pattern on the soles of the shoes. When asked whether he could say that a shoe caused the injury, Dr. Lantz stated that the pattern on the victim's back appeared to be caused by some type of shoe or flat object, but that he could not "say definitely [that] it was actually a shoe that caused" the bruise. Referring to the shoes seized at defendant's residence, the pathologist told the jury that he could not "say with any degree of certainty that these shoes actually caused any injuries to [the victim's] body." After reviewing the testimony of the pathologist, we conclude that the prosecutor's comments were a reasonable inference from the facts in evidence. The trial court did not abuse its discretion by failing to intervene *ex mero motu*.

[15] Next, defendant contends that the prosecutor misstated the testimony by making the following argument: "[The victim] was shaken and she was thrown (Illustrating) and the back of her head, what Dr. Lantz told you, hit that wall. He's done it before. He did it with 'Tunny'

[Anderson's four-year-old son, Roger] so hard that the wooden chair fell up against the wall." The record shows that Dr. Lantz testified that a crack in the drywall at defendant's home was similar in appearance to an abrasion or scrape on the back of the victim's head. The State's evidence tended to show that Tabitha suffered severe injuries to the head and that the cause of death was brain injuries. This evidence supports the inference that defendant threw Tabitha and that the back of her head hit the wall. We conclude that the trial court did not abuse its discretion by failing to intervene *ex mero motu*.

[16] Finally, defendant contends that the prosecutor misstated the facts by telling the jury that defendant said he "smacked [the victim] ten times on the night of her death." Agent Brown testified that defendant told Brown that defendant smacked the victim ten times during the three-week period prior to Tabitha's death. We conclude that the prosecutor's misstatement was a *lapsus linguae*; that the trial court did not abuse its discretion by failing to intervene *ex mero motu* in the argument to correct the misstatement; and that there is no reasonable possibility that, had the court taken corrective action, a different result would have been reached at trial.

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. RICHARD EUGENE CAGLE AND MICHAEL PAUL SCOTT

No. 336A95

(Filed 24 July 1997)

1. Evidence and Witnesses § 2908 (NCI4th)— capital murder— killing cat—admissible

There was no abuse of discretion in a capital prosecution for first-degree murder in the introduction of evidence that defendant Cagle had killed a cat by smashing its head against a wall and against a fish tank where, in response to pretrial written motions by both defendants, the court barred the evidence under N.C.G.S.

§ 8C-1, Rule 403 but noted that it would reconsider if doors were opened; the court reconsidered following cross-examination and after hearing arguments from all parties; and the evidence was relevant to explain or rebut evidence elicited by defendant on cross-examination of the State's witnesses. Also, the court instructed the jurors to consider the evidence only to the extent they found it bore on defendant Cagle's state of mind, intent, malice or lack of malice.

Am Jur 2d, Evidence §§ 340-342.

2. Homicide § 669 (NCI4th)— first-degree murder—voluntary intoxication—requested instruction not given—no error

There was no error in a prosecution for first-degree murder, robbery, and conspiracy in the trial court's failure to give defendant Cagle's requested instruction on voluntary intoxication where the evidence showed that defendant Cagle was able to have a predetermined plan, communicate the plan to another, execute the plan, flee the murder scene, and use the alibi. The evidence failed to show that at the time of the killing Cagle's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill.

Am Jur 2d, Homicide § 517.

3. Criminal Law § 1389 (NCI4th Rev.); Appeal and Error § 504 (NCI4th)— capital sentencing—mitigating circumstance—impaired capacity—instructions—invited error—not prejudicial

Any error in a capital prosecution for first-degree murder, robbery, and conspiracy in the court's instruction on the impaired capacity mitigating circumstance as to defendant Cagle was invited and not subject to review where the instruction was requested and agreed to by Cagle's counsel at the charge conference. Moreover, any error was harmless in that defendant contended on appeal that the instruction forced the jury to find both intoxication and narcotics ingestion before finding the mitigating circumstance, but the evidence was uncontradicted that Cagle consumed alcohol and smoked marijuana on the night of the murder. Also, the jury was instructed to consider mental illness in relation to several other mitigating circumstances. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Appellate Review §§ 715, 716; Criminal Law §§ 598, 599.

4. Criminal Law §§ 1375, 1392 (NCI4th Rev.)— capital sentencing—instructions—definition of mitigating circumstances

The trial court did not err in a capital sentencing hearing in its definition of mitigating circumstance and by not explaining several nonstatutory mitigating circumstances. The court's instructions concerning both the definition of mitigating circumstance and the jury's duty to consider any circumstance arising from the evidence were substantially identical to the pattern jury instructions and to instructions held to be correct in other cases. The nonstatutory mitigating circumstances submitted to the jury were drafted by defendant, defendant did not object to the court's instructions on these circumstances, and the instructions on nonstatutory mitigating circumstances were clear and did not minimize the importance of the circumstances.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—peremptory instruction—nonstatutory mitigating circumstance

There was no error in a capital sentencing proceeding in the court's peremptory instructions on nonstatutory mitigating circumstances where the court instructed the jurors that they could refuse to find the circumstances, which all of the evidence supported, if they did not deem the circumstances to have mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 865.

6. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—instruction on sympathy or mercy—refused—no error

The trial court did not err in a capital sentencing proceeding by denying defendant's request for an instruction that the jury may base its sentencing recommendation upon sympathy or mercy where the court submitted the statutory catchall mitigating circumstance after proper instructions to the jury.

Am Jur 2d, Trial §§ 1119, 1445-1447.

Instructions to jury: Sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

7. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A sentence of death was not disproportionate where the record fully supports the aggravating circumstance found by the jury, the failure to find certain submitted mitigating circumstances was a rational result from the evidence, there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration, and the case is more similar to certain cases in which death sentences were found proportionate than to those where it was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. Although defendant Cagle argues that most robbery-murder defendants receive a life sentence, defendant was convicted on the theory of premeditation and deliberation as well as under the felony murder rule, indicating a more cold-blooded and calculated crime; the fact that the murder was committed in the victim's home is significant, as is the fact that defendant fled while the victim was still alive and suffering and that defendant never attempted to ensure that the victim received medical assistance; defendant was twenty-five years old while the defendant in *State v. Young*, 312 N.C. 669, was nineteen; defendant delivered the fatal stab wounds; and the evidence suggests that the crime was motivated in part by prejudice toward homosexuals.

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.

8. Evidence and Witnesses § 1134 (NCI4th)— murder and robbery—codefendant killing cat—admissible

The trial court did not err as to defendant Scott in a prosecution for first-degree murder, robbery, and conspiracy by admitting evidence of the killing of a cat by a codefendant. Defendant Scott's Confrontation Clause rights were not violated because the evidence was not an out-of-court statement but was trial testimony and defendant Scott had the opportunity to cross-examine.

Am Jur 2d, Criminal Law §§ 723, 729; Evidence § 751.

9. Criminal Law §§ 339; 574 (NCI4th Rev.)— murder and robbery—codefendant killing cat—severance and mistrial denied

The trial court did not abuse its discretion in a prosecution for robbery and murder by denying defendant Scott's motion for severance and a mistrial after the trial court admitted evidence concerning a codefendant killing a cat. Although Scott argues that it was probative only of his codefendant's intent, Scott was convicted of first-degree murder only under the felony-murder rule, which does not require intent to kill. The introduction of the evidence against defendant Cagle about Cagle killing the cat could not have denied defendant Scott a fair trial.

Am Jur 2d, Trial §§ 164-166.

10. Criminal Law § 475 (NCI4th Rev.)— murder and robbery—prosecutor's argument—bruising after death—no error

The prosecutor's comments in a prosecution for murder and robbery concerning bruising after death did not so infect defendant Scott's trial with unfairness as to make the resulting conviction a denial of due process where defendant Scott contended that the prosecutor argued medical facts not in evidence (that bruising stops at death), but defendant Scott was not prejudiced even if the argument was not a reasonable inference because it is irrelevant under the theory of acting in concert whether he committed any positive act in the assault.

Am Jur 2d, Trial §§ 609, 632.

11. Criminal Law § 475 (NCI4th Rev.)— murder and robbery—prosecutor's argument—killing of cat by codefendant—limiting instruction disregarded

Defendant Scott's trial was not so infected with unfairness as to make the resulting conviction a denial of due process where he contended that the prosecutor improperly argued that the killing of a cat by a codefendant should be considered as evidence against Scott despite an instruction limiting the evidence to defendant Cagle. Intent to kill was not an element of Scott's felony murder conviction and he could not have been prejudiced by any evidence of his intent.

Am Jur 2d, Criminal Law § 825; Homicide § 560.

STATE v. CAGLE

[346 N.C. 497 (1997)]

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death as to defendant Cagle and a judgment imposing a sentence of life imprisonment as to defendant Scott entered by Weeks, J., on 15 June 1995 in Superior Court, Cumberland County, upon jury verdicts of guilty of first-degree murder. Defendants' motions to bypass the Court of Appeals as to additional judgments imposed as to each defendant for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon were allowed on 15 October 1996. Heard in the Supreme Court 14 April 1997.

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

Richard B. Glazier for defendant-appellant Cagle.

James M. Walen for defendant-appellant Scott.

ORR, Justice.

At a joint trial, the jury found defendant Cagle guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury found defendant Scott guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first-degree felony murder. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for defendant Cagle and a sentence of life imprisonment for defendant Scott. The judge sentenced each defendant accordingly. Cagle was also sentenced to a term of ten years' imprisonment for his conviction of conspiracy to commit robbery with a dangerous weapon and to a consecutive term of forty years' imprisonment for his conviction of robbery with a dangerous weapon. Scott was also sentenced to a term of three years' imprisonment for his conviction of conspiracy to commit robbery with a dangerous weapon, and the judgment against him for robbery with a dangerous weapon was arrested as the underlying felony upon which his felony murder conviction was based.

The evidence presented at trial tended to show the following facts, based substantially on the testimony of Ryan Christopher Jones. In November of 1993, defendant Cagle and his girlfriend, Jamie Kass, were living together at the Cape Fear Motel in Fayetteville,

North Carolina. Defendant Scott and Ryan Christopher Jones were magazine salesmen for Sun Circulation and were also staying at the Cape Fear Motel. On the evening of 4 November 1993, Cagle left Kass in the motel room to rest while he went across the street to a nightclub called "The Oz Club," which was considered to be a gay bar. Subsequently, Kass spoke with Scott and Jones at the motel. They also went to the Oz Club, where defendant Cagle was playing pool with Dennis Craig House, the victim.

After Cagle and House finished playing pool, House drove his truck to the motel; Cagle, Scott, Jones, and Kass walked. Kass testified that while they were walking to the motel, Cagle, Scott, and Jones joked about "rolling a fag," which she understood to mean taking money from a homosexual. Jones testified that during the walk, Cagle said he knew the combination to House's safe, he knew that House had about $4,000 and a pound of marijuana, and he suggested that they rob him. Jones testified that he understood from the conversation that they were going to rob House.

The group went to Cagle and Kass' motel room, where Kass rested on the bed, and the others drank alcohol and talked. Cagle used a tatoo gun to draw a tatoo on Jones. Whenever House stepped out of the room, the joking about "rolling a fag" continued. At approximately 2:00 a.m., Cagle, Scott, Jones, and House decided to leave the motel and drive to House's home while Kass went to sleep in the motel room. Jones testified that Cagle and House got into House's truck first while Jones and Scott stayed in the motel room and argued about who was going to take a knife that Kass had there. After Scott took the knife, he and Jones got into the truck, and House drove them all to his trailer.

At House's trailer, the group drank alcohol and smoked marijuana. According to Jones' testimony, at one point, Jones and Scott were sitting in the living room while Cagle and House were in the back room. Scott told Jones that the plan was for Jones to stab House while House was performing oral sex on Cagle. Shortly after that conversation, Cagle walked out of the back room carrying a cat by the neck. Jones testified that Cagle slammed the cat's head against the wall, and the cat's head split open. Cagle then bashed the cat's head on the fish tank. Then Cagle sat on the couch, and House entered the room. Next, Cagle followed Jones to the bathroom, gave him a knife, and told him that "he was gonna get [House] to give him oral sex and [Jones] was supposed to stab him."

According to Jones' testimony, he waited in the bathroom while Cagle returned to the living room. When Jones subsequently entered the living room, he saw Cagle lying on the couch and House performing oral sex on Cagle. Cagle reached out to grab Jones by the belt, and Jones stabbed House in the back once. Jones pulled the knife out and dropped it on the ground, and Cagle picked it up. House said, "Why are you guys doing this? I'll give you anything." House then lunged and grabbed Jones, and Scott began punching House in the head. Jones pulled away from House. Then Cagle stabbed House three or four times in the chest and dropped the knife on the ground. Scott tried to hit House with a bowling ball. While Jones, Scott, and House were wrestling, Cagle hit House with something that looked like either a fireplace poker or a pool cue, according to the testimony. Next, Cagle, Scott, and Jones ran toward the back room, where Cagle said, "Go finish him, go kill him." Cagle, Scott, and Jones ran out the front door, with Jones picking up the knife as he ran through the living room. The only item they took from House's home was a camera that Cagle picked up.

House ran to the home of his neighbor, Roger Ayscue, and knocked on the door. When Ayscue let him in, House collapsed and said, "Roger, they are trying to kill me." Ayscue looked out his window and saw Cagle and Scott leaving House's trailer. House ultimately died from stab wounds in the chest.

While fleeing, Cagle, Jones, and Scott discussed an alibi. They decided to tell police that they got in a fight at a keg party and that House left with another man. Shortly after leaving the murder scene, they reached a house and knocked on the door. Elizabeth Hales answered the door, and Cagle asked to use her phone to call a cab because their car had broken down. Hales refused, but told them she would call a cab for them. Hales called a cab company and the police. Cagle, Jones, and Scott then began walking down the road. A deputy sheriff responding to Hales' call spotted them and asked them what had happened. Cagle said they had been to a keg party, and their car had broken down. Cagle said the blood on his pants was from a fight at the keg party. The deputy sheriff then arrested Cagle, Jones, and Scott.

ISSUES RAISED BY DEFENDANT CAGLE

GUILT-INNOCENCE PROCEEDING

I.

[1] Defendant Cagle first contends that the trial court erred by allowing the introduction of evidence about Cagle's killing of the cat by smashing its head against a wall and against a fish tank in House's home just prior to the murder. Defendant argues that the evidence was inadmissible under Rule 401 of the North Carolina Rules of Evidence because it was not relevant and that the evidence was inadmissable under Rule 403 because any probative value was substantially outweighed by the risk of prejudice or confusion of the issues. We disagree.

Prior to trial, both defendants filed written motions to bar any evidence related to the killing of the cat. The court granted the motions based on Rule 403, finding that "any probative value the evidence might have is substantially outweighed by the danger or risk of prejudice or confusion of the issues." However, the court noted that it would reconsider its ruling during the trial if any "doors were opened" to the introduction of the excluded evidence. Following the defense cross-examination of State's witnesses Ryan Jones and Cumberland County Sheriff's Department Sergeant Durwood Cannon, the court reversed its earlier ruling and found that the defense had opened the door to the introduction of evidence about the killing of the cat. The court found that Rule 403 no longer prohibited admission of the evidence. The court stated that the evidence now had probative value, "as it bears on the question of intent, the state of mind, or in terms of showing a complete picture or context for the jury to understand the evidence in this case." The State then introduced such evidence through the testimony of three witnesses: Jones described Cagle's killing of the cat; Sergeant Cannon testified about viewing the dead cat, blood evidence regarding the cat, and a photograph of the dead cat; and Cumberland County Sheriff's Department Detective Sergeant Ray Wood testified about the photograph of the dead cat and the evidence regarding the cat that was found by law enforcement officers at the scene.

After reviewing the transcript, we conclude that the trial court did not err in ruling that defense counsel opened the door to introduction of the evidence about the killing of the cat. "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. Johnston*, 344 N.C. 596, 605, 476 S.E.2d 289, 294 (1996); *see also 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). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1992). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). "We have interpreted Rule 401 broadly and have explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

Rule 403 provides:

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

N.C.G.S. § 8C-1, Rule 403 (1992). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). Relevant evidence is admissible "unless the judge determines that it must be excluded, for instance, because of the risk of 'unfair prejudice.' " *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986). " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (quoting N.C.G.S. § 8C-1, Rule 403 commentary (Supp. 1985)). "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it

could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

A careful review of the transcript reveals that during the cross-examination of Jones, defense counsel implied that Jones acted independently when he stabbed House, that any discussion of harming House was merely a joke rather than a serious plan, and that Cagle had no actual intention of following through with the plan to stab House. The cross-examination of Sergeant Cannon involved questions about blood evidence that may have been the result of the killing of the cat. We conclude that the evidence about Cagle's killing of the cat was relevant to explain or rebut the evidence elicited by defendant through cross-examination of the State's witnesses. The court did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by the risk of prejudice or confusion of the issues. The court's reconsideration of its pretrial decision was made after hearing arguments from all parties. Also, the court instructed the jurors to consider the evidence only "to the limited extent that you find that it bears on the defendant Cagle's state of mind, intent, malice or lack of malice." This assignment of error is overruled.

II.

[2] Defendant Cagle next contends that the trial court erred in failing to instruct the jury, as requested, on the defense of voluntary intoxication. We disagree.

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.
>
> > The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

> *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)).

State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988) (citations omitted).

Cagle argues that he met this burden because the evidence showed (1) that on the night of the murder, he consumed significant amounts of alcohol and smoked marijuana, (2) that he got drunk easily, and (3) that nobody had discussed any intent to kill House when they made the plan to rob him prior to going to his home. However, the defense of voluntary intoxication depends not on the amount of alcohol consumed, but on its effect on the defendant's ability to form the specific intent to kill after premeditation and deliberation. *See id.* Also,

> [p]remeditation 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). Thus, defendant Cagle could have formed the specific intent to kill based on premeditation and deliberation that occurred at House's home, moments before the murder, even though he had no such intent when the plan to rob House was originally made.

After reviewing the transcript, we conclude that the evidence failed to show that at the time of the killing, defendant Cagle's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. Jones testified that during a conversation between him and Cagle in the bathroom prior to the murder, Cagle told him the plan. According to Jones' testimony, Cagle said that he was going to get House to perform oral sex on him and that Jones was supposed to stab him. Jones further testified that when he reentered the living room, House was performing oral sex on Cagle in accordance with the plan. Jones also testified that after the assault on House, Cagle, Jones, and Scott ran to the back of the trailer, where "[Cagle] was say-

ing, 'go finish him, go finish him, go kill him.' " After Cagle, Jones, and Scott ran away through the woods and planned an alibi story, they came to the home of Elizabeth Hales. Hales testified that Cagle came to her door and asked to use the phone to call a cab because they had had car trouble. Jones testified that when they were first stopped by a police officer, Cagle told the officer the alibi story that they had planned.

Thus, the evidence shows that Cagle was able to have a predetermined plan, communicate the plan to Jones, execute the plan, flee from the murder scene, and use the alibi in talking with Hales and a police officer. Defendant failed to meet his burden of production, and the trial court committed no error in refusing to give an instruction on voluntary intoxication.

SENTENCING PROCEEDING

III.

[3] Defendant Cagle next assigns error to a part of the jury charge in the sentencing proceeding in which the court instructed the jurors to find the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance if they found that Cagle "had consumed beer at the Oz Club and Jack Daniels whiskey at the victim's residence, had smoked marijuana at both the Oz Club and the victim's residence and that this impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law." Cagle argues that this instruction was error because it forced the jury to make a finding that both intoxication and narcotics ingestion existed before the jury could find this mitigating circumstance and because it failed to mention consideration of mental illness.

This instruction was requested and agreed to by Cagle's defense counsel at the charge conference. Therefore, if there was error in the charge, it was invited error and not subject to review. *See State v. Harris*, 338 N.C. 129, 150, 449 S.E.2d 371, 380 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 752 (1995). We note, however, that any error in the charge was harmless. The evidence was uncontradicted that Cagle consumed alcohol and smoked marijuana on the night of the murder. Also, the jury was instructed to consider mental illness in relation to several other mitigating circumstances. *See State v. Rouse*, 339 N.C. 59, 104, 451 S.E.2d 543, 568 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995). For the foregoing reasons, this assignment of error is overruled.

IV.

[4] Defendant Cagle next contends that the court defined "mitigating circumstance" too narrowly during the jury charge and that the court improperly minimized the importance of several nonstatutory mitigating circumstances by failing to give an explanation of those circumstances. We disagree.

The court's instructions concerning both the definition of "mitigating circumstance" and the jury's duty to consider any circumstance arising from the evidence which the jury deemed to have mitigating value were substantially identical to the pattern jury instructions, *see* N.C.P.I.—Crim. 150.10 (1996), and to the instructions held to be a correct statement of the law and free from error in *State v. Conaway*, 339 N.C. 487, 533-34, 453 S.E.2d 824, 853-54, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995), and *State v. Robinson*, 336 N.C. 78, 122, 443 S.E.2d 306, 328 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

The nonstatutory mitigating circumstances submitted to the jury were drafted by defendant, and defendant did not object to the court's instructions on these circumstances. After reviewing the transcript, we conclude that the court's instructions on the nonstatutory mitigating circumstances were clear and did not minimize the importance of the circumstances. This assignment of error is overruled.

V.

[5] Defendant Cagle next assigns error to the court's peremptory instructions on nonstatutory mitigating circumstances. The court instructed the jurors that they could refuse to find the circumstances, which all of the evidence supported, if they did not deem the circumstances to have mitigating value. Cagle argues that this instruction unconstitutionally allowed the jury to refuse to consider relevant mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 990 (1978). As defendant concedes, this Court has previously rejected this argument. *E.g.*, *State v. Lynch*, 340 N.C. 435, 474-76, 459 S.E.2d 679, 699-700 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 558 (1996); *State v. Fullwood*, 323 N.C. 371, 395-97, 373 S.E.2d 518, 533-34 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). Even if jurors find from uncontroverted and manifestly credible evidence that a nonstatutory mitigating circumstance exists, the jurors may reject the nonstatutory mitigating circumstance if they do not deem it to have mitigating

value. *State v. Lynch*, 340 N.C. at 475-76, 459 S.E.2d at 700; *State v. Green*, 336 N.C. 142, 173-74, 443 S.E.2d 14, 32-33, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994); *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993). This rule does not allow jurors to refuse to consider relevant mitigating evidence. This assignment of error is overruled.

VI.

[6] Defendant Cagle also contends that the trial court erred in denying defendant's written request for an instruction that the jury may base its sentencing recommendation "upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case." This Court has consistently rejected defendant's argument on this issue. *See State v. Wooten*, 344 N.C. 316, 337, 474 S.E.2d 360, 372 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 348 (1997); *State v. Hill*, 331 N.C. 387, 421, 417 S.E.2d 765, 782 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). As this Court held in *State v. Hill*, because the trial court submitted the statutory catchall mitigating circumstance after proper instructions to the jury, the court did not err in declining to give defendant's requested instruction. This assignment of error is overruled.

VII.

[7] We now turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. We have examined the record, transcripts, and briefs in the present case and conclude that the record fully supports the aggravating circumstance found by the jury, that the murder was committed by defendant Cagle during the commission of or an attempt to commit robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5) (Supp. 1996). We also find that the jury's failure to find certain submitted mitigating circumstances was a rational result from the evidence. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must now turn to our final statutory duty of proportionality review.

Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine whether "the sentence of death in the present case is excessive or disproportionate to the penalty

imposed in similar cases considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2). We do not conclude that the imposition of the death penalty in this case is aberrant or capricious.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). It is also proper for this Court to compare this case with the cases in which we have found the death penalty to be proportionate. *Id.* Although we review all of the cases when engaging in this statutory duty, we will not undertake to discuss or cite all of those cases each time we carry out that duty. *Id.* This case is distinguishable from each of those cases in which this Court has found the death penalty disproportionate.

Defendant Cagle argues that most robbery-murder defendants receive a life sentence and points out that four of the death sentences that this Court has found to be disproportionate were robbery-murder cases. However, in three of those cases, *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant either pled guilty or was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of premeditation and deliberation as well as under the felony murder rule. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Defendant argues that this factor alone is insufficient to support a holding that a death sentence is proportionate. However, there are other significant factors that distinguish this case from those in which the death sentence was held to be disproportionate.

The fact that the murder was committed in the victim's home is one significant factor. As this Court has consistently stated:

> The sanctity of the home is a revered tenet of Anglo-American jurisprudence. . . . And the law has consistently acknowledged the expectation of and right to privacy within the home. This crime shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious inva-

> sion of an especially private place, one in which a person has a right to feel secure.

State v. Brown, 320 N.C. 179, 231, 358 S.E.2d 1, 34 (citations omitted), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

Another significant factor in this case is the fact that defendant Cagle fled while the victim was still alive and suffering, and he never attempted to ensure that the victim received medical assistance. "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)." *State v. Norwood*, 344 N.C. 511, 541, 476 S.E.2d 349, 363-64 (1996) (holding death sentence proportionate where 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), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 500 (1997); *cf. State v. Bondurant*, 309 N.C. 674, 694, 309 S.E.2d 170, 182-83 (1983) (holding death sentence disproportionate where immediately after he shot the victim, the defendant drove the victim to the hospital).

Defendant also argues that his death sentence should be held to be disproportionate because the facts of this case are very similar to the facts of *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), in which the death sentence was held to be disproportionate. This Court summarized the facts of *State v. Young* in *State v. Carter*, 342 N.C. 312, 464 S.E.2d 272 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 957 (1996):

> In *Young* the defendant, age nineteen, and two companions went to the victim's home and robbed and killed him. Defendant stabbed the victim twice, and one of his companions "finished him" by stabbing him five or six more times. The three young men then stole money and valuable coins and fled the scene.

Id. at 329-30, 464 S.E.2d at 283. We concluded that *State v. Carter* was distinguishable from *State v. Young*, in part, because of the ages of the defendants: In *State v. Young*, the defendant was nineteen years old; in *State v. Carter*, the defendant was twenty-four years old. *Id.* The case before us is likewise distinguishable because defendant Cagle was twenty-five years old at the time of the murder.

This case is also distinguishable from *State v. Young* because in *State v. Young*, although the defendant stabbed the victim twice, one

of his companions "finished him" by stabbing him five or six more times. In contrast, the evidence in the case before us showed that defendant Cagle delivered the fatal stab wounds. Another distinguishing feature in the case before us is that the evidence suggests that the crime was motivated in part by prejudice toward homosexuals. The coconspirators continually referred to their plan to rob House as a plan to "roll a fag." The plan to stab House, instigated by Cagle, was carried out when Cagle induced House to perform a homosexual act, thereby placing him in a vulnerable position.

We conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment. Therefore, the sentence of death recommended by the jury and ordered by the trial court in defendant Cagle's case is not disproportionate.

VIII.

Defendant Cagle concedes that his remaining assignments of error, enumerated VIII through XVII and set out on pages 100 through 112 in his brief, concern issues that this Court has previously decided contrary to his position. Specifically, defendant Cagle contends that the trial court erred in (a) permitting the prosecutor to use peremptory challenges to excuse qualified jurors based on their lack of enthusiasm about the death penalty, *see 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); (b) failing to define "preponderance of the evidence" in relation to defendant's burden to prove mitigating circumstances, *see Walton v. Arizona*, 497 U.S. 639, 650-51, 111 L. Ed. 2d 511, 526-27 (1990); *State v. Payne*, 337 N.C. 505, 532-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995); (c) instructing the jury that defendant bore the burden of proving mitigating circumstances to the satisfaction of the jury, *see State v. Payne*, 337 N.C. at 532-33, 448 S.E.2d at 108-09; (d) instructing the jury on Issue Three of the "Issues and Recommendation as to Punishment" form, concerning the weighing of the mitigating and aggravating circumstances, *see State v. Keel*, 337 N.C. 469, 493-94, 447 S.E.2d 748, 761-62 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 147 (1995); (e) imposing the North Carolina death penalty statute, which defendant contends is unconstitutional, *see State v. Roper*, 328 N.C. 337, 370, 402 S.E.2d 600, 619, *cert. denied*, 502 U.S.

902, 116 L. Ed. 2d 232 (1991); (f) instructing the jury on Issue Four of the "Issues and Recommendation as to Punishment" form, concerning whether the jury was satisfied that the aggravating circumstance found was sufficiently substantial to call for imposition of the death penalty, *see State v. McDougall*, 308 N.C. 1, 26, 301 S.E.2d 308, 323-24, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); (g) instructing the jury on the burden of proof applicable to mitigating circumstances, *see State v. Payne*, 337 N.C. at 532-33, 448 S.E.2d at 108-09; (h) using the word "may" in the jury instructions on Issues Three and Four of the "Issues and Recommendation as to Punishment" form, *see State v. Gregory*, 340 N.C. 365, 417-19, 459 S.E.2d 638, 668-69 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996); (i) submitting the aggravating circumstance specified in N.C.G.S. § 15A-2000(e)(5), *see State v. Davis*, 340 N.C. 1, 27, 455 S.E.2d 627, 640-41, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 83 (1995); and (j) refusing to instruct the jury that a sentence of life imprisonment would be imposed if the jury was unable to reach a unanimous agreement on the proper sentence, *see State v. Young*, 312 N.C. at 685, 325 S.E.2d at 191. Defendant raises these issues to provide this Court an opportunity to reexamine its prior holdings and to preserve the issues for any future review. We have carefully considered defendant's arguments on these issues. We find no compelling reason to depart from our prior holdings, and we are not persuaded that prejudicial error occurred so as to warrant a new trial. However, the issues are preserved for any necessary future review.

ISSUES RAISED BY DEFENDANT SCOTT

[8] Defendant Scott argues two issues to this Court. First, Scott contends that the trial court erred in allowing evidence of Cagle's killing of the cat and in denying Scott's motion for a severance and a mistrial based on that evidence. We disagree.

We have already held that the evidence about Cagle's killing of the cat was properly admitted against defendant Cagle. The court instructed the jury not to consider this evidence in the State's case against defendant Scott. Citing *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), Scott argues that the court's limiting instruction was not valid to correct the damage caused by the evidence of the cat killing. However, *Bruton* is distinguishable because the evidence admitted in *Bruton* was a nontestifying codefendant's statement; because the defendant could not cross-examine the codefendant about the statement, the defendant's Confrontation Clause

rights were violated. In the case before us, the evidence in question was not an out-of-court statement by Cagle, but was Jones' trial testimony describing the cat killing and a police investigator's trial testimony about physical evidence related to the cat killing. Scott was given an opportunity to cross-examine both witnesses at trial. Therefore, his Confrontation Clause rights were not violated by admission of the evidence. Thus, the remaining question before us is whether the trial court erred in denying defendant Scott's motion for a severance and a mistrial in light of the evidence about the cat killing that was admitted against Cagle.

> The decision to grant or deny a mistrial rests within the sound discretion of the trial court. A trial court should grant a mistrial "only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict."

State v. Marlow, 334 N.C. 273, 287, 432 S.E.2d 275, 283 (1993) (citation omitted) (quoting *State v. Laws*, 325 N.C. 81, 105, 381, S.E.2d 609, 623 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990)).

[9] N.C.G.S. § 15A-927 provides that the court must grant a severance

> [i]f during trial, upon motion of the defendant . . . , it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

N.C.G.S. § 15A-927(b)(2) (1988). We review the trial court's decision of whether to grant a severance under the abuse-of-discretion standard. *State v. Barnes*, 345 N.C. 184, 219-20, 481 S.E.2d 44, 63 (1997). As this Court stated in *State v. Barnes*:

> There is a strong policy in North Carolina favoring the consolidation of the cases of multiple defendants at trial when they may be held accountable for the same criminal conduct. Severance is not appropriate merely because the evidence against one codefendant differs from the evidence against another. The differences in evidence from one codefendant to another ordinarily must result in a conflict in the defendants' respective positions at trial of such nature that, in viewing the

> totality of the evidence in the case, the defendants were denied a fair trial. However, substantial evidence of the defendants' guilt may override any harm resulting from the contradictory evidence offered by them individually.

Id. at 220, 481 S.E.2d at 63-64 (citations omitted).

Defendant Scott argues that the evidence about Cagle's killing of the cat denied Scott a fair trial because it was probative only of Cagle's intent and should not have been allowed to suggest anything about Scott's intent when there was no other evidence presented about Scott's intent. However, Scott was convicted of first-degree murder only under the felony murder rule. Felony murder includes any killing committed in the perpetration or attempted perpetration of a robbery. N.C.G.S. § 14-17 (Supp. 1996). "Felony murder, by its definition, does not require 'intent to kill' as an element that must be satisfied for a conviction." *State v. Richardson*, 341 N.C. 658, 670, 462 S.E.2d 492, 500 (1995). There was substantial evidence of defendant Scott's guilt of felony murder. Therefore, intent to kill was not an element of Scott's felony murder conviction, and he could not have been prejudiced by any evidence related to his intent. The introduction of the evidence against defendant Cagle about Cagle killing the cat could not have denied defendant Scott a fair trial, and the trial court properly denied Scott's motion for a severance and a mistrial. This assignment of error is overruled.

[10] In his final issue, defendant Scott assigns error to two sections of the prosecutor's closing argument to the jury. As we have often stated:

> Trial counsel are allowed wide latitude in jury arguments. Counsel are permitted to argue the facts based on evidence which has been presented as well as reasonable inferences which can be drawn therefrom. Control of closing arguments is in the discretion of the trial court. Additionally, as this Court has previously pointed out, "for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " [*State v.*] *Soyars*, 332 N.C. [47,] 60, 418 S.E.2d [480,] 487-88 [(1992)] (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)). In order to reach the level of "prejudicial error" in this regard, it now is well established that the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d

144, 157 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637[, 643], 40 L. Ed. 2d 431[, 437] (1974)).

State v. Green, 336 N.C. at 186, 443 S.E.2d at 39-40 (citations omitted).

First, Scott contends that the prosecutor argued medical facts not in evidence. Jones testified that during the assault on House, Scott punched House in the head and may have hit him with a bowling ball. Scott's attorney pointed out to the jury that House was not bruised and argued that, contrary to Jones' story, Scott did not hit House or participate in the incident. The prosecutor rebutted this argument when he said to the jury:

> From your personal experience and your common sense, you know it takes time for a bruise to develop. You know it takes time for a contusion to develop. . . . You know that Dennis Craig House died within minutes after this assault on him, within minutes. . . . Now it doesn't take the chief medical examiner of the State of North Carolina, it doesn't take a medical doctor, it doesn't take anybody other than a person who has got a lick of sense to know that when you are dead, your bodily processes stop.

When Scott's attorney objected, the court ruled that "[c]ounsel is entitled to argue the evidence, reasonable inferences to be drawn from the evidence. It is for the members of the jury to determine what the evidence and the case does, in fact, show. The objection is overruled, exception noted for the record."

After reviewing the transcript, we conclude that even if it is not reasonable to infer that bruising stops when someone dies, defendant was not prejudiced by the prosecutor's argument. Jones testified, and the jury found, that Scott was a coconspirator in the plan to rob House. Scott carried the knife from the motel room, and he told Jones the plan to stab House while House performed oral sex on Cagle. The jury was instructed on the theory of acting in concert.

> Under the doctrine of acting in concert when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose. 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-[17]. . . . "[W]hen two people act in concert to commit a robbery, each person is responsible not only for that crime, but for a murder com-

mitted during the course of the robbery." *State v. Reese*, 319 N.C. 110, 141, 353 S.E.2d 352, 370 (1987)[, *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997)].

State v. Thomas, 325 N.C. 583, 595, 386 S.E.2d 555, 561-62 (1989). Thus, under the theory of acting in concert, it is irrelevant whether Scott committed any positive act in the assault on House. Therefore, we conclude that the prosecutor's comments about the bruising did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.

[11] Defendant Scott also contends that although the court had given a limiting instruction that the evidence of the cat killing should be considered as evidence only of defendant Cagle's intent, the prosecutor improperly argued that the killing of the cat should be considered as evidence against Scott. The challenged argument follows:

> What is the significance of the dead cat with respect to Jones and Scott? . . . The death of the cat occurred, uncontradicted, in front of both of them after Mr. Scott had made the statement to Mr. Jones, "Here's the plan, while Ricky's getting oral sex, you're supposed to stab him." That is what was said before the death of the cat.
>
> Now, Mr. Scott is there and sees Mr. Cagle do this to the cat. There has been a lot of talk about the joking nature this evening, the partying nature of this event.
>
> Well, folks, whatever the perception of that nature, that joking, that partying, it got deadly serious when Ricky Cagle killed that cat in front of these two people. It matters not that Ricky said, "I don't like cats." So what? If you don't like the cat, throw him out the door if you are going to party and get on with it. Have a nice time. Do some tattoos. . . .
>
> He doesn't like cats and he also intended to kill Dennis Craig House that night. And Michael Scott stood right there and watched him. And Ricky—excuse me, Ryan Jones stood right there and watched him. And both of them knew at that point, "Whoa, this is some serious stuff."
>
> . . . .
>
> The statements have been made. The cat, which had nothing to do, nothing to do, with that conspiracy except to show you the intent of the party who did the act of killing the cat and to tele-

graph to his confederates, his accomplices, "Okay boys, this is serious. Party time is over. The rolling party is over, and now the rolling is gonna start."

As we held above, intent to kill was not an element of Scott's felony murder conviction, and he could not have been prejudiced by any evidence of his intent. Following the same reasoning, we conclude that any implication that the prosecutor made in his argument about Scott's intent did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. This assignment of error is overruled.

Having considered and rejected all of the assignments of error presented by defendant Cagle and defendant Scott, we hold that both defendants received a fair trial and sentencing proceeding, free from prejudicial error. Therefore, the sentences entered against both defendants must be and are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. TIMOTHY RICHARDSON

No. 232A95

(Filed 24 July 1997)

1. Jury § 226 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause without rehabilitation

The trial court did not err by excusing for cause in a capital trial six prospective jurors who stated unequivocally that they would be unable to vote to impose the death penalty but also stated that they could follow the law as to sentence recommendation without affording defendant the opportunity to attempt to rehabilitate the prospective jurors where additional questioning by defendant would not likely have produced different answers.

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 § 148 (NCI4th)— capital trial—jury selection—automatic vote for death penalty—certain questions not permitted—no *Morgan* error

The trial court did not improperly limit defendant's questioning of prospective jurors in a capital trial in violation of *Morgan v. Illinois*, 504 U.S. 719, when the court refused to permit certain questions as to whether the jurors would automatically vote for the death penalty if they found defendant guilty of first-degree murder after the jurors had made inconsistent statements on this issue where defendant never challenged the prospective jurors for cause but peremptorily challenged both of them; defendant was subsequently permitted to ask the first prospective juror whether she "would be able to vote for life" if she found defendant guilty and found that the appropriate punishment was life and the juror responded affirmatively, the juror answered "not necessarily" when asked if she believed the appropriate punishment for first-degree murder is always the death penalty, and this juror stated that she could think of circumstances where she could find a defendant guilty of first-degree murder and recommend a sentence of life; defendant was allowed to elicit answers from the second prospective juror indicating that she understood that she must consider the punishments of both life and death, that death should not always be the penalty for first-degree murder, and that it was possible that, under certain facts and circumstances, life would be the appropriate sentence for first-degree murder; and defense counsel thus had an opportunity to ask sufficient questions to intelligently exercise his peremptory challenges. Even assuming *arguendo* that there was *Morgan* error during the *voir dire*, such error was harmless where other questioning revealed, with sufficient specificity, that the jurors would consider a life sentence in the appropriate circumstances.

Am Jur 2d, Criminal Law § 685; Jury §§ 193, 279.

3. Evidence and Witnesses §§ 2047, 2975 (NCI4th)— witness telling truth—testimony by officers—not improper character evidence—explanation of investigation

In a first-degree murder prosecution wherein the State introduced defendant's pretrial statements which implicated one Hedgepeth as the actual perpetrator, and testimony by Hedgepeth refuted defendant's statements, testimony by one law officer that officers had "checked out" Hedgepeth's story, "taking care to make sure he was telling us the truth," and that in his opinion

Hedgepeth had told him the truth, and testimony by a second officer that it appeared that Hedgepeth's story was true did not constitute inadmissible character evidence; rather, this testimony was admissible to explain the officers' investigation following defendant's implication of Hedgepeth and why Hedgepeth had been eliminated as a suspect. Assuming *arguendo* that the admission of this testimony was error, the error was harmless since Hedgepeth and his alibi witnesses testified at trial and the jurors were able to judge Hedgepeth's credibility for themselves. N.C.G.S. § 8C-1, Rules 405(a) and 608.

Am Jur 2d, Expert and Opinion Evidence §§ 26, 30, 31.

4. Homicide § 226 (NCI4th)— first-degree murder—defendant as perpetrator—sufficiency of evidence

The State's evidence in a first-degree murder prosecution was sufficient for the jury to find that defendant alone abducted the victim from a food store, drove her to a secluded area, and killed her by running over her with her own car, although defendant told officers that he was with one Hedgepeth when Hedgepeth abducted and killed the victim, that he and Hedgepeth went back to the store, and that Hedgepeth went inside the store while he parked his car, where the evidence tended to show that the store alarm was triggered at 1:50 a.m. on the night of the killing; when officers arrived at the store, they found a car registered to defendant's wife parked behind the store, and the hood was cold, which indicated that the car had been parked for a while; the car was located at defendant's house the morning after the murder; according to the store's security system, there was only one entry into the store after the victim locked it at 11:41 p.m.; fibers from defendant's T-shirt were consistent with fibers found on the victim's shirt; a shoe impression on a piece of plasterboard in the store was made by defendant's right shoe; and defendant went to the house of Hedgepeth's uncle at 2:00 a.m. on the night of the killing and obtained a ride to the vicinity of the food store.

Am Jur 2d, Homicide § 435.

Footprints as evidence. 35 ALR2d 856.

5. Homicide § 255 (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 on premeditation and

deliberation where it tended to show that defendant abducted the victim from a food store, drove her to a secluded area, and ran her down with her own car; as the victim tried to crawl away, defendant ran over her again; and defendant then went back to the store to make a robbery attempt.

Am Jur 2d, Homicide § 439.

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

6. Homicide § 260 (NCI4th)— first-degree murder—lying in wait—sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on a charge of first-degree murder on the basis of lying in wait where it would permit the jury to find that defendant drove into the parking lot of a food store from the side entrance so that the victim would not see him; he waited fifteen minutes for the victim to come out and close the store; defendant ran up to the victim and the victim did not see him until he was right up to her; defendant abducted the victim, drove her to a secluded area, and ran over her with her own car; and defendant went back to the store to make a robbery attempt.

Am Jur 2d, Homicide § 49.

Homicide: what constitutes "lying in wait". 89 ALR2d 1140.

7. Homicide § 283 (NCI4th)— felony murder—kidnapping as underlying felony—sufficiency of evidence

The evidence supported submission to the jury of the charge of felony murder with kidnapping as the underlying felony where it tended to show that defendant abducted the victim as she closed a food store, transported her in her car to the location of the murder, took her keys, ran over with her own car, and then drove back to the store to make a robbery attempt.

Am Jur 2d, Abduction and Kidnapping § 12; Homicide §§ 46, 72, 73.

8. Homicide §§ 506, 705 (NCI4th)— felony murder—kidnapping and armed robbery as predicates—insufficient evidence of armed robbery—guilty verdict—absence of prejudice

Although kidnapping and armed robbery were submitted to the jury as predicate offenses of felony murder, and the evidence was insufficient to support a charge of armed robbery, defendant's conviction of felony murder was not affected thereby where the court instructed the jury that it must find defendant guilty of one or both of those offenses in order to convict him of felony murder; the jury found defendant guilty of first-degree kidnapping and not guilty of armed robbery; and the jury thus necessarily convicted defendant of felony murder based on kidnapping as the underlying felony. Assuming *arguendo* that the jury erroneously found defendant guilty under the theory of felony murder based on the charge of armed robbery, defendant was not prejudiced since he was also found guilty of first-degree murder based on theories of lying in wait and premeditation and deliberation.

Am Jur 2d, Abduction and Kidnapping § 12; Homicide §§ 46, 72.

9. Criminal Law § 481 (NCI4th Rev.)— capital trial—closing argument—caution not to read indictment

The trial court did not impermissibly limit defense counsel's closing argument in a prosecution for first-degree murder and first-degree kidnapping by cautioning counsel, who was holding an indictment in his hand as he argued, that he was very close to using the exact language in the indictment and that he should not read the indictment to the jury.

Am Jur 2d, Trial §§ 187, 544.

10. Criminal Law § 1402 (NCI4th Rev.)— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant, where defendant was convicted on theories of premeditation and deliberation, felony murder, and lying in wait; the evidence supported the jury's finding of the aggravating circumstances that the murder was committed for pecuniary gain and that it was

especially heinous, atrocious, or cruel; defendant was twenty-nine years old at the time of the murder; defendant abducted the victim as she closed a food store and transported her to a secluded area; defendant made no effort to assist the victim, but ran over the victim repeatedly with her car and left her to die; defendant, whose only objective after the killing was to attempt to rob the food store, showed no remorse; the victim suffered physical and psychological torture before she died; and the victim had numerous repeated episodes of trauma to her body which were inflicted prior to and after her death and was not only in pain, but was also aware of her impending death as she attempted to run away from defendant.

Am Jur 2d, Criminal Law § 628.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Sumner, J., at the 24 April 1995 Criminal Session of Superior Court, Nash 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 23 January 1996. Heard in the Supreme Court 15 October 1996.

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

J. Clark Fischer for defendant-appellant.

PARKER, Justice.

Defendant was indicted for first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation, felony murder, and lying in wait and guilty of first-degree kidnapping. Defendant was acquitted on the robbery with a dangerous weapon charge. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder; and the trial court sentenced accordingly. The trial court sentenced defendant to forty years' imprisonment for the first-

degree kidnapping conviction to begin at the expiration of the murder sentence.

On 6 October 1993 twenty-three-year-old Tracy Marie Rich (victim) went to work at the L & L Food Store in Castalia, North Carolina. Linda Rich, the victim's mother, spoke with her daughter at approximately 10:00 p.m. According to the computer records of the alarm system installed at the store, the victim closed the store at 11:41 p.m. Ordinarily, the victim would arrive home from work around 11:40 or 11:50 p.m. When her daughter did not return home at her usual time, Linda Rich became worried and drove to the store. Ms. Rich did not find her daughter at the store and did not see anything unusual at the scene; Ms. Rich returned home.

The store's front-door motion detector and alarm "tripped" at 1:50 a.m. on 7 October. Lieutenant Leonard Brantley of the Nash County Sheriff's Department was called to the store. Brantley checked the rear of the store and found it to be secure. Another officer informed Brantley that the front door was also secure. Brantley noticed a red car parked behind the store. The car was unoccupied, and no heat was coming from the hood. Brantley subsequently learned that the car was registered to Terry Richardson, defendant's wife. Neither Brantley nor other officers at the store observed anything out of order, and they left the scene. The front-door alarm did not indicate that the front door was opened again until the next morning when the store was opened for business.

Rose Hankerson, the assistant store manager, arrived at the store on 7 October at approximately 5:55 a.m. and unlocked the store, which was equipped with a two-way lock. When Hankerson reached to put her key in to relock the door from the inside, she noticed that there was a key already in the door. Hankerson walked to the back of the store to turn off the alarm system and saw what she recognized as the victim's key ring lying on the floor. When Hankerson turned the store lights on, she noticed that part of the store's ceiling had been knocked out and was lying on the floor. At this time Hankerson called the Sheriff's Department.

Lieutenant Brantley returned to the store shortly after 6:00 a.m. Pieces of plasterboard from the ceiling were on the floor inside the store. There were also indications that someone had attempted to move the store safe. A ventilator opening on the rear of the building had also been removed. Brantley observed that the red car was gone.

The victim's body was found wedged under her car on a dirt road not far from the store. The victim's tennis shoe and her eyeglasses were found in the road near the car. The eyeglasses appeared to have been run over by a vehicle.

Because defendant's wife's car had been seen at the store the previous night, defendant became a suspect in the murder investigation. Officers went to defendant's home and located defendant hiding in the attic. Defendant was arrested and gave several statements to law enforcement officers.

In defendant's first statement he denied any knowledge of the murder. Defendant told officers that he went to work on the morning of the sixth and then went home for the rest of the night. Defendant stated that he hid from the officers because he thought they were after him for writing a bad check.

When confronted with inconsistencies in his original statement, defendant gave a second statement in which he implicated Kevin Hedgepeth. Defendant stated that he gave Hedgepeth a ride to the store so he could get some money. According to defendant, Hedgepeth grabbed the victim when she came out of the store, put her in the passenger side of her car, and motioned for defendant to follow in his car. Defendant followed Hedgepeth and the victim to a dirt road. Defendant stated that he saw the victim run by his car and that he witnessed Hedgepeth run over the victim. Defendant told officers that the victim attempted to crawl out of the road and that Hedgepeth backed up and ran over her again.

Defendant stated that Hedgepeth came over to his car and got in the passenger side. Hedgepeth told defendant that he had some money and wanted "to go to get a rock" (crack cocaine). Defendant stated that after purchasing "a rock," Hedgepeth told him that he wanted to go back to the store because he had the keys.

Defendant stated that he and Hedgepeth returned to the store, and Hedgepeth went inside while defendant parked the car. Defendant then also went into the store. When officers arrived at the store in response to the alarm, Hedgepeth hid inside the store and defendant left through the roof. After the officers left the area, Hedgepeth also left the store through the roof. Defendant stated that he gave Hedgepeth a ride home and that Hedgepeth gave him thirty dollars. Defendant stated that he knew Hedgepeth did not have any money before the victim was murdered.

After defendant gave his second statement, the police located Kevin Hedgepeth. Hedgepeth told officers that on 6 October, he got home around 11:00 p.m. Hedgepeth stated that defendant arrived at his house at approximately 2:00 a.m. and asked for a ride to Castalia. Defendant told Hedgepeth he was out of gas and needed a ride to his car. Hedgepeth and his uncle dropped defendant off near the store but did not see defendant's car. The police cleared and released Hedgepeth.

In a third statement defendant told officers that he and Hedgepeth were dropped off together by Hedgepeth's uncle at the store. Defendant maintained that Hedgepeth was also present during the murder.

At trial State Bureau of Investigation Special Agent Joyce Petzka, an expert in comparing footprint and tire-track impressions, opined that a shoe impression left on a piece of plasterboard collected from the store was made by defendant's right shoe. Special Agent Jonathon Macy, an expert in the field of forensic fiber identification, testified that fibers taken from the T-shirt defendant was wearing when he was arrested were consistent with fibers found on the victim's shirt. Agent Macy also testified that polyester fibers taken from the plasterboard at the roof entry of the store were consistent with fibers that made up the yarn of defendant's T-shirt.

Dr. Robert E. Zipf testified that the victim died as a result of multiple blunt-force injuries and compression injuries to her body, head, and chest as a result of being hit by and run over with a vehicle.

Defendant presented evidence during the sentencing proceeding that he had been married to Terry Richardson for ten years and had a two-year-old daughter. Mrs. Richardson testified that defendant had a good relationship with his daughter. Mrs. Richardson also testified that defendant had a problem with drugs.

Defendant presented the testimony of two mental health experts. Dr. Billy Royal testified that based upon his evaluation and the results of defendant's testing, defendant suffered from crack-cocaine abuse and dependency, cocaine intoxication which was in remission, marijuana dependency which was in remission, alcohol abuse and alcohol intoxication in remission, borderline mental retardation, mild neurocognitive disorder, and personality disorder. Dr. Royal testified that he felt defendant's retardation was caused by acute lead intoxication

at the age of three. Dr. Royal also testified that the lead accounted for defendant's neurocognitive disorder. Dr. Royal testified that in his opinion defendant's capacity to appreciate the criminality of his conduct was impaired at the time of the crime and that on the date of the murder defendant suffered from an emotional illness that prevented him from appreciating the criminality of the present charge.

Dr. John Gorman testified that defendant had significant difficulty with anything based upon language functioning and that his "overall functioning would be comparable to that of an average eleven-and-a-half [or] twelve-year-old." Dr. Gorman testified that defendant has "fairly significant intellectual limitations" which are aggravated by drug use, making "his judgment and other functionings even less effective than they normally are." Dr. Gorman also opined that defendant "has significant limitations as far as being able to anticipate consequences when he's straight or when he's in regular state of mind. And when he has been ingesting various drugs, I'm sure he has even less capacity to anticipate the consequences of his acts."

The prosecution and defense stipulated that defendant's criminal record consisted of a misdemeanor worthless-check charge in 1989, a misdemeanor larceny in 1991, and several traffic violations.

JURY SELECTION ISSUES

[1] Defendant first argues that the trial court erroneously excused six prospective jurors who had indicated general opposition to the death penalty but who stated they could follow the law, without affording defendant reasonable opportunity to attempt to rehabilitate the prospective jurors. Defendant argues that prospective jurors Crumel, Brinkley, Howard, Hunter, Mills, and Perry were erroneously excused.

The extent and manner of questioning during jury *voir dire* is within the sound discretion of the trial court. *State v. Godwin*, 336 N.C. 499, 508, 444 S.E.2d 206, 211 (1994). A defendant seeking to have his conviction reversed because of an error in the jury selection process must show a clear abuse of discretion, as well as prejudice. *Id.* Defendant in this case has shown neither prejudice nor abuse of discretion.

A juror is properly excused for cause based on his views on capital punishment if those views would prevent or impair the performance of his duties as a juror in accordance with his instructions

and his oath. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985). In *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993), this Court held that a trial court may not prohibit, in a blanket manner, defendant's request to attempt to rehabilitate prospective jurors challenged for cause. However, "[i]t 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. Norwood*, 344 N.C. 511, 526, 476 S.E.2d 349, 354-55 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 500 (1997). A prospective juror's bias may not always be provable with unmistakable clarity; in such cases reviewing courts must defer to the trial court's judgment as to whether the prospective juror would be able to follow the law impartially. *State v. Ward*, 338 N.C. 64, 85, 449 S.E.2d 709, 720 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995).

The examination of prospective juror Crumel is representative of the questioning of the other five prospective jurors at issue in this case and according to defendant "is consistent with the Court's entire conduct of *voir dire* and exemplifies the unconstitutional limitation placed on defendant's participation in the jury selection process." After the trial judge gave a general explanation of the capital sentencing process, the following dialogue took place:

> Q. Ms. Crumel, please listen very carefully to the following questions I'm about to ask, and consider your responses very closely before you respond, please.
>
> 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 any other lesser offense?
>
> A. Yes, Your Honor.
>
> Q. 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?
>
> A. Yes, Your Honor.
>
> Q. Considering your personal beliefs, Ms. Crumel, 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 that I have previously mentioned to you?

A. Unable.

Q. Unable? 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?

A. Yes, Your Honor.

The court then excused Crumel for cause and denied defendant's request to rehabilitate her.

We upheld the same process and reason for excusing jurors for cause in *State v. Ward*. The prospective jurors were unequivocal about their inability to render the death penalty; this Court reasoned in *Ward* that additional questioning by defendant would not likely have produced different answers. 338 N.C. at 87-88, 449 S.E.2d at 721-22.

In the instant case the six prospective jurors at issue stated unequivocally that they would be unable to vote to impose the death penalty. The trial court properly excused these jurors for cause and did not abuse its discretion by refusing to allow defendant to question them.

[2] Defendant next argues that the trial court improperly limited defendant's questioning of two prospective jurors, Carolyn Patterson and Patricia Donofrio, in violation of *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992).

In *Morgan* the United States Supreme Court held that a defendant must be allowed an opportunity "to lay bare the foundation of [his] challenge for cause against those prospective jurors who would *always* impose death following conviction." *Id.* at 733, 119 L. Ed. 2d at 506. The Court went on to hold that a defendant is "entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id.* at 736, 119 L. Ed. 2d at 507.

In the instant case prospective juror Patterson stated that when she heard about the murder of the victim, she formed the opinion that a person found guilty of this murder "deserve[d] the same thing that

happened to [the victim]." When asked what she meant, Patterson said that "if he is guilty of it, then he should die; if he's not, then there's the life sentence, whatever." Defense counsel then asked, "And so if you were to find him guilty of first degree murder, you would then vote for the death penalty?" The Court interrupted stating, "That's not what she said." Counsel then asked: "Do you believe that if a person is found guilty of first degree murder, that the appropriate punishment would be death?" The court sustained the prosecutor's objection on the basis that Patterson had answered that question.

Patterson subsequently stated that she would not automatically vote for the death penalty. Patterson reiterated her position and said she would not automatically "say [defendant] is guilty and should have the death sentence." The trial court denied defense counsel's request to ask follow-up questions on this issue.

Prospective juror Donofrio gave inconsistent responses, first indicating that if a person was found guilty of first-degree murder, she would automatically vote for the death penalty and then stating that she did not think the death penalty was always indicated. Counsel then asked: "Are you saying that you would or would not automatically vote for the death penalty?" The trial court sustained an objection to that question and subsequent questions on this issue.

In *Morgan v. Illinois* the defendant was not allowed to ask if a juror would "automatically vote to impose the death penalty no matter what the facts are." 504 U.S. at 723, 119 L. Ed. 2d at 499. This Court has held:

> *Morgan* stands for the principle that a defendant in a capital trial must be allowed to make inquiry as to whether a particular juror would automatically vote for the death penalty. "Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rulings in this regard will not be reversed absent a showing of abuse of discretion." *State v. Yelverton*, 334 N.C. 532, 541, 434 S.E.2d 183, 188 (1993).

State v. Robinson, 336 N.C. 78, 102-03, 443 S.E.2d 306, 317 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

In the instant case we conclude that the trial judge did not abuse his discretion during jury *voir dire*. We first note that defendant never made a motion challenging Patterson or Donofrio for cause and

that he peremptorily challenged both of these prospective jurors. Furthermore, defense counsel had an opportunity to ask sufficient questions to intelligently exercise his peremptory challenges as to each of these jurors. As to prospective juror Patterson, defendant was permitted to ask whether she "would be able to vote for life" if she found defendant guilty and found that the appropriate punishment was life. Patterson answered, "If that's what it would come to, yes." She answered "not necessarily" when asked if she believed that the appropriate punishment for first-degree murder is always the death penalty. She stated that she could think of facts and circumstances where she could find a person guilty of first-degree murder and recommend a sentence of life.

Prospective juror Donofrio responded "yes" when asked by defendant whether she "would be able to vote for life." Donofrio later stated that she would automatically vote for the death penalty. Donofrio then stated that she did not believe that the death penalty was always indicated for first-degree murder. When defendant then asked, "Are you saying that you would or would not automatically vote for the death penalty?" the trial court sustained the objection. Defendant was subsequently allowed to elicit answers indicating that Donofrio understood that she must consider the punishments of both life and death; that death should not always be the penalty for first-degree murder; and that it was possible that, under certain facts and circumstances, life would be the appropriate sentence for first-degree murder.

Even assuming *arguendo* that there was *Morgan* error during this *voir dire*, such error is harmless where other questioning reveals, with sufficient specificity, whether the juror will consider a life sentence in the appropriate circumstances. *See State v. Simpson*, 341 N.C. 316, 340, 462 S.E.2d 191, 204 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 194 (1996). We conclude that any error in this case is harmless beyond a reasonable doubt.

GUILT/INNOCENCE PHASE

[3] Defendant next argues that the trial court erred by allowing Captain Milton Reams and Special Agent Malcolm McLeod to give improper character testimony that Kevin Hedgepeth was telling the truth when he denied responsibility for the victim's murder.

The State introduced defendant's pretrial statements into evidence. The statements were exculpatory to the extent that they

named Hedgepeth as the actual perpetrator. After Reams testified the State then called Hedgepeth to refute defendant's statements. Defendant argues that the prosecution violated N.C.G.S. § 8C-1, Rules 405 and 608 by seeking to strengthen Hedgepeth's testimony and its prosecution strategy with inadmissible character evidence.

Reams testified that officers had "checked out" Hedgepeth's story, "taking care to make sure he was telling us the truth." Reams also testified that in his opinion, Hedgepeth had told him the truth. McLeod similarly testified that it appeared that Hedgepeth's story was true.

Rule 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." N.C.G.S. § 8C-1, Rule 405(a) (1992). Rule 608 provides that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

We conclude that, in the instant case, the officers were not giving character testimony, but rather were explaining their investigation following defendant's implication of Hedgepeth. Reams was not commenting on Hedgepeth's general credibility; he merely told the jury that he believed Hedgepeth had told the truth during the investigation. *See State v. Baker*, 338 N.C. 526, 555, 451 S.E.2d 574, 591 (1994) (holding that the trial court did not abuse its discretion in allowing a detective to testify on rebuttal that a former suspect the defendant contended committed the murder had no motive and had an alibi that checked out). In the instant case when the State laid out its case and presented defendant's statements to law enforcement officers, it was evident to the jurors that defendant had implicated Hedgepeth in the murder. It was then incumbent upon the State to explain to the jurors why Hedgepeth had been eliminated as a suspect.

Assuming *arguendo* that admission of this testimony was error, any error was harmless. Hedgepeth and his alibi witnesses testified at trial. The jurors were able to judge Hedgepeth's credibility for themselves. Furthermore, when the trial judge charged the jurors, he told them that they should assess the credibility of Hedgepeth's testimony and that of his alibi witnesses on their own. "Jurors are presumed to follow the trial court's instructions." *State v. Gregory*, 340 N.C. 365, 408, 459 S.E.2d 638, 663 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). This assignment of error is overruled.

Defendant next argues that the evidence was insufficient to submit the charge of first-degree murder to the jury under any theory. Defendant was convicted of first-degree murder on the theories of premeditation and deliberation, lying in wait, and felony murder.

When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* The trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). In evaluating the sufficiency of the evidence, the trial court must determine whether there is "any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

[4] In the instant case the evidence was plenary that defendant actually murdered the victim. At approximately 1:50 a.m. on the night of the killing, the store alarm was triggered. When officers arrived at the store, they found a car registered to defendant's wife parked behind the store. The hood was cold, which indicated that the car had been parked for a while. When officers were called back to the store later that morning, the car was gone.

The morning after the murder, the car was located at defendant's house. When officers arrived at defendant's house, defendant would not answer the door. Defendant was subsequently discovered hiding in the attic. Defendant first denied any knowledge of the murder and told officers he had been at home since the afternoon of 6 October. Confronted with facts inconsistent with his initial statement, defendant gave a detailed statement suggesting that he was with Hedgepeth when Hedgepeth abducted and killed the victim. Defendant also stated that he and Hedgepeth went back to the store and that Hedgepeth went inside the store while he parked the car. Defendant stated that Hedgepeth gave him thirty dollars after coming out of the store.

The State presented evidence which discredited defendant's story. Defendant testified that he drove his car to the murder scene

and that he followed Hedgepeth. However, officers testified that the red car's hood was cold at 2:00 a.m. Defendant stated that after the murder, he and Hedgepeth entered the store separately. However, according to the store's security system, there was only one entry into the store after the victim locked it at 11:41 p.m. Special Agent Macy, an expert in the field of forensic fiber identification, testified that fibers from defendant's T-shirt were consistent with fibers found on the victim's shirt. Special Agent Petzka, an expert in comparing footprint impressions, testified that a shoe impression on a piece of plasterboard in the store was made by defendant's right shoe and that only his shoe could have made that impression.

Robert Manley, Hedgepeth's uncle, testified that defendant came to his house on foot at approximately 2:00 a.m. on the night of the killing and asked for a ride. Defendant told Manley that he had walked there from Castalia and that he was out of gas. Hedgepeth and his uncle gave defendant a ride to the vicinity of the L & L Food Store. This evidence was consistent with the State's theory that defendant alone abducted the victim, drove her to the location of the murder in her car, and then obtained a ride back to the store with Hedgepeth and Manley.

[5] The evidence of premeditation and deliberation is also sufficient. Premeditation means that "defendant contemplated killing for some period of time, however short, before he acted." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993), *sentence vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994). Deliberation means that defendant acted in a "cool state of blood," not under the influence of any violent passion suddenly aroused by some lawful or just cause or legal provocation. *Id.* In the instant case the evidence tended to show that defendant abducted the victim from the store, drove her to a secluded area, and ran her down with her own car. As the victim tried to crawl away, defendant drove over her again. Defendant then went back to the store to make a robbery attempt. This evidence is sufficient to withstand a motion to dismiss the charge of first-degree murder based on premeditation and deliberation.

[6] The evidence is also sufficient to support the theory of lying in wait. An assailant who watches and waits in ambush for his victim is lying in wait. *State v. Allison*, 298 N.C. 135, 147-48, 257 S.E.2d 417, 425 (1979). Defendant's statement suggested that he and Hedgepeth drove into the parking lot as the victim was closing the store. Defendant said he pulled in from the side entrance so that the victim

would not see them, that he and Hedgepeth waited fifteen minutes for the victim to come out, that Hedgepeth ran up to the victim, and that the victim never saw Hedgepeth until he was right up to her. Given the substantial evidence that Hedgepeth was in fact not involved in this incident, the inference is that defendant alone carried out these actions. This evidence is sufficient to submit to the jury the charge of first-degree murder on the basis of lying in wait.

The State also submitted the charge of first-degree murder based on the theory of felony murder. A murder committed during the "perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon" is felony murder. N.C.G.S. § 14-17 (1993) (amended 1994). In this case the State sought to prove that defendant murdered the victim during the commission of kidnapping and robbery with a dangerous weapon.

[7] Kidnapping is the confining, restraining, or removing from one place to another of a person sixteen years of age or over without the person's consent and for a purpose prohibited by statute. N.C.G.S. § 14-39(a) (1993) (amended 1994). In this case the State alleged that defendant kidnapped the victim by removing her from one place to another for the purpose of facilitating a robbery. The evidence showing that the victim was transported in her car to the location of the murder, that defendant took the victim's keys, and that he then drove back to and attempted to rob the store amply supports submission of felony murder with kidnapping as the underlying felony.

[8] Robbery with a dangerous weapon, or armed robbery, was also submitted to the jury in support of the charge of felony murder. This Court has defined armed robbery as "the taking of personal property from the person or presence of another, by the use or threatened use of a dangerous weapon, whereby the victim's life is endangered or threatened." *State v. Rasor*, 319 N.C. 577, 587, 356 S.E.2d 328, 334 (1987). The indictment for robbery with a dangerous weapon charge stated that "the defendant committed this act by means of an assault consisting of having in his possession and threatening the use of a handgun whereby the life of Tracy Marie Rich was threatened and endangered." We agree with defendant's contention that there was insufficient evidence of robbery with a dangerous weapon to submit this charge to the jury.

We first note that defendant was acquitted of the charge of robbery with a dangerous weapon; therefore, as to this individual charge,

defendant has not been prejudiced. However, armed robbery was also submitted to the jury in support of the charge of felony murder, for which defendant was found guilty. While kidnapping and armed robbery were submitted to the jury as predicate offenses of the felony murder, the trial court instructed the jury that it must find defendant guilty of one or both of these offenses in order to convict defendant of felony murder. In this case the jury found defendant guilty of first-degree kidnapping and not guilty of armed robbery. We presume that juries follow the court's instructions. *State v. Johnson*, 341 N.C. 104, 115, 459 S.E.2d 246, 252 (1995). Therefore, having acquitted defendant of robbery with a dangerous weapon, the jury, in keeping with the judge's instructions, necessarily convicted defendant of felony murder based on kidnapping as the underlying felony. However, assuming *arguendo* that the jury erroneously found defendant guilty under the theory of felony murder based on the charge of armed robbery, defendant cannot show prejudice since he was also found guilty of first-degree murder based on the theories of lying in wait and premeditation and deliberation. *State v. McLemore*, 343 N.C. 240, 249, 470 S.E.2d 2, 7 (1996). Defendant's conviction and sentence for first-degree murder based on these theories is not affected.

Defendant also argues that the trial court should have dismissed the first-degree kidnapping charge at the close of the State's evidence. We have previously discussed the sufficiency of the evidence for this charge and found no error.

[9] In his last assignment of error, defendant contends the trial court impermissibly limited defendant's guilt/innocence-phase closing argument. Defendant maintains that the court improperly refused to allow counsel to discuss in detail the specific elements of the charges.

During closing argument defense counsel stated, "[M]y client is charged with first degree murder in that he did with malice and forethought [sic] kill and murder [the victim], an act in violation of the statute." The court sustained the State's objection. Counsel then stated that defendant was charged with first-degree kidnapping and that "the indictment so bears out that that's what [defendant] is charged with." The court again sustained the State's objection. In a bench conference the prosecutor stated that the basis for the objection was that no one is permitted to read an indictment to the jury. Defense counsel stated that he was not reading the indictment, but the court cautioned that counsel was very close to using the exact

language of the indictment and that he did not want counsel to "go past that line."

N.C.G.S. § 15-1221(b) provides that at no time during jury selection or during trial may any person read the indictment to the jury. The purpose of this statute is to prevent jurors from receiving a distorted view of the case. *State v. Rogers*, 52 N.C. App. 676, 279 S.E.2d 881 (1981). Defendant argues that this concern is unfounded once evidence has been presented and the case is ready to be submitted to the jury.

In the instant case Judge Sumner merely cautioned the attorney not to read the indictment to the jury. We conclude that the judge's cautionary remarks were appropriate. After being cautioned by the court, counsel told the jury, "I've been practicing law about twenty years and sometimes I get carried away and I should have known that I can't read that piece of paper to you." This statement implies that counsel was holding an indictment in his hand as he argued; the court, seeing that, simply warned the attorney not to read the indictment directly.

Defense counsel was able to argue fully the charges against defendant and to urge that the State had not proven the elements of these crimes. Defense counsel Alford stated to the jury, without objection, "Let's look at the indictment." He then argued, without objection, that no evidence of a handgun had been present and no evidence showed that defendant had kidnapped or robbed anyone. Counsel then stated, "That's what's in the indictment." This assignment of error is overruled.

PROPORTIONALITY

We are required by N.C.G.S. § 15A-2000(d)(2) to review the record and determine (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). After a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we are convinced that the jury's finding of the aggravating circumstances that the murder was committed for

pecuniary gain and that the murder was especially heinous, atrocious, or cruel was supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[10] Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *Robinson*, 336 N.C. at 133, 443 S.E.2d at 334. The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We compare this case to similar cases within a pool which we defined in *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and in *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Our consideration on proportionality review is limited to cases roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant was convicted of first-degree murder on the theories of premeditation and deliberation, felony murder, and lying in wait. Defendant was also convicted for first-degree kidnapping. The jury found both the submitted aggravating circumstances: (i) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6) (Supp. 1996); and (ii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

While four statutory mitigating circumstances were submitted to the jury, only two were found. The two statutory mitigating circumstances found by the jury were: (i) defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); and (ii) the

murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). The jury declined to find the statutory mitigating circumstances that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6), and the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). The nonstatutory mitigating circumstances found by the jury are as follows: (i) defendant's prior criminal convictions consist solely of misdemeanors, with none of the prior convictions involving violence; (ii) defendant is borderline mentally retarded, with an IQ of 73; (iii) defendant is addicted to crack cocaine; (iv) at an important stage in his development, defendant suffered from the homicide of his brother, which resulted in significant changes in his personality and behavior; (v) defendant ingested lead at an early age and suffered from lead poisoning; and (vi) defendant has no prior history of violent conduct.

We begin our analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In five of the seven cases in which this Court has concluded that the death penalty was disproportionate, the jury did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181; *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703. Because the jury in the present case found this statutory aggravating circumstance to exist, this case is easily distinguishable from those cases. As we have previously stated, "[w]hile this fact is certainly not dispositive, it does serve as an indication that the sentence of death . . . is not disproportionate." *State v. Walls*, 342 N.C. 1, 72, 463 S.E.2d 738, 777 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 794 (1996).

In the other two cases in which we have concluded that the death penalty was disproportionate, the jury did find that the murders were especially heinous, atrocious, or cruel. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170. Both cases are distinguishable from the present case on other grounds.

In *State v. Stokes* the 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 defendant was twenty-nine years old at the time of the murder and was found guilty of first-degree murder on the basis of premeditation and deliberation. This case is also distinguishable from *Stokes* because the jury in the present case found an additional aggravating circumstance, that the murder was committed for pecuniary gain.

In *State v. Bondurant* the defendant shot the victim but then immediately directed the driver of the car in which they had been riding to proceed to the emergency room of the hospital. In concluding that the death penalty was disproportionate, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast the evidence in the present case tended to show that defendant made no efforts to assist the victim. Instead, defendant ran over the victim repeatedly with her car and left her to die. Defendant, whose only objective after the killing was to attempt to rob the L & L Food Store, showed no remorse.

Another distinguishing characteristic of this case is that two aggravating circumstances were found by the jury. Of the seven cases in which this Court has found a sentence of death disproportionate, 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 aggravating circumstances found by the jury was that the murder was especially heinous, atrocious, or cruel.

Additionally, there is evidence that the victim suffered physical and psychological torture before she died. Dr. Zipf testified that the victim had numerous repeated episodes of trauma to her body which

were inflicted prior to and after death; thus, she was not only in pain, but was also aware of her impending death as she attempted to run from defendant. That defendant was convicted on the theory of premeditation and deliberation is also significant. "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).

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." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. We conclude the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment. *See, e.g., State v. Rowsey*, 343 N.C. 603, 472 S.E.2d 903 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 221 (1997), in which the victim, as in this case, was the lone employee at a convenience store in the middle of the night and was, therefore, vulnerable.

Accordingly, we conclude that defendant received a fair trial free from prejudicial error and that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

NO ERROR.

AUTRY v. MANGUM

No. 257P97

Case below: 126 N.C.App. 223

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

BLACKWELL v. MULTI FOODS MANAGEMENT, INC.

No. 237P97

Case below: 126 N.C.App. 189

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

CAIN v. GENCOR, INC.

No. 318PA97

Case below: 126 N.C.App. 435

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 23 July 1997.

COX v. FOOD LION

No. 299P97

Case below: 126 N.C.App. 437

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

CREECH v. MELNIK

No. 539A96

Case below: 124 N.C.App. 502

Motion by defendant (Melnik) to dismiss appeal denied 23 July 1997.

CRESCENT ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

No. 297P97

Case below: 126 N.C.App. 344

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

EVANS v. MacGREGOR DEVELOPMENT CO.

No. 278P97

Case below: 126 N.C.App. 224

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

FARMAH v. FARMAH

No. 280PA97

Case below: 126 N.C.App. 210

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 23 July 1997.

FORMYDUVAL v. LOCKEY

No. 263P97

Case below: 126 N.C.App. 224

Petition by defendants (Eldiweiss Lockey, Willard Formyduval, and Graolin Formyduval) for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

GOODE v. JENKINS

No. 10A94-3

Case below: 341 N.C. 513

Johnston County Superior Court

Petition by plaintiff for writ of supersedeas and motion for temporary stay denied 27 June 1997. Petition by plaintiff for writ of prohibition to prohibit order of the Honorable Knox V. Jenkins, Jr. denied 27 June 1997.

G. P. PUBLICATIONS, INC. v. QUEBECOR PRINTING—ST. PAUL, INC.

No. 123P97

Case below: 125 N.C.App. 424

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

GRIFFIN v. GRIFFIN

No. 276PA97

Case below: 126 N.C.App. 224

Petition by third party defendants (Michael Griffin, et al) for discretionary review pursuant to G.S. 7A-31 allowed 23 July 1997 as to the issue dealing with the sufficiency of notice given about the hearing on sanctions; as to all other issues denied. Motion by defendants (Jo and David Bullock) to dismiss appeal for lack of substantial constitutional question denied 23 July 1997.

HEDRICK v. PPG INDUSTRIES

No. 286P97

Case below: 126 N.C.App. 354

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

HELBEIN v. SOUTHERN METALS CO.

No. 264P97

Case below: 126 N.C.App. 224

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

HUANG v. WILLIS

No. 302P97

Case below: 126 N.C.App. 632

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

JOHNSON v. MAYO YARNS, INC.

No. 290P97

Case below: 126 N.C.App. 292

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

JOHNSON v. SOUTHERN INDUSTRIAL CONSTRUCTORS, INC.

No. 282PA97

Case below: 126 N.C.App. 103

Petition by Seimans Energy & Automation, Inc. and Zurich-American Insurance Co. for discretionary review pursuant to G.S. 7A-31 allowed 23 July 1997.

JOYNER v. STAR DELIVERY & TRANSFER

No. 200P97

Case below: 125 N.C.App. 743

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

KLUTTZ v. NORFOLK SOUTHERN RAILWAY CO.

No. 279P97

Case below: 126 N.C.App. 224

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

LAXTON v. BETLER

No. 272P97

Case below: 126 N.C.App. 224

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

LOOS v. DUTRO

No. 107P97

Case below: 126 N.C.App. 615

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

MIDDLETON v. RUSSELL GROUP, LTD.

No. 234P97

Case below: 126 N.C.App. 1

Petition by defendant (Life Ins. Co. of Georgia) for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

MONROE v. KING

No. 245P97

Case below: 125 N.C.App. 747

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

MULLIS v. SECHREST

No. 283A97

Case below: 126 N.C.App. 91

Petition by defendant (Sechrest) 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 23 July 1997.

NADEAU v. WILKES SENIOR VILLAGE

No. 222P97

Case below: 125 N.C.App. 747

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

NYE v. ROGERS

No. 203A97

Case below: 125 N.C.App. 743

Motion by plaintiffs (Nye et al) to dismiss appeal allowed 23 July 1997.

PELZER v. UNITED PARCEL SERVICE

No. 289P97

Case below: 126 N.C.App. 305

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

PETERSON v. HOOPER

No. 216P97

Case below: 126 N.C.App. 221

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

ROBBINS v. UNION SECURITY INS. CO.

No. 256P97

Case below: 126 N.C.App. 436

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

SCOTTSDALE INS. CO. v. WEST

No. 233P97

Case below: 126 N.C.App. 221

Petition by defendant (West) for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

SHACKLEFORD v. VARIETY WHOLESALERS, INC.

No. 275P97

Case below: 126 N.C.App. 225

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. BATES

No. 145A91-3

Case below: Yadkin County Superior Court

Petition by Attorney General for writ of supersedeas and motion for temporary stay of the judgment of the Superior Court, Yadkin County allowed 27 June 1997. Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Yadkin County allowed 27 June 1997.

STATE v. BEATTY

No. 255A97

Case below: 126 N.C.App. 225

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 23 July 1997.

STATE v. BOYD

No. 242P97

Case below: 126 N.C.App. 226

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 July 1997.

STATE v. BROWN

No. 271P97

Case below: 126 N.C.App. 226

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. CALL

No. 341A96

Case below: Ashe County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Ashe County denied 23 July 1997.

STATE v. CLARK

No. 267P97

Case below: 122 N.C.App. 396

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 23 July 1997.

STATE v. COCALIS

No. 274A97

Case below: 126 N.C.App. 226

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 July 1997.

STATE v. DICK

No. 293P97

Case below: 126 N.C.App. 312

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. EVANS

No. 109P97

Case below: 125 N.C.App. 301

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Motion by Attorney General to dismiss appeal allowed 23 July 1997.

STATE v. FIELDS

No. 260P97

Case below: 126 N.C.App. 226

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. GOODE

No. 10A94-2

Case below: Johnston County Superior Court

Motion by defendant (Goode) for temporary stay denied 25 June 1997. Petition by Attorney General for writ of supersedeas allowed 25 June 1997. Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Johnston County allowed 25 June 1997. Motion by defendant for temporary stay denied 30 June 1997.

STATE v. GREEN

No. 308A97

Case below: 126 N.C.App. 437

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 23 July 1997.

STATE v. GREEN

No. 235P97

Case below: 126 N.C.App. 222

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 23 July 1997.

STATE v. HARRIS

No. 270P97

Case below: 126 N.C.App. 226

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 July 1997.

STATE v. HILL

No. 247P97

Case below: 126 N.C.App. 226

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. JACKSON

No. 244PA97

Case below: 126 N.C.App. 129

Petition by Attorney General for writ of supersedeas allowed 23 July 1997. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 23 July 1997.

STATE v. JAMES

No. 258P97

Case below: 126 N.C.App. 227

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 23 July 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. JOHNSON

No. 273P97

Case below: 126 N.C.App. 227

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 July 1997.

STATE v. LATTIMORE

No. 254P97

Case below: 124 N.C.App. 460

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of appeals denied 23 July 1997.

STATE v. LEGRANDE

No. 215A96

Case below: Stanly County Superior Court

Motion by defendant (LeGrande) to dismiss capital appeal denied 23 July 1997.

STATE v. McCRAY

No. 248P97

Case below: 117 N.C.App. 465

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 23 July 1997.

STATE v. PERSON

No. 269P97

Case below: 126 N.C.App. 227

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 July 1997.

STATE v. RAINEY

No. 227P97

Case below: 125 N.C.App. 213

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 23 July 1997.

STATE v. ROBINSON

No. 243P97

Case below: 126 N.C.App. 228

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. ROPER

No. 284P97

Case below: 126 N.C.App. 228

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

STATE v. STURDIVANT

No. 311P97

Case below: 126 N.C.App. 439

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 July 1997.

STATE v. WILLIAMSON

No. 312P97

Case below: 126 N.C.App. 439

Petition by defendant for writ of supersedeas and motion for temporary stay denied 7 July 1997.

STATE v. WILLIS

No. 236P97

Case below: 126 N.C.App. 223

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 July 1997.

STRATFORD METAL FINISHING v. OLD SALEM, INC.

No. 296P97

Case below: 126 N.C.App. 436

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

WALKER v. METRIC CONSTRUCTORS, INC.

No. 294P97

Case below: 126 N.C.App. 436

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 23 July 1997.

WHITFIELD v. GILCHRIST

No. 287PA97

Case below: 126 N.C.App. 241

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 23 July 1997.

WIGGINS v. BUSHRANGER FENCE CO.

No. 239P97

Case below: 126 N.C.App. 74

Petition by appellants (Budget and Cigna) for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

WILKES NATIONAL BANK v. HALVORSEN

No. 259P97

Case below: 126 N.C.App. 179

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 July 1997.

WILLIAMS v. DANAC, INC.

No. 281P97

Case below: 126 N.C.App. 229

Motion by both parties to withdraw petition for discretionary review allowed 23 July 1997.

WILMINGTON STAR-NEWS v. NEW HANOVER REGIONAL MEDICAL CENTER

No. 54PA97

Case below: 125 N.C.App. 174

Motion by third-party respondent (United Healthcare) to withdraw petition for discretionary review and dismiss appeal allowed 23 July 1997.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, FRONTIER UTILITIES OF NORTH CAROLINA, INC. (APPLICANT-INTERVENOR), THE PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION (INTERVENOR), AND MICHAEL F. EASLEY, ATTORNEY GENERAL (INTERVENOR) v. PIEDMONT NATURAL GAS COMPANY, INC. (APPLICANT-INTERVENOR)

No. 252PA96

(Filed 24 July 1997)

1. Utilities § 321 (NCI4th)— appellate review—substantial evidence test

In reviewing a decision by the Utilities Commission, it is not the function of the appellate court to determine whether there is evidence to support a position the Commission did not adopt. Rather, the test is whether, in view of the entire record, the Commission's findings and conclusions are supported by substantial, competent, and material evidence.

Am Jur 2d, Administrative Law §§ 211, 521, 522, 530, 542.

Supreme Court's views as to what constitutes factual issue under "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a), providing that findings of fact shall not be set aside unless clearly erroneous. 72 L. Ed. 2d 890.

2. Utilities § 321 (NCI4th)— credibility of testimony—Utilities Commission decision—presumption of consideration of competent evidence

The credibility of the testimony and the weight to be accorded it are for the Utilities Commission to decide, and the appellate court will presume that the Commission gave proper consideration to all competent evidence presented.

Am Jur 2d, Administrative Law §§ 211, 521, 522, 530, 542.

Supreme Court's views as to what constitutes factual issue under "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a), providing that findings of fact shall not be set aside unless clearly erroneous. 72 L. Ed. 2d 890.

3. Utilities § 48 (NCI4th)— natural gas service—two applicants—proposed sources of funding—supporting evidence for certificate award

The Utilities Commission did not act arbitrarily and capriciously by giving the greatest weight to the proposed sources of funding in deciding between two applicants for a certificate of public convenience and necessity to provide natural gas service to a four-county area. Furthermore, there was substantial evidence in the record to support the Utilities Commission's award of the final certificate to a newly formed local distribution company (Frontier) rather than to a previously existing company (Piedmont) where Frontier proposed to use traditional financing and Piedmont was unwilling to provide the service without expansion fund financing; the Commission found that it would be inappropriate under N.C.G.S. § 62-158 to allow expansion funds to be used if a feasible alternative was available; credible evidence was presented that it was feasible to provide natural gas service to the area using traditional rather than expansion fund financing; the Commission found that both Piedmont and Frontier had made a *prima facie* case that they were qualified and capable of providing natural gas service to the area; Frontier proposed a much more extensive rural distribution system than did Piedmont and had a much shorter construction schedule; the Commission considered the rights, interests, and preferences of the citizens of the four-county area; and although Piedmont's proposed rates were lower, Frontier's proposed rates were considerably less than the cost of alternative energy sources.

Am Jur 2d, Public Utilities §§ 323-330.

Requirement that public contract be awarded on competitive bidding as applicable to contract for public utility. 81 ALR3d 979.

4. Utilities § 233 (NCI4th)— natural gas service—two applicants—procedures and evidence rulings

The Utilities Commission's procedures for receiving evidence from both applicants for a certificate of public convenience and necessity to provide natural gas service to a four-county area (Frontier and Piedmont) and its rulings with regard to the admissibility of that evidence were proper where the Commission established prefiling dates for the filing of testimony, exhibits, and rebuttal testimony; supplemental evidence filed by Piedmont

in the nature of rebuttal of the Public Staff's testimony was admitted, and new evidence in the nature of additional direct testimony was excluded; the Commission noted that the ruling did not foreclose the consideration of the excluded evidence at a later time, but Piedmont never tendered the evidence again; evidence offered by Piedmont to show that it could finance the project without using an expansion fund was later contradicted by Piedmont's letter declining a conditional certificate on the ground that Piedmont considered the project to be financially infeasible without the use of an expansion fund; the Commission issued a conditional certificate to Frontier and required Frontier to meet ten conditions for a final certificate; Frontier filed testimony and exhibits to show that these conditions had been met; and Piedmont was given the opportunity to offer evidence to contradict this additional information but declined to do so. Piedmont was given notice at all stages of the proceeding and was given the same opportunities as Frontier to present direct, supplemental, and rebuttal evidence.

Am Jur 2d, Administrative Law §§ 350, 353, 371; Evidence § 470; Public Utilities §§ 323-330.

5. Utilities § 48 (NCI4th)— certificate for natural gas service—reason distribution company formed—finding supported by evidence

Substantial evidence supported a finding by the Utilities Commission that a new local distribution company was formed to develop a rural natural gas system to provide service to four counties where the new company first applied for a certificate to serve only three counties because it did not wish to oppose an existing company in the fourth county, and the new company filed its application to serve all four counties after the existing company applied to serve all four counties.

Am Jur 2d, Administrative Law §§ 414, 522, 537; Public Utilities §§ 317, 329, 330.

6. Utilities § 48 (NCI4th)— certificate for natural gas service—length of distribution system—finding supported by evidence

Substantial evidence supported the Utilities Commission's finding that an applicant's proposed natural gas distribution system was in excess of 428 miles, despite a finding by the

Commission in an earlier order that the applicant's proposed project included 718 miles of distribution main.

Am Jur 2d, Administrative Law §§ 414, 522, 537; Public Utilities §§ 317, 329, 330.

7. Utilities § 48 (NCI4th)— certificate for natural gas service—length of applicant's distribution main—finding supported by evidence

A finding by the Utilities Commission that a previously existing local distribution company proposed to construct only 215 miles of natural gas distribution main was supported by testimony of the company's own witness that the core system of 215 miles described in the company's application would be the complete system installed to serve area customers.

Am Jur 2d, Administrative Law § 542.

8. Utilities § 27 (NCI4th)— certificate for natural gas service—competing applicants—expansion fund

The evidence supported the Utilities Commission's finding that Piedmont's proposal to provide natural gas service to a four-county area was contingent upon 30% or more of the capital being provided from an expansion fund where Piedmont's certificate application requested approval to use an expansion fund to finance the project, and Piedmont declined a conditional certificate on the ground that it was not economically feasible to construct and operate the project without the use of expansion funds. Furthermore, there was no merit to Piedmont's argument that it was not provided the same opportunities as the competing applicant (Frontier) to demonstrate that the project could be completed with traditional financing where Frontier proposed *ab initio* to use only traditional financing, whereas Piedmont originally requested the use of expansion funds and never waivered from that position.

Am Jur 2d, Administrative Law §§ 414, 522, 537; Public Utilities §§ 323-330.

9. Utilities § 27 (NCI4th)— certificate for natural gas service—competing applicants—traditional versus expansion fund financing—necessity for granting certificate to traditional financing applicant

The evidence supported the Utilities Commission's finding that its failure to grant a final certificate to Frontier to provide

natural gas service to a four-county area would likely result in no natural gas being available in these counties in the foreseeable future, notwithstanding Piedmont has also applied to serve this area, where Piedmont refused to provide service to this area without the use of expansion funds, and the Commission concluded that it would be inappropriate under N.C.G.S. § 62-158 to allow expansion funds because traditional financing is feasible.

Am Jur 2d, Administrative Law §§ 414, 522, 537; Public Utilities §§ 323-330.

10. Utilities § 48 (NCI4th)— certificate for natural gas service—competition for corporate resources—finding supported by evidence

The evidence supported the Utilities Commission's finding that a four-county area would have to compete for limited corporate resources if Piedmont is granted the certificate to provide natural gas service to this area where Piedmont's self-documented current customer growth rate is among the highest nationally, and the area would have to compete with Piedmont's currently franchised markets for construction expenditures.

Am Jur 2d, Administrative Law §§ 414, 522, 537; Public Utilities §§ 323-330.

11. Utilities § 254 (NCI4th)— certificate for natural gas service—market study—substantial compliance with proposal—admissibility

While an independent market study required as a condition of a final certificate for providing natural gas service to a four-county area differed from Frontier's initial proposal with regard to the pace of construction and development of the distribution system, the study was in substantial compliance with Frontier's preliminary proposal, and the Utilities Commission properly denied Piedmont's motion to dismiss Frontier's filing of the study, where the study covers basically the same geographic service area, serves the same markets, uses the same rate structure, involves the same construction and engineering issues, and costs approximately the same.

Am Jur 2d, Administrative Law §§ 350, 353.

12. Utilities § 27 (NCI4th)— certificate for natural gas service—expansion fund—franchise areas

Any proclaimed right a local distribution company has to the creation and use of an expansion fund is limited to those areas in which it possesses a certificate of public convenience and necessity and does not extend to unfranchised areas which are the subject of competing certificate applications. N.C.G.S. § 62-158.

Am Jur 2d, Franchises § 62; Pipelines § 22; Public Utilities § 329

13. Utilities § 27 (NCI4th)— certificate for natural gas service—competing applicants—traditional rather than expansion fund financing—public interest and policy goals

The Utilities Commission could properly determine that the method of financing of natural gas service for a four-county area takes precedence over the limited differential between the rates proposed by Piedmont versus those proposed by Frontier and that it is in the public interest and in accordance with the policy goals of this state to pursue gas expansion through traditional rather than expansion fund financing if such an alternative is reasonably available.

Am Jur 2d, Public Utilities §§ 201, 326.

Requirement that public contract be awarded on competitive bidding as applicable to contract for public utility. 81 ALR3d 979.

14. Utilities § 27 (NCI4th)— certificate for natural gas service—competing applicants—economic feasibility—expansion funds—net present value method not required

The Utilities Commission did not improperly fail to employ the net present value (NPV) method of analysis to determine whether extension of natural gas service into a four-county area was economically feasible pursuant to N.C.G.S. § 62-158(c) since (1)the Commission must apply the NPV method only in evaluating the feasibility of a single proposal, not when there are competing applicants, one of which conclusively demonstrates the economic feasibility of a project using traditional rather than expansion fund financing; and (2) the record indicates that one applicant (Piedmont) repeatedly asserted that the extension of natural gas service into the four-county area had a negative NPV and could only be accomplished with the aid of expansion funds,

whereas the second applicant (Frontier) demonstrated with empirical data and studies that a positive NPV project was possible.

Am Jur 2d, Public Utilities §§ 138, 197.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of a final order of the North Carolina Utilities Commission entered 30 January 1996 in Docket Nos. G-38 and G-9, Sub 357, and of previous orders upon which the final order is based. Heard in the Supreme Court 15 November 1996.

Petree Stockton, L.L.P., by James P. Cain, M. Gray Styers, Jr., and Teresa DeLoatch, for applicant-intervenor-appellee Frontier Utilities of N.C.

Robert P. Gruber, Executive Director, by Gisele L. Rankin, Staff Attorney, for intervenor-appellee the Public Staff.

Michael F. Easley, Attorney General, by J. Mark Payne, Assistant Attorney General, intervenor-appellee.

Amos & Jeffries, L.L.P., by Jerry W. Amos and Russell M. Robinson, III, for applicant-intervenor-appellant Piedmont Natural Gas Co.

Simpson Aycock, P.A., by Dan R. Simpson, on behalf of Representative George M. Holmes, Representative Rex L. Baker, Representative John W. Brown, Representative Bill S. Hiatt, Representative Gene Wilson, Senator Daniel R. Simpson, Senator Donald R. Kincaid, Senator Don W. East, and Senator Virginia Ann Foxx, amici curiae.

WHICHARD, Justice.

This appeal involves competing applications filed by Frontier Utilities of North Carolina, Inc. (Frontier) and Piedmont Natural Gas Company, Inc. (Piedmont) to provide natural gas service to Surry, Wilkes, Watauga, and Yadkin Counties (Four-County area).

On 23 September 1994 Frontier, a newly formed local distribution company (LDC), filed an application for a certificate of public convenience and necessity to construct, own, and operate an intrastate pipeline facility and local distribution system and for establishment of rates for that system. Frontier requested authority to serve the Four-County area. On 27 September 1994 Piedmont also filed an

application seeking a certificate to serve the Four-County area or, in the alternative, a declaration that Piedmont's existing certificates authorize it to construct the necessary facilities to extend natural gas service to the unserved counties. Frontier proposed to fund its project with traditional debt and equity financing. Piedmont's application indicated that expansion of service into the Four-County area would be economically feasible only if Piedmont could use funds from an expansion fund.[1] Piedmont subsequently filed a petition requesting authority to use expansion funds for a project to serve the Four-County area.

By order dated 21 October 1994, the Commission consolidated the two applications for hearing, required public notice, and established intervention and filing deadlines. A public hearing was set for 1 December 1994 in Wilkesboro, with the hearing continuing in Raleigh on 31 January 1995. The Commission invited briefs on the question of whether Piedmont was entitled to extend natural gas service to the Four-County area under its existing certificates as territory contiguous to territory Piedmont already occupied. The Commission ultimately concluded that there was considerable "unoccupied" territory between those areas already serviced by Piedmont and the unserved Four-County area. The Commission therefore denied Piedmont's alternative claim for authority to serve the Four-County area pursuant to the "contiguous" proviso of N.C.G.S. § 62-110(a).

Forty-eight persons testified as public witnesses at the hearing in Wilkesboro. During the second phase of the hearing in Raleigh, seven more public witnesses testified in addition to testimony presented by Piedmont, Frontier, and the Public Staff. At the conclusion of this hearing, the Commission ordered the Public Staff to file by 21 February 1995 supplemental testimony setting forth its recommendation. On 6 March 1995 Piedmont filed supplemental rebuttal testimony relating to Frontier's inability to adequately service the Four-County area and relating to the desires of the citizens of the area. The hearing subsequently reconvened on 7 March 1995 to receive the supplemental testimony and recommendation of the Public Staff. Frontier objected to the majority of the supplemental evidence offered by Piedmont on the grounds that it was new, direct evidence. The Commission sustained the objection and limited presentation of

1. Expansion fund financing involves the use of refunds from gas suppliers or other sources for construction of appropriate and authorized natural gas facilities that otherwise would not be feasible, pursuant to N.C.G.S. § 62-158.

evidence to evidence intended to rebut the testimony of the Public Staff. Thereafter, the Public Staff recommended that Frontier be awarded a certificate, conditioned upon Frontier's submitting ten specified studies, analyses, and other evidence, and that a further hearing be scheduled for the limited purpose of determining whether Frontier satisfied these conditions.

Contrary to the recommendation of the Public Staff, the Commission issued an order on 19 June 1995 giving Piedmont the option of accepting a certificate subject to the condition, *inter alia*, that Piedmont would not use any expansion funds for construction of the Four-County area project. The condition was based on the Commission's conclusion that allowing the construction of a project using expansion fund financing when adequate service could be provided without resort to such nontraditional financing was inconsistent with the legislative intent expressed in N.C.G.S. § 62-158. By letter filed 10 July 1995, Piedmont declined to accept the conditional certificate, stating that it could not construct a safe, reliable, and economically viable transmission and distribution system in the Four-County area without the use of expansion funds.

On 20 July 1995 the Commission issued an order granting a conditional certificate to Frontier and scheduling a further hearing. The Commission required Frontier to complete and file ten specified items, including market and economic feasibility studies conducted by an independent consultant, information concerning system design, gas supply and capacity arrangements, construction contracts, and financing plans. A hearing limited to whether Frontier had met the conditions was scheduled to commence 12 December 1995.[2]

Frontier timely filed testimony and exhibits in satisfaction of the ten conditions on 18 October 1995. On 7 November 1995 Piedmont filed a motion to dismiss the filing on the grounds that Frontier's market study evaluated a proposal substantially different than Frontier's original proposal. The Commission deferred ruling pending the 12 December hearing already scheduled. During November a number of towns, economic development groups, and individuals filed petitions to intervene. The Commission denied these petitions on the grounds

2. Piedmont attempted to appeal this order by notice of appeal filed 18 August 1995. Piedmont filed the settled record on appeal for this appeal on 5 December 1995. On 6 December 1995 Frontier filed a motion to dismiss and a supporting brief. The Public Staff and the Attorney General filed similar motions on 8 December and 12 December 1995, respectively. By order dated 3 January 1996, the Court of Appeals dismissed the appeal as interlocutory.

that they were untimely and would result in delay in the proceedings. The order provided, however, for additional public witness testimony, and any persons and groups who filed petitions to intervene were permitted to testify as public witnesses.

The second phase of the proceedings came on for hearing on 12 December 1995 as scheduled. The Commission issued a prehearing order stressing that the 12 December hearing would be limited to the issue of the adequacy of the information filed by Frontier in satisfaction of the ten conditions enumerated in the conditional certificate granted to Frontier. Nine public witnesses testified at the hearing. Frontier and the Public Staff presented the testimony of four and three witnesses, respectively. On 30 January 1996 the Commission issued an order awarding a final certificate to Frontier to provide natural gas service to the Four-County area.

On 28 February 1996 Piedmont requested a rehearing of the 30 January order and an opportunity for oral argument on this request. The Commission denied the request without hearing oral argument. On 15 March 1996 Piedmont filed its notice of appeal of the Commission orders that culminated in the 30 January order granting a final certificate to Frontier. The record on appeal was filed with the Court of Appeals on 28 May 1996. On 26 June 1996 this Court allowed petitions by Frontier, the Public Staff, and Piedmont for discretionary review prior to a determination by the Court of Appeals.

Piedmont first challenges two substantive aspects of the Commission's findings of fact and resulting conclusions of law. Piedmont argues that the Commission erred by failing to consider the expressed preferences of the citizens of the Four-County area and by failing to adopt any findings of fact or conclusions of law with respect to this public sentiment. Piedmont asserts that recognition of customer preferences enhances economic development and is therefore of paramount importance to the decision of awarding a certificate of public convenience and necessity. Here, public testimony weighed heavily in support of Piedmont's serving the Four-County area. Piedmont received the overwhelming support of the public witnesses who testified; the nine legislators who represent the Four-County area determined that the public interest favored Piedmont; and the Yadkin County, Surry County, Town of Wilkesboro, and Town of Mount Airy Commissioners all determined that Frontier's higher rates would adversely affect economic development in their respective communities. Piedmont contends that, despite this overwhelm-

ing support, the Commission did not make a single finding of fact with respect to consumer preferences.

Piedmont also argues that the Commission's decision to award the final certificate to Frontier is compromised by the Commission's own finding that Piedmont is the best-qualified applicant to provide natural gas service to the Four-County area. In its 19 June 1995 order, the Commission found as factors favorable to Piedmont that (1) Piedmont has lower rates and more experience than Frontier, as well as an existing, large customer base; (2) Piedmont has an extensive operations and maintenance training program and is well equipped to handle emergency situations; (3) Piedmont has a diverse, well-balanced portfolio of gas supplies already under contract, enabling it to provide reliable service to the Four-County area; and (4) Piedmont is in a superior position to absorb the losses if demand for gas is less than projected. Piedmont argues that the Commission's disregard of its own prior determinations of which utility could best serve the Four-County area, as well as neglect of public testimony, constitutes error of law requiring reversal of the 30 January 1996 order awarding the certificate to Frontier and reissuance of the Commission's 19 June 1995 order granting a certificate to Piedmont.

North Carolina General Statutes section 62-110 requires that any entity desiring to provide a public utility service must obtain a certificate of public convenience and necessity from the Commission prior to beginning the construction or operation of a public utilities facility. N.C.G.S. § 62-110(a) (1989). "[W]hat constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration." *State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963) (quoting *Utilities Comm'n of N.C. v. Great Southern Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943)). "The convenience and necessity required are those of the public and not of an individual or individuals." *Id.* Therefore, in adjudicating between two competing certificate applicants, it is for the Commission to weigh and balance a myriad of factors in an effort to protect the interests and welfare of the general public.

[1],[2] The scope of appellate review of a decision by the Commission is provided in N.C.G.S. § 62-94. The reviewing court

> may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

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

(6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (1989). It is not the function of this Court to determine whether there is evidence to support a position the Commission did not adopt. *State ex rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987). Rather, the test is whether, in view of the entire record, the Commission's findings and conclusions are supported by substantial, competent, and material evidence. *Id.* The credibility of the testimony and the weight to be accorded it are for the Commission to decide, *State ex rel. Utilities Comm'n v. City of Durham*, 282 N.C. 308, 322, 193 S.E.2d 95, 105 (1972), and this Court presumes that the Commission gave proper consideration to all competent evidence presented, *State ex rel. Utilities Comm'n v. Thornburg*, 316 N.C. 238, 245, 342 S.E.2d 28, 33 (1986). This Court may not properly set aside the Commission's recommendation merely because different conclusions could have been reached from the evidence. *State ex rel. Utilities Comm'n v. General Tel. Co. of Southeast*, 281 N.C. 318, 354, 189 S.E.2d 705, 728 (1972).

[3] With these principles in mind, we consider whether there is substantial evidence, in view of the entire record, to support the position the Commission adopted. The Commission determined that Frontier, rather than Piedmont, should be awarded the final certificate of public convenience and necessity to provide natural gas service to the Four-County area. The decision ultimately turned on whether use of an expansion fund pursuant to N.C.G.S. § 62-158 was appropriate where credible evidence had been presented that adequate service could be provided to the Four-County area without resort to such nontraditional financing. The Commission concluded that "to the extent it has been demonstrated that adequate service can be provided to unserved counties using traditional financing, state law and policy require that the feasible option be pursued." In support of this

conclusion, the Commission relied upon the following evidence, findings of fact, and conclusions of law.

The Commission first emphasized that "it would be inappropriate and inconsistent with the legislative intent expressed in N.C.G.S. § 62-158 to allow expansion funds to be used in this case because an alternative that appeared to be feasible is available." In support of this position, the Commission cited the Public Staff's testimony that using expansion fund financing when a feasible alternative was available would not be consistent with legislative intent. If Frontier could serve the Four-County area using traditional financing, the supplier refunds currently being held by Piedmont for inclusion in the expansion fund could be used to extend natural gas service to other unserved areas. The Commission also noted the Public Staff's testimony with regard to the limited availability of expansion funds.

The Commission further explained that the express terms of N.C.G.S. § 62-158 provide for the use of an expansion fund only when construction of natural gas facilities in the territory at issue would otherwise be economically infeasible. Given this legislative mandate, it would be inappropriate to grant a certificate premised on the use of expansion fund financing where another applicant has offered credible evidence that adequate service can be provided without such nontraditional financing.

The Commission next focused on the production of credible evidence that traditional financing was indeed economically feasible. Specifically, the Commission found that detailed market and economic feasibility studies prepared by an independent consultant conclusively demonstrated that it was feasible to provide natural gas service to the Four-County area using traditional, rather than expansion fund, financing. The evidence in support of this finding was contained in the testimony and exhibits of Scott Heath of Heath and Associates, Inc.; Frontier witnesses Robert Oxford and Steven Shute; and the Public Staff panel.

Heath, president of Heath and Associates and a registered professional engineer, testified that Heath and Associates was hired to conduct an independent detailed market survey and economic feasibility study. Heath testified that in order to identify, compare, and prioritize the market potential of the residential and commercial customers, the populated areas within the Four-County area were divided into fifty-three study areas. The project areas represented over 170 square miles and over 600 miles of roads. Heath testified

that the market survey demonstrated that the Four-County area has sufficient industrial, commercial, and residential loads to support an independent gas utility. Industrial loads of approximately three million dekatherms per year were identified as potential sales for Frontier. The approximately 428 miles of distribution main would make gas available to 16,000 residential and 1,500 commercial customers; additional residential and commercial markets exist in more rural areas and may also become economically attractive opportunities for Frontier. There are also approximately 500 poultry farms that represent potential gas loads within the Four-County area, with between 225 and 325 of these being economical to connect.

In addition to the market study, Heath testified that Heath and Associates performed a detailed feasibility study using (1) information provided in the market study, (2) construction and other costs developed after review of Frontier's design of the pipelines necessary to serve the Four-County area, (3) the costs of gas supply and capacity, and (4) the proposed retail rates Frontier would offer to its customers. Based on the results of the economic feasibility study, Heath testified that a natural gas utility could construct and operate an economically feasible, positive net present value (NPV) project within the Four-County area. He also testified that Frontier's proposed retail gas rates must be set higher than other established utilities to generate the revenue needed to make the project feasible. These rates should not, however, inhibit Frontier's ability to connect customers and maintain sales to industrial customers. In sum, Heath found Frontier's project economically feasible.

Frontier also offered the testimony of Robert J. Oxford, chairman of the board and president of Frontier, and Steven Shute, an officer and shareholder of Frontier and a registered professional engineer specializing in rural gas utilities. Both testified that the Heath and Associates report demonstrates that the potential customers and loads identified by Frontier in the Four-County area can be converted to natural gas at the full range of rates and rate designs that Frontier proposed for approval. In addition, they offered evidence that the system design would provide adequate and reliable service.

The Public Staff witnesses testified that based on their review of the market study, construction cost estimates, and financing plans for the Frontier project, they agreed with Heath's conclusion regarding the economic feasibility of the project. They further testified that they had reviewed the system design and verified the flow calcula-

tions provided by Frontier and had concluded that the design proposed by Frontier was adequate.

From this and other testimony, the Commission concluded that the Heath and Associates studies prove that Frontier's proposed 428-mile, predominantly rural distribution system, which covers twice as many miles as Piedmont's proposal, is feasible using traditional financing. It will make natural gas service available to more citizens and businesses with the attendant opportunities for economic development.

Finally, the Commission noted that Frontier was the only applicant willing to provide service to the Four-County area using traditional financing and that it had adequately satisfied the ten conditions set forth in the Commission's 20 July 1995 order. These circumstances, coupled with Piedmont's unwillingness to provide service without the use of expansion fund financing, persuaded the Commission that public convenience and necessity required that Frontier be awarded the final certificate.

We are cognizant of Piedmont's argument that the Commission's focus on the issue of expansion fund versus traditional financing was arbitrary and capricious under N.C.G.S. § 62-94(b)(6). Piedmont asserts that an Idaho case, *In re Applications of Intermountain Gas Co.*, 77 Idaho 188, 289 P.2d 933 (1955), is instructive on the question of whether the Commission's decision to focus on a single factor, in disregard of other competing factors, is arbitrary and capricious. In *Intermountain Gas* the Idaho Public Service Commission issued a certificate to Idaho Natural Gas rather than Intermountain Gas. The Commission's approval of the Idaho Natural proposal rested upon speculation as to future service possibilities. The Idaho Supreme Court reversed the Commission's order, stating that "[a]n order based upon a finding made without evidence, or upon a finding made upon evidence which clearly does not support it, is an arbitrary act against which courts afford relief." *Id.* at 202, 289 P.2d at 942 (citations omitted).

Intermountain Gas is clearly distinguishable from the circumstances presented here. Here, the Commission based its decision on tangible evidence and express testimony rather than speculative considerations. Further, the Commission considered a multitude of factors before awarding the certificate to Frontier. The Commission found persuasive, *inter alia*, that Frontier proposed a much more extensive rural distribution system than did Piedmont, thus increasing potential economic development; that Frontier had a much

shorter construction schedule than Piedmont; that new companies such as Frontier should be encouraged to come to North Carolina to provide utility service to citizens of our state who are now without service; and that Frontier agreed to file a final financing plan as a way of satisfying any concerns raised during the proceedings. Further, contrary to Piedmont's assertions, the record indicates that the Commission carefully considered the rights, interests, and preferences of the citizens of the Four-County area. The Commission stated that over 150 people attended the public hearing in Wilkesboro and acknowledged that "a number of the public witnesses testified for Piedmont, citing its lower rates." However, Frontier's proposed rates were considerably less than the cost of alternative energy sources in the Four-County area; and in an effort to protect consumer interest, the Commission strongly discouraged Frontier from raising its rates at any point over the next five years.

No law prohibits the Commission from giving one factor greater weight than any other. The Commission found that both Piedmont and Frontier had made a *prima facie* case that they were qualified and capable of providing natural gas service to the Four-County area. This finding necessarily required the Commission to weigh the relative importance of other, external factors. Based on its interpretation of the legislative intent of the gas expansion statutes, the Commission gave the greatest weight to the sources of funding proposed by the two applicants.

A determination by the Commission is considered *prima facie* just and reasonable. *State ex rel. Utilities Comm'n v. Ray*, 236 N.C. 692, 697, 73 S.E.2d 870, 874 (1953). The burden is on the appellant to demonstrate an error of law in the proceedings. *State ex rel. Utilities Comm'n v. Champion Papers, Inc.*, 259 N.C. 449, 456, 130 S.E.2d 890, 895 (1963). To be arbitrary and capricious, the Commission's order would have to show a lack of fair and careful consideration of the evidence or fail to display a reasoned judgment. *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 515, 334 S.E.2d 772, 776 (1985). Based on a review of the whole record, we conclude that Piedmont has not sustained its burden of demonstrating either that the Commission's order was unsupported by competent, material, and substantial evidence or that the order failed to display a reasoned judgment.

[4] Piedmont next challenges two procedural aspects of the Commission proceedings. Piedmont asserts first that the Commission allowed Frontier to amend its proposal and to offer additional evi-

dence without providing a similar opportunity to Piedmont. Piedmont further contends that the Commission excluded evidence properly offered by Piedmont in rebuttal to the testimony of the Public Staff. Piedmont argues that the Commission's procedures were unlawful, arbitrary, and capricious; in excess of the Commission's statutory authority; and violative of Piedmont's rights to due process.

The Commission established prefiling dates at the outset of the proceedings which allowed for the filing of testimony, exhibits, and rebuttal testimony. The Commission ordered that the direct testimony and exhibits of Frontier and Piedmont had to be filed by 23 November 1994, that the direct testimony and exhibits of the Public Staff had to be filed by 11 January 1995, and that rebuttal testimony of Frontier and Piedmont had to be filed by 23 January 1995. Pursuant to this order, Piedmont filed the direct testimony of three Piedmont executives as well as thirty-eight pages of rebuttal testimony from the same three witnesses, all of which was admitted into evidence. On 8 February 1995 the parties agreed that the Public Staff would file additional testimony to make its recommendation and that the hearing would reconvene on 7 March 1995 for the presentation of that testimony. On the afternoon of 6 March 1995, Piedmont filed and served twenty-six pages of "Supplemental Rebuttal Testimony" and seventy-nine pages of new exhibits. Among other things, Piedmont offered evidence that Frontier's proposal would cost in excess of $77 million, rather than $46.9 million as projected by Frontier, and that Piedmont could, in fact, finance the project without using any expansion funds. At the hearing the following day, Frontier objected to those portions of the evidence that contained new information and that were not offered to rebut the recommendation of the Public Staff. The Commission ruled that evidence presented would be confined to the rebuttal of the Public Staff's testimony. However, the Commission explicitly noted that the ruling did not foreclose the possibility of considering the testimony at a later time. Thereafter, the evidence that was in the nature of rebuttal testimony was admitted, and the new testimony that was in the nature of additional direct testimony was excluded.

Despite the Public Staff's recommendation that Frontier be awarded the certificate, the Commission conditionally offered the certificate to Piedmont. Piedmont declined the certificate on the grounds that it could not adequately service the Four-County area without the use of expansion funds. Based upon evidence presented at the hearings in late 1994 and early 1995, the Commission issued an

order on 20 July 1995 giving Frontier the option of accepting a conditional certificate. The Commission required Frontier to complete and file ten specified items and scheduled a meeting in December 1995 to determine whether Frontier adequately met the required conditions. In response to the order, Frontier filed thirty-three pages of testimony, explaining and authenticating over 920 pages of exhibits in satisfaction of the conditions. The hearings for this phase of the proceedings were held 12-14 December, after which the Commission issued its final order awarding a certificate to Frontier.

The Commission has been given the authority and responsibility for regulating public utilities, and in doing so it is allowed to exercise its discretion and judgment. The procedure before the Commission is relatively informal; and the Commission, in the absence of any statutory inhibition, may regulate its own procedures and adopt reasonable rules and regulations. *State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev. Inc.*, 257 N.C. 560, 569, 126 S.E.2d 325, 332 (1962). In this case the Commission established prefiling dates and scheduling orders necessary for the orderly conduct of its business. Piedmont was given notice at all stages of the proceedings and afforded the same opportunities as Frontier to present direct, supplemental, and rebuttal evidence. For example, at the 7 March 1995 hearing, the Commission specifically stated that the evidence excluded at that hearing could be relevant at a later proceeding; yet Piedmont never tendered the evidence again. Moreover, the evidence offered by Piedmont to show that it could finance the project without using an expansion fund was later contradicted by Piedmont's letter declining the conditional certificate offered by the Commission on the grounds that Piedmont considered the project to be financially infeasible without the use of an expansion fund. Piedmont's argument that Frontier was permitted to amend its proposal, while Piedmont was not, ignores the fact that Frontier was *required* by the Commission to file additional testimony in support of its application. Indeed, Piedmont was given the time and opportunity at the 12 December hearing to offer evidence against this additional information required of Frontier but apparently chose not to exercise that option. In sum, we conclude that the Commission's procedures for receiving evidence from both Frontier and Piedmont and its rulings with regard to the admissibility of that evidence were proper in all respects.

Piedmont next argues that the Commission made numerous findings not supported by competent, material, and substantial evidence.

We have already determined that the Commission's final order was properly supported by the evidence presented at all relevant stages of these proceedings. We nevertheless address each of Piedmont's contentions.

[5] Piedmont first challenges the Commission's finding in its 20 July 1995 order that Frontier was formed to develop a rural natural gas system to provide service to Surry, Watauga, Wilkes, and Yadkin Counties. Piedmont contends that the undisputed evidence shows that Frontier was formed to provide service to Wilkes, Surry, and Yadkin Counties and that Watauga County was added only after Piedmont filed its application. Piedmont submits that the Commission may have been influenced by Frontier's prior filing, and therefore the challenged finding was prejudicial to Piedmont's application.

The evidence indicates that Oxford, president of Frontier, initially identified Wilkes County as one of the larger unserved counties in the eastern United States. He testified that he and his associates set up a meeting with representatives of Wilkes County, which was later expanded to include Surry and Yadkin Counties at the request of the Wilkes County officials. Oxford performed an extensive study of the area in March 1994 and decided to apply for a certificate. In April he contacted Watauga County officials and subsequently performed a preliminary feasibility study in that county. However, Oxford's conversations with Piedmont led him to believe that Piedmont favored Watauga over the other three counties. Because Frontier did not wish to oppose Piedmont, Frontier applied for a certificate to service only Wilkes, Yadkin, and Surry Counties. It was only after Piedmont filed its application to serve all four counties, in contravention of what Oxford and Frontier had been led to believe, that Frontier amended its application to include Watauga County. We conclude from the evidence as to this evolution of events that the Commission had adequate support for the finding in question and that Piedmont was not prejudiced thereby.

[6] Piedmont's second argument is that in its 20 July 1995 order, the Commission found Frontier's proposed project to include 718 miles of distribution mains, while in its 30 January 1996 order, the Commission found Frontier's project to be in excess of 428 miles. Piedmont asserts that it was inappropriate for the Commission to change the number of pipeline miles and that there is no evidence to support the number upon which the Commission ultimately relied.

Review of the record reveals that Frontier's initial proposal contained 718 miles of distribution main, which included 115 miles of distribution main running parallel with transmission main. One of the conditions imposed by the Commission on Frontier was that an independent consultant perform a market study. As a result, Frontier filed an analysis prepared by Heath and Associates as to how Heath expected the distribution system to evolve. On cross-examination Scott Heath made clear that the report prepared by his company was not Frontier's proposal but rather an independent assessment. Heath testified that an extensive rural distribution system with an *initial* distribution system of 428 miles could feasibly be constructed; he did not rule out the possibility of a bigger system, depending upon the exact geographical area serviced. In any event, the 428-mile system evaluated by Heath and Associates included farm taps instead of parallel distribution main, so it eliminated 115 miles of distribution main without eliminating any miles of actual natural gas availability.

Further, on cross-examination Frontier witness Shute explained that Frontier's original market survey was compiled using statistical data. Based on 1990 census data, Frontier estimated the number of households it would reach with a given number of miles of distribution line and then calculated conversions from that data. The Heath study, on the other hand, was done on the basis of actually driving down each road within the fifty-three study areas and counting houses, a method which obviously produces a more precise calculation. Shute also testified that Frontier analyzed several areas outside of Heath's fifty-three study areas, including Miller's Creek and Fair Plains, which constituted approximately 143 miles of additional distribution mains and 5,000 more residential customers. Frontier intends to construct these miles of distribution mains and serve these customers. Based on this evidence, the Commission could conclude that the distribution system included in the Heath report, standing alone, is an extensive rural distribution system exceeding the Piedmont proposal and that Frontier intended to add to the initial construction schedule approximately 145 miles of distribution main. There is substantial evidence to support the Commission's findings with respect to the number of miles of distribution mains Frontier intends to construct.

[7] Piedmont next argues that the Commission's conclusion that Frontier would lay more miles of distribution main than Piedmont lacks evidentiary support. The Commission found that Piedmont proposed to construct 215 miles of distribution main. Piedmont now con-

tends that the 215 miles included only a core system and that it did not include the full expanded system Piedmont intended to build. Our review of the record indicates that testimony from Piedmont's own witness contradicts Piedmont's contention that its proposal before the Commission included more than 215 miles. On cross-examination Piedmont witness Ray Killough was asked whether the core system described in Piedmont's application would be the complete system installed to serve the Four-County area customers. Killough responded, "That's correct at this time." This testimony is sufficient to support the Commission's finding.

Piedmont's fourth and fifth challenges are in regard to the Commission's findings that Piedmont's proposed project would result in fewer communities being served than the project proposed by Frontier and that Frontier planned to provide service to twice as many customers as Piedmont and to provide that service sooner than Piedmont. Piedmont argues that these findings are incorrectly based upon a comparison of Piedmont's "core" system with Frontier's total system and therefore have no supporting evidence. Given our prior conclusion that the Commission correctly determined that Piedmont's proposal included 215 miles of distribution main, compared to Frontier's minimum of 428 miles, it logically follows that Piedmont would serve fewer customers and fewer communities. Accordingly, the evidence supports this finding.

[8] In its sixth argument, Piedmont disputes the Commission's finding that Piedmont's proposal was contingent upon 30% or more of the capital being provided from an expansion fund. Piedmont also argues that, unlike Frontier, it was not permitted to introduce evidence as to alternative methods of financing and was not provided an opportunity to show that it could serve the Four-County area using traditional financing, if permitted to charge the same rates as those proposed by Frontier. We note that in its certificate application, Piedmont stated that construction of the Four-County area project would "not produce a positive return based on Piedmont's existing rates," and Piedmont therefore requested approval to use expansion funds to finance the project. Further, Piedmont declined a conditional certificate on the grounds that it was not economically feasible to construct, operate, and maintain the Four-County area project without the use of expansion funds. Piedmont's argument that it was not provided the same opportunities as Frontier to demonstrate that the Four-County area project could be completed using traditional financing misses the mark in that Frontier proposed *ab initio* to use

only traditional financing, whereas Piedmont originally requested the use of expansion funds and never waivered from that position. Indeed, there is no reference in any of Piedmont's filings or exhibits to any other form of financing, and it is not the responsibility of the Commission to permit applicants to file supplemental applications intended to cover all possible financial contingencies. Thus, the evidence supports this Commission finding.

[9] In its seventh argument, Piedmont contests the Commission's finding that its failure to grant a final certificate to Frontier for the Four-County area would likely result in no natural gas being available in these counties in the foreseeable future. Piedmont submits that this finding is not supported by record evidence, considering Piedmont's repeated declarations of desire and ability to serve the area. As we stated earlier, the Commission concluded that it would be inappropriate and inconsistent with the legislative intent expressed in N.C.G.S. § 62-158 to allow expansion funds to be used in this case because alternative financing is feasible. Given (1) this legislative intent, (2) that it is feasible here to use traditional financing, and (3) that Piedmont refused to provide natural gas service to the Four-County area without the use of expansion funds, it follows that if Frontier is not awarded the final certificate, the Four-County area will remain without natural gas service.

[10] By its eighth argument, Piedmont contends that there is no evidence to support the Commission's finding that the Four-County area would have to compete for limited corporate resources because Piedmont had already agreed to meet the Commission's construction schedule set forth in the 19 June 1995 order. As support for this finding, the Commission cites the Public Staff's discomfort with Piedmont's self-documented current customer growth rate, which has been among the highest nationally. The growth in customers has necessarily resulted in increases in Piedmont's construction expenditures. It is inevitable that if Piedmont obtains the certificate for the Four-County area, the area would be required to compete with Piedmont's currently franchised markets, some of which may be more profitable than the Four-County area. It is therefore possible that Piedmont's more lucrative projects may take precedence over the Four-County area project, thereby reducing the corporate resources allocated to that area. The Commission thus could determine that service to the Four-County area would be inhibited or delayed.

[11] Piedmont's ninth and final argument pertains to whether there is sufficient evidence that Frontier satisfied the ten conditions imposed in the Commission's 20 July 1995 order. Piedmont asserts in particular that Frontier failed to satisfy the conditions because conditions one and seven required Frontier to produce a study from an independent consultant to show that Frontier's original proposal was economically feasible, yet the study actually filed was of a much smaller system. Rather than detailing here the voluminous record evidence relating to the independent study performed by Heath and Associates, we will address this assertion in conjunction with Piedmont's contention that the Commission improperly denied Piedmont's motion to dismiss Frontier's 18 October 1995 filing. It suffices to say here that there is competent, substantial, and material evidence to support each of the Commission's findings.

Accordingly, we turn to Piedmont's challenge of the Commission's denial of Piedmont's motion to dismiss. Piedmont moved to dismiss Frontier's 18 October 1995 filing on the ground that the proposal evaluated in the Heath study was not "in substantial compliance with the proposal that Frontier has presented in its testimony" as required by the Commission's 20 July 1995 order. In the motion Piedmont contended that a comparison of the proposal evaluated in the Heath study with the proposal Frontier presented in its testimony shows that the proposal in the Heath study provides for a 40% smaller distribution system, 49% fewer residential customers, 72% fewer commercial customers, 57% fewer poultry farms, 53% fewer total customers, higher rates, 49% less residential volumes, 72% less commercial volumes, and 66% less poultry volumes. Piedmont now argues that the Commission exceeded its statutory authority by permitting Frontier's independent consultant to evaluate a smaller, more expensive proposal, in effect allowing Frontier to substantially alter its proposal, without affording Piedmont a similar opportunity to change its proposal.

In the conditional order dated 20 July 1995, the Commission described Frontier's project as follows:

> Frontier's proposed project includes 144 miles of transmission mains and 718 miles of distribution mains and is estimated to cost approximately $47 million. At the end of its first five years of operation, Frontier expects to serve 10,060 residential customers, 2,090 commercial customers, 500 poultry farms, and 20 industrial customers, with annual volumes totaling 4.5 million

> dekatherms (dts). Frontier intends to finance its proposed project with capital raised from investors using an initial capital structure of 25% equity and 75% debt, the equity portion of which will increase to a more conservative level within five to eight years of initial operation.
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> . . . Frontier's project[] originat[es] with a connection to Transco at U.S. Highway 601, near Cooleemee, extending along road rights-of-way to serve the towns of Yadkinville, Dobson, Elkin, Mount Airy, Wilkesboro, North Wilkesboro, and Boone and a number of smaller communities and rural areas in between. . . . Frontier plans to serve . . . such communities as Brooks Cross Roads in Yadkin County; Hays, Fairplains, Mulberry, and Miller's Creek north of North Wilkesboro and Moravian Falls and Boomer south of Wilkesboro in Wilkes County; Deep Gap in western Wilkes County; and White Plains, Toast, and Bannertown in Surry County.

Further, and of particular significance to resolution of this issue, the Commission acknowledged in its order that "[n]either applicant had finalized all of its studies, designs and arrangements" and that "the further proceedings ordered herein involved *finalizing* plans." (Emphasis added.)

On 18 October 1995 Frontier filed the "Market Study and Feasibility Report" prepared by Heath and Associates to satisfy conditions one, three, and seven set forth in the Commission's order of 20 July 1995. Based upon this study, Scott Heath concluded:

> Frontier Utilities can construct and operate a natural gas utility in the Four County area as an economically feasible, positive net present value project. Although Frontier Utilities may pursue a more aggressive construction/marketing/connection schedule than is depicted by Heath and Associates in this analysis, Heath and Associates is of the opinion that the economics detailed in this report are economically feasible.

Heath and Associates' conclusions were based on a more conservative system development, which projected by year five 418 miles of distribution main, serving 5,154 residential customers and 215 poultry farms, at a cost of $44 million. While the Heath study differs from Frontier's initial proposal with regard to the pace of the construction and development of the distribution system, it covers basically the

same geographic service area, serves the same markets, uses the same rate structure, involves the same construction and engineering issues, and costs approximately the same.

In addition, Heath made clear that his company's report was not Frontier's proposal but rather was Heath and Associates' analysis and opinion as to how the Four-County area distribution system would likely evolve. He testified that his understanding of Heath and Associates' assignment was to conduct an independent study of the general geographic area Frontier proposes to serve at the same rates Frontier proposes to charge. While acknowledging that the area and mileage included in the Heath study does not include 100% of the initial Frontier proposal, Heath testified that it includes the vast majority of it and that the market study is in substantial compliance with Frontier's proposal.

Finally, regardless of whether the Commission was ultimately persuaded by the Heath development system or the Frontier proposal, both projects were more ambitious than the Piedmont proposal, and both were funded by traditional rather than expansion fund financing. We therefore conclude that Frontier's filing in response to the ten conditions outlined in the 20 July 1995 order was in substantial compliance with Frontier's preliminary proposal, and accordingly the Commission's denial of Piedmont's motion to dismiss was proper.

[12] By its final assignment of error, Piedmont argues that the Commission's interpretation of N.C.G.S. § 62-158 is contrary to legislative intent and therefore in error. The Utilities Commission has previously determined, and this Court has agreed, that the purpose of N.C.G.S. § 62-158 is

> to facilitate the construction of facilities and the extension of natural gas service into areas of the State where it may not be economically feasible to expand with traditional funding methods in order to provide infrastructure to aid industrial recruitment and economic development.

State ex rel. Utilities Comm'n v. Carolina Util. Cust. Ass'n, 336 N.C. 657, 667, 446 S.E.2d 332, 338 (1994). This Court has likewise acknowledged that "the Legislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment." *State ex rel. Utilities Comm'n v. Duke Power Co.*, 285 N.C. 377, 388, 206 S.E.2d

269, 276 (1974). Piedmont argues that N.C.G.S. § 62-158 is to be interpreted *in pari materia* with the General Assembly's intent to set rates as low as possible. In so doing, it argues, the Commission's interpretation of N.C.G.S. § 62-158 must fail because award of the certificate to Frontier based on its ability to use traditional rather than expansion fund financing increases the rates citizens of the Four-County area would have paid under Piedmont's proposal by $1.2 million per year. Piedmont argues that in view of the purpose of N.C.G.S. § 62-158 to attract industry and increase economic development, as well as the Commission's duty to fix rates as low as reasonably possible, the Commission's requirement that Piedmont forego its rights to apply for and use expansion funds to fund a portion of the cost of providing service to the Four-County area was contrary to the intent of N.C.G.S. § 62-158. We disagree.

Section 62-158(a) provides:

> In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission may, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund to be used by that company to construct natural gas facilities in areas within the company's franchised territory that otherwise would not be feasible for the company to construct. The fund shall be supervised and administered by the Commission. Any applicable taxes shall be paid out of the fund.

N.C.G.S. § 62-158 (Supp. 1996). First, examination of the statutory language reveals that expansion funds may be used to provide natural gas service to unserved areas "within the company's franchised territory." Piedmont's argument overlooks the fact that the Four-County area is not within its franchised territory. Therefore, any proclaimed right Piedmont has to the creation and use of an expansion fund is limited to those areas in which it already possesses a certificate of public convenience and necessity. That "right" does not extend to unfranchised areas, such as the Four-County area, which are the subject of competing certificate applications.

Further, assuming *arguendo* that Piedmont's request to use expansion funds to serve the Four-County area was proper, the Commission's order was nevertheless in accordance with statutory intent. Section 62-158 limits the creation of expansion funds for the development of natural gas facilities to unserved areas in which service otherwise would not be feasible. To implement this statute, the

Commission adopted Rule R6-82, which requires that an LDC show "that there are unserved areas in the LDC's franchised territory and that expansion of natural gas facilities to such areas is economically infeasible." N.C. Utilities Commission, *North Carolina Public Utilities Laws and Regulations*, Rule R6-82(b) (1993 ed.) (Michie 1994). Rule R6-82(d) states that "[b]efore ordering the establishment of a fund, the Commission must find that it is in the public interest to do so." If the Commission determines, in its discretion, that the creation of an expansion fund would not be in the public interest, it would presumably decline to order the creation of a fund.

Here, the Commission determined that the public interest would best be served by construction of natural gas facilities using traditional methods of financing rather than an expansion fund. That conclusion was supported in part by the testimony of former state Representative Joe Mavretic, who initiated the review of natural gas expansion as a member of the Joint Legislative Utility Review Committee and was involved in the drafting and enactment of N.C.G.S. § 62-158. Mavretic testified:

> [T]he expansion fund was never intended to be used in a situation where a firm proposed to expand natural gas and make it available using its own resources. . . . [I]t flies in the face of common sense in two areas. First of all, if the expansion fund were to be used in a situation of expansion where a non-fund firm would go[,] then instead of having these four counties getting natural gas and other counties being available for the expansion fund you only have the four counties, and it seems to me that if we want to increase natural gas availability in as many counties as possible, 100 if we can, then we would certainly use a firm who wants to pay for it all to expand into four counties and use that expansion money in areas where we don't have other firms that want to come in.
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> . . . [I]f we use the expansion fund to close out the initiative of a firm from outside North Carolina it would have a chilling effect on other firms outside of North Carolina who might want to come into this State into our underserved or unserved areas for natural gas.

In this case Frontier's using its investors' capital to serve the Four-County area, while Piedmont's expansion fund is preserved for future use in other unserved areas, is economically sound. The Commission

could conclude that it would be a waste of resources to use expansion funds when they are not needed, thereby depriving other areas of the use of these funds.

In addition the Commission's final order in this proceeding discusses at length the legislative history of N.C.G.S. § 62-158 and other, related natural gas expansion statutes. We have already reviewed this portion of the order in detail and find the Commission's interpretation of the statute correct.

[13] Finally, it is the policy of this state and the duty of the Commission "[t]o provide just and reasonable rates and charges for public utility services." N.C.G.S. § 62-2(4) (1989). While the Commission seeks to establish the lowest possible rates, that is not the polar star by which the Commission conducts its business. Rather, the Commission is guided by considerations of the public interest. Under the circumstances presented here, the Commission could determine that the method of financing expansion of natural gas service into the Four-County area takes precedence over the limited differential between the rates proposed by Piedmont versus those proposed by Frontier and that it is in the public interest and in accordance with the policy goals of this state to pursue gas expansion through traditional financing if such an alternative is reasonably available.

[14] Under this final assignment of error, Piedmont also argues that the Commission erred because it did not employ the net present value (NPV) method of analysis to determine if the Four-County area project was feasible, as required by N.C.G.S. § 62-158. Section 62-158(c) provides that "[o]nly those projects with a negative net present value shall be determined to be economically infeasible for the company to construct." Net present value is defined as "[t]he present value of expected future net cash inflows over the useful life of a Project minus the present value of net cash outflows." Commission Rule R6-81(b)(3). Piedmont asserts that, here, the Commission made no effort to determine the economic feasibility of the Piedmont project but simply determined that because Frontier believed it could finance the project without using expansion funds, that project was economically feasible and therefore automatically preferred.

Initially, we note that the Commission must apply the NPV method only in evaluating the feasibility of a single proposal, not when there are competing applicants, one of which conclusively

demonstrates the economic feasibility of a project financed in an alternative manner. Moreover, the record indicates that Piedmont repeatedly asserted that the extension of natural gas service into the Four-County area had a negative NPV and could only be accomplished with the aid of expansion funds, whereas Frontier demonstrated with empirical data and studies that a positive NPV project was indeed possible. Accordingly, the Commission's valuation of the economic feasibility of the two projects was proper and supported by the evidence.

After a careful review of the record, we hold that the Commission's interpretation of N.C.G.S. § 62-158 was consistent with the language and intent of chapter 62 and of the policy of this state; that the Commission's final order contains findings sufficient to justify its conclusion that Frontier should be awarded the final certificate of public convenience and necessity to provide natural gas service to Surry, Wilkes, Watauga, and Yadkin Counties; and that the Commission did not err in its conduct of the proceedings. The orders of the Utilities Commission are therefore

AFFIRMED.

STATE OF NORTH CAROLINA v. JAMES EARL ROBINSON

No. 388A95

(Filed 24 July 1997)

1. Searches and Seizures § 150 (NCI4th)— first-degree murder—victim's car—released to finance company—no error

The trial court did not err in a capital prosecution (life sentence) for first-degree murder by denying defendant's motion to dismiss because the State failed to preserve potentially exculpatory evidence where the car in which the victim had been sitting when shot was seized by the Sheriff's Department; a finance company requested its release; and the chief investigator obtained permission from the district attorney for the release of the car. Although defendant contends that the State should have preserved a towel found under the victim's right arm, two cigarette butts found on the floorboard, a tissue, and an empty gun case, the evidence presented at the pretrial hearing demonstrated no

bad faith on the part of law enforcement authorities and the exculpatory value of the car and other items was speculative at best. The trial court's findings that the officers acted in good faith and that no evidence was destroyed which rose to the level of constitutional materiality were supported by the evidence and are conclusive on appeal.

Am Jur 2d, Searches and Seizures § 212.

Review on appeal by United States under 18 USCS § 3731 of orders suppressing or excluding evidence, or for return of seized property. 34 ALR Fed. 617.

2. Jury § 260 (NCI4th)— first-degree murder—jury selection—peremptory challenges—not racially motivated

The trial court did not err during jury selection for a capital first-degree murder prosecution which resulted in a life sentence by overruling defendant's objections to the State's use of its peremptory challenges in an allegedly discriminatory manner where the prosecutor's reasons for peremptorily challenging the prospective jurors included equivocal responses to questions concerning the death penalty, trouble completing the jury questionnaire accurately and fully, deceptive answers, physical responses indicating hesitancy about the death penalty, and failure to make eye contact. The reasons given by the prosecutor must be clear and reasonably specific and related to the particular case, but may be exercised on the basis of legitimate hunches and past experience and need not rise to a level justifying exercise of a challenge for cause. The reasons given here are supported by the record and, based on the entire jury selection process, the State met its burden of coming forward with neutral, nonracial explanations for each of the challenges.

Am Jur 2d, Jury §§ 234 et seq.

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

3. Constitutional Law § 342 (NCI4th)— first-degree murder—recorded bench conferences—outside defendant's presence—no error

The trial court did not err in a first-degree murder prosecution by conducting recorded bench conferences with defendant

seated at counsel table where defense counsel represented defendant's interests at the conferences and had both the obligation and the opportunity to discuss matters with defendant and raise for the record any matter to which defendant objected and ask questions warranted by defendant's statements to him. Defendant has failed to demonstrate and the record does not in any way suggest that these bench conferences implicated defendant's confrontation rights or that his presence at the conferences would have had a reasonably substantial relation to his opportunity to defend.

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

4. Evidence and Witnesses § 292 (NCI4th)— first-degree murder—defendant beating girlfriend—jealous rage—prior to murdering victim—admissible

There was no abuse of discretion in a first-degree murder prosecution where the trial court admitted testimony that defendant beat his girlfriend in a jealous rage prior to murdering the victim. The evidence tended to show that defendant beat his girlfriend because he thought she was involved with another man; went to a nightclub, threatened a man at gunpoint, and demanded to know whether he was having an affair with the girlfriend; and was seen talking to the victim. This was circumstantial evidence of guilt and was relevant to describe the chain of circumstances leading up to the murder; the trial court did not abuse its discretion by concluding that the evidence was relevant and that the probative value was not outweighed by the possibility of unfair prejudice. Finally, evidence that defendant beat his girlfriend on the day of the murder was later introduced through four other witnesses without objection.

Am Jur 2d, Evidence §§ 405, 409, 447, 454.

5. Evidence and Witnesses § 292 (NCI4th)— first-degree murder—evidence of defendant beating girlfriend—admissible

There was no error, much less plain error, in a first-degree murder prosecution where four witnesses were allowed to testify that defendant beat his girlfriend before killing the victim because he thought she was running around with another man. The evidence of the beating was circumstantial evidence of defendant's guilt because it was relevant to defendant's motive,

intent, and plan to kill the victim, and was additionally relevant because it described the chain of circumstances leading up to the murder.

Am Jur 2d, Evidence §§ 405, 409, 447, 454.

Judicial abrogation of felony-murder doctrine. 13 ALR4th 1226.

6. Homicide § 226 (NCI4th)— first-degree murder—sufficiency of evidence

There was sufficient evidence to support a first-degree murder conviction where the evidence showed that defendant brought his girlfriend into his trailer at gunpoint and forced her into the bathroom, threatened to kill her, and beat her in the head with a pistol until she was unconscious; arrived at another woman's house that evening and told her about the beating and said the incident was not over yet; proceeded to a nightclub, where he threatened a man at gunpoint and asked him if he was having an affair with his girlfriend; talked with the victim while at the club; drove later that night to another woman's home, described how he had beaten his girlfriend, and placed a pistol beneath the driver's seat of his white Cadillac as he drove away; the owner of a convenience store testified that he looked out the window after being awakened by two shots and saw a white Cadillac driving away from a red car; the victim was found shot to death in the red car; defendant arrived at another convenience store at approximately 2:00 a.m., pulled into the parking lot, and fell asleep; he was arrested a short time later; the arresting officer found the murder weapon under defendant's seat; and a ballistics expert testified that his pistol fired the fatal shots into the victim. The evidence presented clearly supports a reasonable inference—more than a mere suspicion or conjecture—that defendant was the perpetrator of the murder.

Am Jur 2d, Homicide §§ 425-458.

7. Criminal Law § 473 (NCI4th Rev.)— first-degree murder—prosecutor's argument—defense attorney as "assassin"

There was no abuse of discretion in a first-degree murder prosecution where the prosecutor was permitted to refer to defense counsel as an "assassin." The prosecutor's statement was a hyperbolic expression of the State's position that an injustice would be done to the victim if the defense counsel were to per-

suade the jury to return a not-guilty verdict and, additionally, urged the jury not to allow counsel to assassinate the victim's character.

Am Jur 2d, Trial §§ 683 et seq.

8. Criminal Law § 468 (NCI4th Rev.)— first-degree murder—prosecutor's argument—reasonable inference

A prosecutor's argument in a first-degree murder prosecution was not so grossly improper as to require intervention *ex mero motu* where defendant contended that the prosecutor impermissibly referred to matters outside the record, but the argument was a reasonable inference from the evidence. Defendant did not show that the prosecutor's comments so infected the trial with unfairness that it rendered the conviction fundamentally unfair.

Am Jur 2d, Trial §§ 251 et seq.

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.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Brooks, J., on 18 April 1995 in Superior Court, Bladen County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 December 1996.

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

Margaret Creasy Ciardella for defendant-appellant.

ORR, Justice.

This case arises out of the murder of Jerry Smith, who was shot twice while sitting in a parked car at a convenience store. On 30 November 1993, defendant was indicted for one count of first-degree murder. Defendant was subsequently tried before a jury, and on 13 April 1995, the jury found defendant guilty of first-degree murder

based on the theories of premeditation and deliberation and felony murder. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment, and the trial court entered judgment accordingly.

After consideration of the assignments of error brought forward on appeal by defendant and a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we conclude that defendant received a fair trial, free from prejudicial error. For the reasons set forth below, we affirm his conviction and sentence.

At trial, the State's evidence tended to show the following: On the afternoon of 26 September 1993, defendant was attending a cookout at his neighbor's home in Garland, North Carolina. Gerthel Highsmith, with whom defendant was having a relationship, was also at the cookout. At approximately 3:30 that afternoon, Highsmith and her three-year-old son, Derrick, left the cookout in defendant's Cadillac to pick up a pizza. They then returned to the cookout for a short while before Highsmith once again left in defendant's Cadillac. Highsmith's son remained at the cookout with defendant.

When Highsmith returned to the cookout, defendant was apparently very upset and ran behind the Cadillac until she stopped. As Highsmith exited the Cadillac, defendant forced her back into the car at gunpoint. They then proceeded to defendant's trailer, where Highsmith's son was waiting. Once inside the trailer, defendant began to hit Highsmith with his fist and kick her in front of her son. Highsmith begged defendant not to hit her in front of Derrick, and defendant ordered her into the bathroom. Once inside the bathroom, defendant repeatedly asked Highsmith who was in his car with her. Defendant continued to beat Highsmith with his fists and then started to hit her on the top of her head with a gun until she lost consciousness. Once Highsmith regained consciousness, defendant kicked and pushed her into the bedroom. Eventually, Highsmith's mother and sister drove by defendant's trailer and honked their car horn. Highsmith then jumped out the bedroom window and ran to the car. Her mother and sister drove her to the "rescue squad," where she was treated for her injuries.

At the time of this incident, Highsmith had known defendant for approximately four months. At trial, Highsmith testified that she used cocaine on the day defendant beat her and that she stayed with defendant because he supplied her with cocaine. She further testified

that the victim, Jerry Smith, was a drug user and had accompanied her on one occasion to defendant's house to buy drugs.

On the evening of 26 September 1993, defendant arrived around 9:00 or 10:00 p.m. in his white Cadillac at a club in Sampson County which was owned by Bill Herring. At trial, Herring testified that he observed that defendant had something in his pocket when he arrived at the club. Herring asked defendant to pull up his shirt and saw what looked like the handle of a gun. Defendant told him that it was not a gun, and Herring allowed defendant to enter the club. Herring further testified that the victim, Jerry Smith, arrived in a red Nissan shortly before defendant. Defendant and Jerry Smith stood at the counter together, but Herring could not tell if they were arguing and did not hear what they said. Herring stated that Jerry Smith left the club first that night and that defendant left fifteen or twenty minutes later.

Clarence Autry testified that he was also at the club that night. He stated that at one point, defendant pulled a gun out of his pocket and ordered him outside to talk. Once outside, defendant confronted Autry about whether he had been "messing around" with Highsmith. After Autry denied any involvement with Highsmith, defendant stated that he believed him and allowed him to return to the club. Autry further testified that Highsmith frequently told defendant things to make him jealous.

Mack Ray Rich, who owns and operates a convenience store at the Helltown Crossroads, testified that his residence is located at the intersection of Highway 210 and Helltown Road. Rich further testified that he was awakened at approximately 12:30 a.m. by two gunshots. He looked out the window and saw a white car heading towards Highway 210 and a red car sitting with its headlights on. Rich asked his wife to call the Highway Patrol. Rich testified that he then saw the same white car, a Cadillac, return and pull up beside the red car and sit there for a few minutes. The white Cadillac then proceeded to drive out Ammons Road.

Investigator Richard Herring of the Bladen County Sheriff's Department testified that he was dispatched to the intersection of Helltown Road and Highway 210 West and arrived at 1:07 a.m. Herring stated that he saw a red Nissan sitting in the parking lot facing Highway 210 with its lights on. He knew it was Jerry Smith's car and saw that Smith was slumped over in the car seat with his seat belt still on. After Herring got no response from Smith, he noticed a bullet hole in Smith's left chest.

Cathy Ann Nethercutt testified that she worked the third shift from 11:00 p.m. to 7:00 a.m. at the Quick Stop Food Mart at the intersection of Cedar Creek Road and I-95. She was working there alone on 27 September 1993 when she saw a white Cadillac drive into the parking lot at approximately 2:00 a.m. The driver never entered the store. After watching the car for an hour, Nethercutt called to report this incident to the police.

Officer Willis Stone of the Fayetteville Police Department testified that he arrived at the Quick Stop at 3:40 a.m. and approached the white Cadillac. As he approached the vehicle, he saw a black male sitting in the driver's seat with his head inclined. Officer Stone made an interior sweep of the car for his own safety and noticed a plastic bag of what appeared to be cocaine in plain view on the passenger seat. Officer Stone tapped on the car window and woke defendant up. When defendant woke up, Officer Stone asked him to unlock the door and step out of the car. Officer Stone testified that he did a quick body frisk for weapons, placed handcuffs on defendant, and put him in his patrol car. Along with the bag of cocaine Officer Stone recovered from the passenger's seat, he also found a medicine bottle containing a bag of crack cocaine and a revolver hidden underneath the driver's seat.

SBI Special Agent Eugene Bishop was tendered and qualified as an expert in the field of forensic firearm identification and toolmark identification. Agent Bishop testified that he conducted firing tests on the revolver recovered from defendant's Cadillac and studied the two spent bullets found in the victim's red Nissan. Agent Bishop "was requested to determine whether or not the fired bullets were fired by the particular weapon that was submitted in this case." After conducting tests on both 13 October 1993 and 14 October 1993, Agent Bishop concluded that the two spent bullets were fired from defendant's revolver, to the exclusion of all other handguns.

Defendant presented no evidence during the guilt/innocence phase.

During the sentencing proceeding, the State did not present additional evidence, but relied upon the evidence presented during the guilt/innocence phase of the trial.

Defendant presented the testimony of Dr. Don Creed during the sentencing proceeding. Dr. Creed was tendered and qualified as a medical expert. Dr. Creed testified that he treated defendant primarily for diabetes, hypertension, and chronic bronchitis and was aware

that defendant had been hospitalized for congestive heart failure. Defendant also presented the testimony of Dr. Brad Fisher, a clinical forensic psychologist. Dr. Fisher testified that he evaluated defendant at the request of defense counsel and conducted interviews with defendant on four separate occasions. In Dr. Fisher's opinion, defendant was not psychotic and was not suffering from any kind of significant neurological condition. He further testified that defendant's problems stemmed from an "undisciplined, almost chaotic upbringing."

I.

[1] Defendant first contends that the trial court erred by denying defendant's motion to dismiss because the State failed to preserve potentially exculpatory evidence. Prior to trial, defendant filed a motion to dismiss or, in the alternative, to suppress certain evidence taken from the car on the grounds that the police failed to preserve other potentially exculpatory evidence they had seized. Defendant argues that the trial court's rulings violated his statutory and constitutional rights. We disagree.

In the course of the investigation, the victim's red Nissan Sentra was seized by the Sheriff's Department. Later, a finance company, which apparently had an ownership interest in the car, requested its release. The chief investigator with the Sheriff's Department obtained permission from the district attorney for the release of the car. Defendant contends that the State should have preserved from the car for his analysis a towel found under the victim's right arm, two cigarette butts found on the floorboard, a tissue, and an empty gun case. Defendant contends that the law enforcement officer in this case acted in bad faith by releasing the car and other items because they were potentially exculpatory.

In *California v. Trombetta*, 467 U.S. 479, 81 L. Ed. 2d 413 (1984), the United States Supreme Court held that in order

> [t]o meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. at 489, 81 L. Ed. 2d at 422 (citation omitted). In *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281 (1988), the United States Supreme Court further stated:

> The Due Process Clause of the Fourteenth Amendment . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.

Id. at 57, 102 L. Ed. 2d at 289. The Supreme Court went on to hold "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58, 102 L. Ed. 2d at 289.

North Carolina statutory and case law imposes similar requirements. N.C.G.S. § 15-11.1(a) provides in part:

> If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner . . . or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership. If the district attorney refuses to release such property, the lawful owner . . . may make application to the court for return of the property.

N.C.G.S. § 15-11.1(a) (Supp. 1996).

In the present case, the evidence presented at the pretrial hearing demonstrated no bad faith on the part of law enforcement authorities, and the exculpatory value of the car and other items was speculative at best. SBI Special Agent Paul Munson testified that he searched the car for all evidence, whether inculpatory or exculpatory. Agent Munson did not seize the white towel, cigarette butts, or tissue because, based on his analysis, these items had no inculpatory or exculpatory value. Agent Munson further testified that based upon his training and experience, the perpetrator fired the shot from outside the car. Agent Munson based his conclusion on the fact that the driver's side window was rolled down, the bullet tracks went from

left to right through the victim and into the car, and the passenger side door was locked and the window rolled up. The chief investigator, Rodney Warwick of the Bladen County Sheriff's Department, confirmed Agent Munson's observations.

Based upon the above testimony, the trial court made the following findings of fact:

> [N]o law enforcement officer—or neither of these two law enforcement officers destroyed any evidence that the officers felt had exculpatory value. [The trial court] is going to further find and conclude that each of the officers acted in good faith in all their actions, as testified to before the Court here today. [The trial court] is going to find that based upon the evidence . . . there was no evidence destroyed that rose to the level of constitutional materiality as that term is used in the case law, *State versus Jones* and the *Trombetta* case.
>
> . . . .
>
> Based on the findings and conclusions we're going to deny . . . the motion to dismiss as well as the motion to suppress.

These findings of fact are supported by the evidence discussed above and presented during the pretrial motions hearing. Because the findings of fact made by the trial judge are supported by the evidence, they are conclusive on appeal. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). Thus, we hold that the law enforcement authorities in this case acted reasonably and in good faith by releasing the victim's car and declining to preserve the challenged items found in the car. Accordingly, this assignment of error is overruled.

II.

[2] Next, defendant contends that the trial court erred in overruling defendant's objections to the State's use of its peremptory challenges in a racially discriminatory manner. Defendant argues that the trial court's ruling deprived him of his state and federal constitutional rights and that he is entitled to a new trial. We do not agree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit a prosecutor from peremptorily excusing a prospective juror solely on the basis of his or her race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *State v. Williams*,

339 N.C. 1, 15, 452 S.E.2d 245, 254 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995). A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a race-neutral explanation to rebut defendant's *prima facie* case. *Id.* Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.*

In the present case, defendant challenged the State's use of peremptory challenges to excuse black jurors. The trial court then determined that defendant had made a *prima facie* showing of racial discrimination and ordered the State to offer nonracial justification for each of the seven black prospective jurors who were excused. After the prosecutor stated his reasons for striking each of the challenged jurors, the trial judge entered lengthy findings of fact and conclusions of law and denied defendant's *Batson* motion.

In order to rebut a *prima facie* case of discrimination, the prosecution must "articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). These reasons " 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). Peremptory challenges may be exercised on the basis of " 'legitimate "hunches" and past experience[,]' so long as there is an absence of racially discriminatory motive." *State v. Jones*, 339 N.C. 114, 140, 451 S.E.2d 826, 839 (1994) (quoting *Porter*, 326 N.C. at 498, 391 S.E.2d at 151), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995). Further, when the prosecutor has proffered his explanations for the peremptory strikes and the trial court has ruled that there was no purposeful discrimination, the only issue for this Court is whether the trial court correctly determined that the prosecutor had not intentionally discriminated. *Williams*, 339 N.C. at 17, 452 S.E.2d at 255. Because the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error. *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412.

Applying these principles, we now examine the prosecutor's reasons for peremptorily challenging the prospective jurors. In his brief, defendant challenges the legitimacy of five of the prosecutor's peremptory strikes. First, defendant contends Mary Jones, a black female, was improperly struck for racial reasons. At trial, the prosecutor offered the following reasons for exercising this peremptory challenge:

> In responses to the death qualifications, when asked if she was opposed to the death penalty, her response initially was yes and no. Her next response was, "But who am I to judge?", which would have indicated to the State that . . . she would not make a decision about the death penalty, or about any issue in the case. She initially said that she had not talked to anyone at all about this case, and I believe she indicated that her son, Willie Lewis, did work in the jail where they were looking after [defendant]. She also had trouble completing her questionnaire accurately and fully. Those would be the reasons that the state peremptorily struck Mary Jones, who was a black female.

This Court has repeatedly held that a juror's equivocal responses concerning the death penalty constitute a race-neutral ground for exercising a peremptory challenge. *State v. Conaway*, 339 N.C. 487, 513, 453 S.E.2d 824, 840, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995). This Court has also held that a prospective juror's difficulty in understanding instructions, and oral responses which differ from responses written on the jury questionnaire, are race-neutral. *State v. Carter*, 338 N.C. 569, 587, 451 S.E.2d 157, 166-67 (1994), *cert. denied*, — U.S. —, 132 L. Ed. 2d 263 (1995). Because the above reasons given by the prosecutor are supported by the record, we hold that the trial court did not err in determining that the prosecutor did not engage in purposeful discrimination when he struck prospective juror Jones.

Second, defendant contends that the prosecutor committed purposeful discrimination when the prosecutor exercised a peremptory challenge on Deangelo Johnson, a black female prospective juror. The prosecutor informed the trial court that he struck Johnson because when he asked her about the death penalty, her response was slow and she "hung her head." This verbal and physical response indicated that Johnson was hesitant and equivocal about the death penalty. As stated above, this constitutes a race-neutral reason for exercising a peremptory challenge. *Conaway*, 339 N.C. at 513, 453 S.E.2d at 840.

Third, defendant contends that the prosecutor engaged in purposeful discrimination by striking Thalia Hammonds, a black female prospective juror. The prosecutor indicated to the trial court that he felt Hammonds was being deceptive in giving some of her answers on *voir dire*. For example, the prosecutor noted that, initially, Hammonds denied having any relatives who were charged with anything other than a misdemeanor. However, the prosecutor was aware of the criminal records of some of her nephews, and after pressing her, Hammonds finally admitted that she had a relative who had been charged with assault with a deadly weapon. Additionally, the State was aware of a relative who had a criminal record that she failed to mention. This Court has previously held that a prosecutor's feeling that a prospective juror gave misleading answers to questions on *voir dire* is a valid nonracial purpose for exercising a peremptory challenge. *State v. Smith*, 328 N.C. 99, 125-26, 400 S.E.2d 712, 727 (1991). Here, the record supports the prosecutor's contention, and accordingly, the prosecutor did not purposefully discriminate when he exercised a peremptory challenge against prospective juror Hammonds.

Fourth, defendant contends that the prosecutor engaged in purposeful discrimination by striking Linwood Patterson, a black male prospective juror. The prosecutor stated that he struck Patterson because

> [h]is responses on the issue of the death penalty were, "I don't really know", that, "It might fit in certain situations." And he was very confrontational with myself as we went through the process—would not make eye contact—very short with his answers, and he was struck for that reason.

This Court has previously held that a prospective juror's failure to make appropriate eye contact with the prosecutor, when coupled with other factors, constitutes a valid, nonracial reason for exercising a peremptory strike. *See Porter*, 326 N.C. at 500, 391 S.E.2d at 152. Thus, the prosecutor did not commit purposeful discrimination by exercising a peremptory strike against prospective juror Patterson.

Finally, defendant contends that the prosecutor committed purposeful discrimination by striking Martha Bellamy, a black female prospective juror. The prosecutor stated the following reasons for striking Bellamy:

> [She] said that she would always choose life, said that she supposes if "they" voted for the death penalty that then she may be

> able to go along with that, referring to other jurors, but . . . she was very, very[] wishy-washy as to the imposition of the death penalty whereas to the responses about life . . . she readily had an answer for that.

As stated above, this Court has repeatedly held that a hesitant or equivocal response concerning the death penalty is a race-neutral reason for exercising a peremptory challenge. *Conaway*, 339 N.C. at 513, 453 S.E.2d at 840. Thus, the prosecutor did not commit purposeful discrimination in striking prospective juror Bellamy.

Based on the reasons given by the prosecutor, which are supported by the record, and based on the entire jury selection process, we conclude that the State has met its burden of coming forward with neutral, nonracial explanations for each of the peremptory challenges defendant assigns as error. Thus, the excusals of the prospective jurors, as discussed above, were not racially motivated and are not clearly erroneous. Accordingly, this assignment of error is overruled.

III.

[3] Defendant next contends that the trial court committed prejudicial error by conducting recorded bench conferences outside the presence of defendant while defendant was seated at counsel table. Defendant argues that by holding these bench conferences, the trial court violated defendant's nonwaivable constitutional right to be present at every stage of his trial, and thus, defendant is entitled to a new trial.

The defendant in a capital trial must be present at every stage of the proceeding. N.C. Const. art. I, § 23. This constitutional mandate serves to safeguard both the defendant's and society's interests in reliability in the imposition of capital punishment. *State v. Huff*, 325 N.C. 1, 30, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). However, this Court has held that a defendant's constitutional right to be present at all stages of his capital trial is not violated when the trial court conducts a bench conference among the lawyers in open court where defendant is present in the courtroom. *State v. Buchanan*, 330 N.C. 202, 223, 410 S.E.2d 832, 845 (1991). 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 preserve 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).

Here, defendant specifically claims he was prejudiced by two recorded bench conferences which took place outside of his presence while defendant was seated at counsel table. First, during a recorded bench conference, the State alleged defendant had made additional statements to Gerthel Highsmith other than the one she mentioned during her testimony. Defendant contends that if he had been present during this bench conference, he could have assisted in determining whether Highsmith had testified to everything that happened. However, defense counsel represented defendant's interests at the bench conference and had both the opportunity and obligation to discuss this matter with defendant and raise for the record any matter to which defendant objected. *Id.* at 223, 410 S.E.2d at 844-45. Further, there is nothing in the record to suggest that defendant was in any way prejudiced by the bench conference, and defendant's assertion to the contrary is merely speculation.

Next, defendant contends he was prejudiced by a recorded bench conference which was held when his lawyer made an offer of proof concerning a statement made by defendant at the time of his arrest. The trial court ruled that this evidence was not admissible, but stated that defendant could make an offer of proof by having the arresting officer whisper his answer to the court reporter. Defense counsel stipulated to this procedure. Defendant now contends he was prejudiced because he did not hear what the officer said during the bench conference and would therefore not know whether there was any reason to challenge the veracity of the officer's testimony.

Once again, defense counsel had both the opportunity and the obligation to discuss this matter with defendant and ask any further questions of the witness if warranted by defendant's statements to counsel. *Id.* Further, there is nothing in the record to suggest that defendant was prejudiced by this recorded bench conference. Additionally, we note that it was defense counsel's request that this witness be allowed to answer on the record. Defendant had access to everything contained in the record at trial, and defense counsel had an opportunity to object to the testimony of the witness.

Finally, as this Court has previously stated with regard to bench conferences:

> Not only have federal courts treated such conferences as outside the scope of the trial for purposes of defendant's constitutional right to be present, but they also have found waiver where, as here, defendant made no request to be present and no objection to his absence. Defendant's attorneys were present at each of the conferences to represent and protect his interests.

Id. at 215, 410 S.E.2d at 839.

Defendant has failed to demonstrate, and the record does not in any way suggest, that the bench conferences here implicated defendant's confrontation rights or that his presence at the conferences would have had a reasonably substantial relation to his opportunity to defend. Accordingly, this assignment of error is overruled.

IV.

[4] Next, defendant contends that the trial court erred by admitting testimony that defendant beat his girlfriend, Gerthel Highsmith, out of a jealous rage prior to murdering the victim. Defendant argues the admission of this testimony violated N.C.G.S. § 8C-1, Rules 401, 402, 403, and 404 and his constitutional right to a fair trial and to due process. We disagree.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Further, Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, and its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996).

First, defendant contends that at the hearing on his motion *in limine,* the trial court erred by denying his motion to prohibit Highsmith from testifying concerning the beating. At the hearing, the

State argued that the evidence showing that defendant beat Highsmith in the head with the same pistol used to murder the victim was admissible under Rule 404(b) for the purpose of identity. Furthermore, the State argued that the beating was also relevant to defendant's motive, intent, and plan to kill the victim.

Here, the evidence tended to show that defendant beat Highsmith because he thought she was involved with another man. Later that same evening, defendant went to a nightclub, threatened Autry at gunpoint, and demanded to know whether he was having an affair with Highsmith; defendant was also seen talking to the victim at the same club. This constitutes circumstantial evidence of defendant's guilt. In addition, evidence of the beating was also relevant because it described the chain of circumstances leading up to the murder. *See State v. Rose*, 339 N.C. 172, 451 S.E.2d 211 (1994) (chain-of-events evidence admissible to establish defendant's intent and motive for the murders), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995). Thus, the trial court did not abuse its discretion by concluding that the evidence was relevant and that the probative value of the Rule 404(b) evidence was not outweighed by the possibility of unfair prejudice under Rule 403.

Finally, evidence that defendant beat Highsmith on the day of the murder was later introduced through four other witnesses without objection. These witnesses were Dr. Verrilli, Mary Crumpler, Clarence Autry, and Bernette Murphy. It is well established that a criminal defendant loses the benefit of an objection when the same or similar evidence is later admitted without objection. *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995).

[5] Next, defendant contends the trial court erred by allowing the four witnesses mentioned above to testify that defendant beat Highsmith and did so because he thought she was "running around with" another man. Because defendant did not object to this testimony at trial, we review this issue 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)). 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).

As we have previously stated, the evidence of the beating was circumstantial evidence of defendant's guilt because it was relevant to defendant's motive, intent, and plan to kill the victim. Additionally, the evidence of the beating was relevant because it described the chain of circumstances leading up to the murder. Thus, we find no error, much less plain error, in the trial court's admission of the witness' testimony.

V.

[6] Next, defendant contends that the trial court erred in denying his motion to dismiss because the evidence was insufficient to support defendant's conviction. Defendant argues that the trial court committed numerous errors without which there was insufficient evidence to convict defendant.

In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984). The State must present substantial evidence of each element of the offense charged. *State v. Alford*, 329 N.C. 755, 759-60, 407 S.E.2d 519, 522 (1991). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

In the present case, the State had to prove beyond a reasonable doubt that defendant unlawfully killed the victim with malice, premeditation, and deliberation, or that he killed the victim during the course of discharging a firearm into occupied property. The evidence showed that on the afternoon of 26 September 1993, defendant brought Highsmith into his trailer at gunpoint and forced her into the bathroom. He then threatened to kill her, but instead beat her in the head with a pistol until she was unconscious. At approximately 7:30

p.m. that same evening, defendant arrived at Mary Crumpler's house and told her about the beating and said the incident was not over yet. Defendant then proceeded to a nightclub, where he threatened Clarence Autry at gunpoint and asked him if he was having an affair with Highsmith. While at the club, defendant also spoke with the victim. Later that night, defendant drove to Bernette Murphy's home, where he proceeded to describe how he beat Highsmith. Murphy testified that, upon leaving her house, defendant placed a pistol beneath the driver's seat of his white Cadillac and drove away.

Mack Rich, the owner of the Helltown Crossroads Convenience Store, testified that he was awakened by two shots. Rich further testified that he looked out the window and saw a white Cadillac driving away from a red car. The victim was found shot to death in the driver's seat of the red car. At approximately 2:00 a.m., defendant arrived at a convenience store on Cedar Creek Road. Defendant pulled into the parking lot and fell asleep behind the wheel. After watching the car for about an hour, the store clerk called the police. When defendant was arrested a short time later, the arresting officer found the murder weapon under defendant's seat in the white Cadillac. The ballistics expert testified that this pistol fired the fatal shots into the victim.

The evidence presented clearly supports a reasonable inference—more than a mere suspicion or conjecture—that defendant was the perpetrator of the murder. Accordingly, this assignment of error is overruled.

VI.

[7] In his final assignment of error, defendant contends that the trial court erred by permitting the prosecutor to make allegedly improper arguments to the jury. Defendant argues that during closing argument, over defendant's objection, the prosecutor was permitted to refer to defense counsel as an "assassin," and later, without objection, the prosecutor impermissibly made references to matters outside the record. Defendant argues that each of these improper comments was prejudicial to defendant and that he is entitled to a new trial. We do not agree.

First, we will address defendant's contention that the prosecutor was permitted to refer to defense counsel as an "assassin." Defendant argues that Judge Brooks erred by overruling the following objection to the prosecutor's argument:

Now, ladies and gentlemen, when you consider the evidence as the State has presented it for you, when you hear the argument that Mr. Grady will make to you, remember he's defending James Earl Robinson. James Earl Robinson is the man that is on trial. Do not let Mr. Grady kill Jerry Lee Smith again.

MR. GRADY: Objection.

COURT: Overruled.

MR. WARREN [the prosecutor]: Do not allow him to assassinate his character, because Jerry Lee Smith is not here to defend himself. Jerry Lee Smith is dead.

Arguments of counsel are left largely to the control and discretion of the trial judge, and counsel is allowed wide latitude in the argument of hotly contested cases. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Further, the remarks are to be viewed in the context in which they are made and the overall factual circumstances to which they referred. *State v. Womble*, 343 N.C. 667, 692-93, 473 S.E.2d 291, 306 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 719 (1997).

In *State v. Pittman*, 332 N.C. 244, 262, 420 S.E.2d 437, 447 (1992), the prosecutor stated that if the defendant was found not guilty, "justice in Halifax County will be dead." We held that this argument was not improper because it was a hyperbolic expression of the State's position that a not-guilty verdict would be an injustice in light of the evidence of guilt. Similarly, in the present case, the prosecutor's statement to "not let Mr. Grady kill Jerry Lee Smith again" was a hyperbolic expression of the State's position that if the defense counsel were to persuade the jury to return a not-guilty verdict, an injustice would be done to the victim. Additionally, the statement urged the jury not to give credence to the defense counsel's suggestion that Smith was a violent person. As the prosecutor continued his argument, he argued to the jury to "not allow [Mr. Grady] to assassinate [Jerry Lee Smith's] character." While rich in hyperbole, we find no error in these arguments of the prosecutor.

[8] Second, we address defendant's contention that the prosecutor impermissibly referred to matters outside the record in his closing argument. Where, as here, defendant failed to object to the argument, defendant must establish that the argument was so grossly improper that the trial court abused its discretion by not intervening *ex mero*

motu. To establish such an abuse, defendant must show the prosecutor's comments so infected the trial with unfairness that it rendered the conviction fundamentally unfair. *Rose*, 339 N.C. at 202, 451 S.E.2d at 229.

The portion of the prosecutor's argument to which defendant now objects is as follows:

> And we know that he [the victim, Jerry Smith] knew James Robinson. And he rolled down his window to speak to him, by pre-arrangement from Herring's Nightclub. And James Robinson fired two shots into the red Nissan. One, you can see the angle lines that are drawn as it goes through the seat. And the other that went through Jerry's heart. He was waiting on somebody he knew, folks. In a rural area at quarter to one in the morning, at a predesignated spot. No, he has no reason to expect any arms coming to him; he's had a nice conversation with the defendant at Herring's Nightclub. James Robinson got out of his car, walked over, fired two shots, one killing Jerry Smith.

Defendant argues that although it is clear that the State's theory of the case was that defendant killed the victim because he thought the victim was having an affair with defendant's girlfriend, the State failed to present a scintilla of evidence to support this theory. Defendant also argues that although defendant and the victim were seen having a conversation at a club earlier on the night of the murder, there is nothing to support the inference that any meeting was prearranged between the two. Defendant contends that because there is no fact to support any inference that a meeting was held, the trial court committed plain error by failing to intervene *ex mero motu* during the prosecutor's closing argument.

In the present case, the evidence showed that defendant went to Herring's nightclub and threatened Autry at gunpoint and asked him if he was having an affair with Highsmith. Autry denied having an affair, and defendant stated that he believed Autry and let him go back inside the nightclub. Defendant then approached the victim, Smith, and spoke with him, apparently without arguing. Then, around 12:30 or 1:00 a.m., Smith drove to Helltown Crossroads Convenience Store and parked his car, leaving his headlights on. The State's evidence tends to show that defendant drove up to Smith's car and shot him to death. From this evidence, the prosecutor could reasonably infer that Smith and defendant had prearranged their meeting at the

convenience store. Thus, the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*. Accordingly, this assignment of error is overruled.

Having reviewed each of defendant's assignments of error brought forward on appeal, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. KENNETH NEAL

No. 145A96

(Filed 24 July 1997)

1. Constitutional Law § 342 (NCI4th)— capital murder—bench conferences—potential jurors excused or deferred—no error

There was no error in a capital first-degree murder prosecution where potential jurors were excused or deferred during bench conferences, all but one of which were recorded. The conferences were held in the presence of counsel for defendant and the State and defendant was present in the courtroom. It does not appear that defendant's presence would have had a relation, reasonably substantial, to the fulness of his opportunity to defend, such that his absence thwarted the fairness and justness of his trial. The facts in *State v. Buchanan*, 330 N.C. 202 substantially overlap with the facts in this case.

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

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

2. Jury § 141 (NCI4th)— capital murder—jury selection—parole—defendant not allowed to question prospective jurors

There was no error in a capital first-degree murder prosecution in the denial of defendant's request to ask prospective jurors

about their understanding of a sentence of life without parole. The North Carolina Supreme Court has consistently decided this issue against defendant's position and the United States Supreme Court has never held that a defendant has a constitutional right to pose this question to prospective jurors. *Simmons v. South Carolina*, 512 U.S. 154, held that the trial court must inform the jury that the sentence of life imprisonment carries with it no possibility of parole where the State argues for the death penalty on the premise that the defendant will be dangerous in the future; that issue was not the basis of the State's argument for the death penalty in this case. Finally, the trial court complied precisely with the provisions of N.C.G.S. § 15A-2002, which provides that the judge shall instruct the jury that a sentence of life imprisonment means life without parole, and there is nothing in the record demonstrating that the jurors did not believe the trial court or follow its instructions. Furthermore, defendant's attorneys repeatedly told the jury that a sentence of life without parole would confine the defendant to a prison cell for the remainder of his life.

Am Jur 2d, Jury §§ 199, 200, 205, 206.

3. Jury § 119 (NCI4th)— capital murder—jury selection—question prohibited—peremptory challenges not exhausted—no error

The trial court did not abuse its discretion in a capital first-degree murder prosecution where defendant was prevented from asking potential jurors whether they would automatically reject the testimony of mental health professionals, but defendant has not shown prejudice because he indicated that he was "satisfied" with these jurors and did not exhaust his peremptory challenges.

Am Jur 2d, Jury §§ 205, 208.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

4. Jury § 82 (NCI4th)— capital murder—prospective juror excused for medical reasons—no abuse of discretion

There was no abuse of discretion in a capital murder prosecution where the trial court excused a prospective juror who had a medical history including coronary bypass surgery and an addiction to Valium and who stated that thinking about the case

was "bringing the problem back," and that the stress of being a prospective juror awakened him in the middle of the night.

Am Jur 2d, Jury §§ 264, 331.

5. Appeal and Error § 147 (NCI4th)— capital murder—nonstatutory mitigating circumstances—peremptory instructions—no objection

The failure of a defendant in a capital murder prosecution to object to the trial court's peremptory instructions on nonstatutory mitigating circumstances violated Appellate Rule 10(b)(6). Although defendant contended that his request for a peremptory instruction at the charge conference was sufficient compliance to preserve the issue for appellate review, in other cases where Rule 10(b)(2) was liberally construed the trial court agreed to give a specific, requested instruction and then proceeded either to give an instruction which differed from the one specified or to omit the instruction altogether, while here defendant made a general request for peremptory instructions on all of the submitted nonstatutory mitigating circumstances without giving the specific, suggested language and never notified the court of the specific instruction sought. In failing to object, defendant did not allow the court an opportunity to cure any perceived errors; hence, the spirit and purpose of the rule are not met.

Am Jur 2d, Appellate Review §§ 614-617.

6. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstances—peremptory instructions—no plain error

The trial court's peremptory instructions on nonstatutory mitigating circumstances in a capital sentencing hearing were reviewed only for plain error where defendant had failed to object at trial and the instructions did not amount to plain error. The jurors could not have failed to understand the meaning of the words "as all of the evidence tends to show in this case" as used in direct reference to and immediately following the words, "This mitigating circumstance is uncontroverted and is manifestly credible." Apparently, defendant's two trial attorneys did not believe the instructions were erroneous or that they enhanced defendant's burden of proof on the ten separate occasions they heard the instructions read to the jury; furthermore, the district attorney's arguments emphasized that the jury should consider

whether these circumstances had mitigating value, not whether the evidence supported the existence of these circumstances.

Am Jur 2d, Trial §§ 412-416, 1291.

7. Criminal Law § 692 (NCI4th Rev.)— capital sentencing—mitigating circumstances—mental or emotional disturbance—impaired capacity—peremptory instructions not given—no error

The trial court did not err in a capital prosecution for first-degree murder by not giving a peremptory instruction on the statutory mitigating circumstances that the offense was committed while defendant was under the influence of a mental or emotional disturbance or that defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. Although some evidence supported the submission of both circumstances, the evidence was conflicting and the trial court did not err by refusing to give peremptory instructions as to these mitigating circumstances.

Am Jur 2d, Trial §§ 1120-1129, 1291.

8. Criminal Law § 1402 (NCI4th Rev.)— 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 factor, and this case is more similar to cases where the death sentence was found proportionate than to those in which it was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. The characteristics which collectively distinguish this case from those in which the death penalty was held disproportionate are that the jury convicted 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 home; the victim suffered great physical pain before her death; and the victim was of unequal physical strength to defendant.

Am Jur 2d, Criminal Law §§ 609-612.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that mur-

der was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that 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 by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Cornelius, J., at the 12 February 1996 Criminal Session of Superior Court, Rockingham County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 May 1997.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 1 May 1995 for the first-degree murder of Amanda Lynn McCurdy. The defendant was tried capitally, and the jury found defendant guilty of the first-degree murder on the basis of malice, premeditation and deliberation. 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 set forth herein, we conclude that the defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

At trial, the State presented evidence tending to show that prior to April 1995, Amanda McCurdy and the defendant had a relationship for seven or eight years, living together for part of that time. McCurdy had two daughters, one of them by the defendant. The defendant had one previous criminal conviction for possession of stolen property, as well as a history of using drugs, particularly crack cocaine.

In the weeks before 13 April 1995, Amanda McCurdy revealed to co-workers, friends and family that the defendant was threatening to kill her. Gardenia Mitchell, a co-worker, testified that McCurdy disclosed to her that McCurdy was attempting to end her relationship with defendant and had put him out of the house. Members of

McCurdy's family, including her father, her sister and her brother, testified that McCurdy told each of them that the defendant was threatening to kill her. McCurdy's twelve-year-old daughter testified that defendant threatened to kill her mother the week before the murder.

Around midday on 13 April 1995, McCurdy dropped her two children off at her father's house so she could rest before going to work. According to the statement given by the defendant to the police, when McCurdy returned home, defendant was waiting outside. The two argued about when the defendant would remove his clothes from the home. Defendant left and walked around the neighborhood for twenty to thirty minutes before returning to the house. The defendant then forced his way into McCurdy's home and continued to argue with her. According to defendant, McCurdy came at him with a hammer, hitting his finger. Defendant took the hammer from McCurdy, and she ran to the bathroom. Before McCurdy could completely shut the door, defendant forced his way into the bathroom, and the two began to "fist fight." McCurdy ran to the living room. According to defendant's statement, McCurdy asked him to "please stop," saying that she would take defendant back. Defendant told her that it was "too late." Defendant hit McCurdy in the head with the hammer multiple times and continued to strike her after she fell to the floor. When the hammer head broke off, defendant jammed the hammer handle down McCurdy's throat.

Defendant then changed his bloody clothes and took the bloody items out of the house in a paper bag. When defendant left the house, McCurdy was still breathing. After leaving McCurdy's house, defendant went to the house of his friend Ronald Mitchell and asked for a plastic bag. Defendant appeared nervous. Defendant then placed the paper bag containing the bloody items into the plastic bag and left the plastic bag in a trash pile located at the road. That afternoon, defendant accepted a ride from Willie Ed Albrighton because defendant "wanted to get off the street." They went to Greensboro, where defendant bought cocaine. From there, defendant went to a motel where he registered under the name "John Smith" and smoked cocaine with three other people.

The next morning, Raymond Logan and Charles McCurdy, the victim's father, summoned police to McCurdy's home after becoming concerned about her well-being. The police discovered McCurdy's body in the living room. A large amount of blood was pooled around her head and spattered around the room. There was a partial shoe impression in blood by McCurdy's feet, which was later matched to a

pair of defendant's tennis shoes. The blood-spatter patterns in the living room indicated that some of the blows to McCurdy's head were delivered near the floor. The head of a hammer lay next to her head, and the hammer handle protruded from her mouth.

Dr. Robert L. Thompson, a pathologist, performed an autopsy on the victim's body. Based on his examination, Dr. Thompson concluded that the cause of death was blunt-force injuries to the victim's head. The injuries sustained were consistent with those that would result from being struck by a hammer. The victim was struck at least fifteen times. Additionally, Dr. Thompson discovered hemorrhages around the victim's neck area, as well as pinpoint hemorrhages in the victim's eyes. Dr. Thompson determined that these injuries resulted from strangulation which occurred prior to death.

On 14 April 1995, defendant was arrested and charged with the first-degree murder of Amanda Lynn McCurdy. After police read defendant his *Miranda* rights, he signed a waiver of those rights. The defendant initially denied any involvement in the death of Amanda McCurdy. However, the defendant later gave oral and written statements describing how he forced his way into the victim's house, argued with the victim and then hit her repeatedly in the head with a hammer. He related how, after the hammer head broke off, he shoved the hammer handle down her throat and then left the house while she was still alive. The defendant also stated that he last used cocaine on Wednesday, 12 April 1995, the day before the murder. After the defendant confessed to killing McCurdy, he led officers to the location of his bag of clothes. Blood on the clothes matched Amanda McCurdy's blood.

A probation officer testified for the defense and stated that defendant tested positive for cocaine use ten times from September 1992 through May 1994. Although the probation officer tried to get defendant to enter treatment programs, defendant refused. A family member and a friend both testified that defendant had a drug problem.

Jeannette Thomason, a psychologist, performed a psychological evaluation of the defendant. Thomason, testifying on behalf of the defendant, stated that he had a long history of drug abuse and was suffering from withdrawal symptoms: depression, confusion and poor judgment. According to Thomason, although the defendant had a limited capacity to deal with stressful situations, he was able to control his impulsiveness.

Dr. David Freeman, a neuroscientist and a physiologist, also testifying on behalf of the defendant, stated that long-term drug usage affects the way the brain operates, and that a withdrawal from the use of cocaine causes depression. However, Dr. Freeman admitted that he had neither talked with nor examined the defendant and that his testimony did not refer specifically to the defendant.

The defendant brings forward thirteen assignments of error for our review, all relating to either the jury selection or the sentencing proceeding.

JURY SELECTION

[1] In his first assignment of error, the defendant contends that his right to be present during all stages of his trial, pursuant to Article I, Section 23 of the North Carolina Constitution, was violated when the trial court excused jurors during bench conferences. During jury selection, the trial court conducted bench conferences on two separate days where it excused or deferred a total of twelve prospective jurors for mental, physical or hardship reasons. These bench conferences were held in the presence of counsel for defendant and for the State. The substance of each conference was entered into the record, showing the basis for each prospective juror's excusal, with the exception of only one instance. During the conference with the first prospective juror, the court reporter simply noted that the prospective juror handed the trial court a paper which was then handed to the attorneys. The defendant was present in the courtroom throughout these proceedings.

Article I, Section 23 of the North Carolina Constitution requires that defendants must be present at every stage of a capital trial proceeding. *State v. Buchanan*, 330 N.C. 202, 217, 410 S.E.2d 832, 841 (1991); *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990); *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). This requirement arises out of the Confrontation Clause of the North Carolina Constitution, which provides in pertinent part: "In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . ." N.C. Const. art. I, § 23.

The constitutional requirement of the defendant's presence at a capital trial protects the defendant's interests, as well as the public interest in preserving human life. This requirement also "protects the integrity of the system by preserving the appearance of fairness and

by optimizing the conditions for finding the truth." *Huff*, 325 N.C. at 30, 381 S.E.2d at 651. Hence, a defendant in a capital trial may not waive this right. *Id.*; *Payne*, 320 N.C. at 139, 357 S.E.2d at 612; *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969). Moreover, the trial court bears a duty to insure that the defendant is present throughout his trial. *Huff*, 325 N.C. at 31, 381 S.E.2d at 651; *Payne*, 320 N.C. at 139, 357 S.E.2d at 612.

Nevertheless, "[t]he burden is on the defendant to show the usefulness of his presence in order to prove a violation of his right to presence." *State v. Buchanan*, 330 N.C. at 224, 410 S.E.2d at 845. Once the defendant meets this burden, the burden shifts to the State to establish that the error is harmless beyond a reasonable doubt. *Id.*; *Huff*, 325 N.C. at 35, 381 S.E.2d at 654.

In *State v. Buchanan*, several bench conferences preceded the excusal of prospective jurors for cause with the express consent of counsel for the defendant and counsel for the State. The facts in *Buchanan* substantially overlap with the facts in the case *sub judice*; however, unlike *Buchanan*, here all of the bench conferences except one *were* recorded. In both cases,

> defendant was personally present in the courtroom during the conferences. Further, and perhaps more importantly, his actual presence was not negated by the trial court's actions. At each of the conferences defendant was represented by his attorneys. Defendant was able to observe the context of each conference and inquire of his attorneys at any time regarding its substance. Through his attorneys defendant had constructive knowledge of all that transpired. Following the conferences defense counsel had the opportunity and the responsibility to raise for the record any matters to which defendant took exception. At all times defendant had a first-hand source of information as to the matters discussed during a conference.

Buchanan, 330 N.C. at 223, 410 S.E.2d at 844-45.

In *Buchanan*, we 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." *Id.* at 223, 410 S.E.2d at 845.

In the instant case, as in *Buchanan*, it does not appear that "defendant's presence would have had 'a relation, reasonably sub-

stantial, to the fulness of his opportunity to defend,' such that his absence thwarted the fairness and justness of his trial." *Buchanan*, 330 N.C. at 215, 410 S.E.2d at 839 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 678 (1934)). Accordingly, we hold that defendant's constitutional right to be present at all stages of his capital trial was not violated in this case. This assignment of error is overruled.

[2] In his next assignment of error, defendant argues that the trial court erred by denying his request to conduct *voir dire* of prospective jurors as to their understanding of the meaning of a sentence of life without parole, so as to allow proper exercise of cause and peremptory challenges and determine whether venire members had misconceptions about parole eligibility that might bias them in favor of capital punishment. This Court has consistently decided this issue against defendant's position. *See, e.g., State v. Chandler*, 342 N.C. 742, 749, 467 S.E.2d 636, 648, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 133 (1996); *State v. Skipper*, 337 N.C. 1, 24, 446 S.E.2d 252, 264 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995); *State v. Green*, 336 N.C. 142, 157, 443 S.E.2d 14, 23, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994); *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 558, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994); *State v. Syriani*, 333 N.C. 350, 399, 428 S.E.2d 118, 145, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Furthermore, the United States Supreme Court has never held that a defendant has a constitutional right to pose this question to prospective jurors. To support his argument, defendant cites *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994). As we have stated previously, the *Simmons* Court "did not hold that a defendant has a constitutional right to question the venire about parole." *State v. Spruill*, 338 N.C. 612, 638, 452 S.E.2d 279, 292 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 63 (1995). *Simmons* simply held that where the State argues for the death penalty on the premise that the defendant will be dangerous in the future, the trial court must inform the jury that the sentence of life imprisonment carries with it no possibility of parole. The issue of defendant's danger to society in the future was not the basis of the State's argument for the death penalty in this case.

Finally, the trial court in the case *sub judice* complied precisely with the provisions of N.C.G.S. § 15A-2002, which provides in part: "The judge shall instruct the jury, in words substantially equivalent to

those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (Supp. 1996). There is nothing in the record demonstrating that the jurors did not believe the trial court or did not follow its instructions. "We presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Furthermore, the defendant's trial attorneys repeatedly told the jury that a sentence of life without parole would confine the defendant to a prison cell for the remainder of his life. Therefore, we hold that the trial court did not err in denying defendant's motion to explore the issue of parole during *voir dire*. This assignment of error is overruled.

[3] In his next assignment of error, the defendant contends that the trial court erred by preventing his defense counsel from asking prospective jurors whether they would automatically reject the testimony of mental health professionals. The defendant contends that this question did not attempt to impermissibly stake out the jurors but rather sought to uncover jurors who would refuse to listen to a psychologist's testimony. We find this argument to be without merit.

"The trial court is given broad discretion to control the extent and manner of questioning prospective jurors, and its decisions will not be overturned absent an abuse of discretion." *State v. Mash*, 328 N.C. 61, 63, 399 S.E.2d 307, 309 (1991). In *Mash*, this Court found no abuse of discretion when the defendant was prevented from "inquiring into the potential jurors' attitudes about . . . the expert testimony of psychiatrists and psychologists." *Id.* Similarly, we find that the trial court did not abuse its discretion in the case *sub judice*.

Even assuming, *arguendo*, that the defendant has demonstrated an abuse of discretion, the defendant has not shown that he was prejudiced thereby. The defendant argues that he was unable to question eight of the twelve jurors regarding their views towards psychological testimony. However, the record shows the defendant expressed that he was "satisfied" with these jurors at a point when he had used only two peremptory challenges. Because the defendant had not exhausted his peremptory challenges, he cannot demonstrate prejudice. *See Mash*, 328 N.C. at 64, 399 S.E.2d at 310. This assignment of error is overruled.

[4] The defendant asserts in his next assignment of error that the trial court improperly excused a prospective juror for medical reasons without allowing the defendant to question the juror. The prospective juror was desirable to the defendant because the juror had experienced drug dependency and was reluctant to impose the death penalty. Nonetheless, we hold this assignment of error lacks merit.

"A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." *State v. Harris*, 338 N.C. 211, 227, 449 S.E.2d 462, 470 (1994). According to N.C.G.S. § 15A-1212(2), a party may challenge for cause a prospective juror who is incapable of performing jury service by reason of mental or physical infirmity. Additionally, N.C.G.S. § 9-6(a) provides that citizens qualified for jury service may be excused for reasons "of compelling personal hardship." N.C.G.S. § 9-6(a) (1986).

Decisions concerning the excusal of prospective jurors are matters of discretion left to the trial court.

> "[I]t is the duty of the trial judge to see that a competent, fair and impartial jury is empaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law."

State v. McKenna, 289 N.C. 668, 680, 224 S.E.2d 537, 546 (quoting *State v. Waddell*, 289 N.C. 19, 29, 220 S.E.2d 293, 300 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976)), *death sentence vacated*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976).

In the instant case, the prospective juror had a medical history including coronary bypass surgery and an addiction to Valium. He stated that thinking about the case was "bringing the problem back," and that the stress of being a prospective juror awakened him in the middle of the night. The trial court properly exercised its discretion in excusing a prospective juror whose health was possibly in jeopardy. Accordingly, this assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[5] In his next assignment of error, defendant contends that the trial court erred in its peremptory instructions on nonstatutory mitigating

circumstances. The trial court agreed to submit ten nonstatutory mitigating circumstances and to give peremptory instructions on all. The trial court gave the following instruction as to each:

> If one or more of you finds from the evidence before you that this mitigating circumstance is uncontroverted and is manifestly credible as all the evidence tends to show in this case then the defendant is entitled for you to find this mitigating circumstance.
>
> And if one or more of you finds by the preponderance of the evidence that this circumstance is also deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the "Issues and Recommendation" form.

No juror answered in the affirmative as to any of the ten nonstatutory mitigators submitted.

The defendant asserts that these instructions failed to convey to the jurors that the evidence was uncontradicted and improperly imposed a higher burden of proof on the defense. We have stated previously that before a jury finds a nonstatutory mitigating circumstance, it must determine: first, that the evidence supports the existence of the circumstance and, second, that the circumstance has 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). According to the defendant's argument, before the jury could make these two determinations, the trial court's instructions erroneously forced jurors to determine (1) whether the evidence was uncontroverted, and (2) whether the evidence was manifestly credible.

However, the defendant failed to object to this instruction, after any of the ten separate times that it was given or at the conclusion of the instructions, before the jury began deliberations. Thus, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure bars this assignment of error. According to the Rule, "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . ." N.C. R. App. P. 10(b)(2). "The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby

eliminate the need for a new trial." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Notwithstanding his failure to object to the instruction given, the defendant claims that his request for a peremptory instruction at the charge conference is sufficient compliance with Rule 10(b)(2) to preserve this issue for appellate review. The defendant likens his case to other cases where this Court liberally construed the meaning of Rule 10(b)(2). *See, e.g., State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992); *State v. Ross*, 322 N.C. 261, 367 S.E.2d 889 (1988). These cases differ from the case *sub judice* significantly. In these cases, the trial court agreed to give a *specific*, requested instruction, and then proceeded either to give an instruction which differed from the one specified or to omit the instruction altogether. Here, in contrast, the defendant made a *general* request for peremptory instructions on all of the submitted nonstatutory mitigating circumstances without giving the specific, suggested language. Defense counsel never notified the trial court of the specific instruction sought. Furthermore, the defendant, in failing to object to the given instruction, did not allow the trial court an opportunity to cure any perceived errors. Hence, "the spirit and purpose of Rule 10(b)(2) are not met." *State v. Allen*, 339 N.C. 545, 554-55, 453 S.E.2d 150, 155 (1995), *overruled by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997).

[6] Because this issue has not been preserved for appeal, we may review it only for plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. "To constitute plain error, an instructional error must be 'so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.' " *State v. Payne*, 337 N.C. 505, 523, 448 S.E.2d 93, 103 (1994) (quoting *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Defendant, therefore, "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). Indeed, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection had been made in the trial court." *State v. White*, 343 N.C. 378, 391, 471 S.E.2d 593, 600 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)), *cert. denied*, — U.S. —, 136 L. Ed. 2d 229 (1996).

After careful consideration of this instruction in light of the arguments presented and the relevant record, we conclude that the trial

court's instructions did not amount to plain error. We do not perceive how the jurors could have failed to understand the meaning of the words "as all the evidence tends to show in this case," which words were used and applied in direct reference to and immediately following the words: "This mitigating circumstance is uncontroverted and is manifestly credible." Apparently, the defendant's two trial attorneys did not believe the trial court's instructions here were erroneous or that the instructions enhanced defendant's burden of proof on the ten separate occasions they heard the instructions read to the jury. Furthermore, the district attorney's arguments emphasized that the jury should consider whether these circumstances had mitigating value, not whether the evidence supported the *existence* of these circumstances. Hence, even though the trial court's instruction arguably may not have been "a model of clarity," we do not believe that it affected the outcome of the case. *State v. Williams*, 339 N.C. 1, 46, 452 S.E.2d 245, 272 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995). This assignment of error is overruled.

[7] In his next assignment of error, the defendant contends that the trial court erred by failing to give peremptory instructions on the statutory mitigating circumstances that the offense was committed while the defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (Supp. 1996), and that the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6). We conclude that this assignment of error lacks merit. The trial court agreed to submit three statutory mitigating circumstances, in addition to the (f)(9) catchall, and to peremptorily charge the jury as to the (f)(1) mitigator, that the defendant has no significant history of prior criminal activity. Although given a peremptory charge on this circumstance, none of the jurors found it to exist. In this regard, this Court has stated:

> "Where . . . all of the evidence in [a capital prosecution], if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). Even if the jury is given a peremptory instruction in regard to a certain mitigating circumstance, the individual jurors may still reject that circumstance on the basis that the supporting evidence was not convincing. *Huff*, 325 N.C. at 59, 381 S.E.2d at 669.

State v. Gay, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993) (alteration in original).

In the case *sub judice*, the trial court did not err in failing to give peremptory instructions on either the (f)(2) or (f)(6) statutory mitigating circumstances because the evidence was not uncontroverted. Although some evidence supported the *submission* of both of these statutory mitigating circumstances, there was also evidence negating the (f)(2) statutory mitigating circumstance, that the defendant was under the influence of a mental or emotional disturbance, as well as the (f)(6) statutory mitigating circumstance, that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

Jeannette Thomason, the psychologist who evaluated the defendant, testified that defendant had a history of drug abuse and dependency, and that he was suffering from withdrawal symptoms. Thomason further testified that in her opinion, the defendant lacked the ability to control his behavior at the time of the crime. However, she also testified that defendant *was* able to control his impulsiveness.

According to the testimony of Dr. David Freeman, long-term drug usage affects the way the brain operates. However, Dr. Freeman also stated that he had not talked with the defendant personally and that his testimony did not refer specifically to the defendant.

While several witnesses testified regarding the defendant's drug abuse, other witnesses provided contradictory testimony. The defendant's employer testified that he had never seen any signs of drug use by the defendant. The defendant's sister-in-law testified that she was unaware of any problems the defendant may have had. Finally, the defendant's brother testified that, while he knew the defendant had a drug problem, he had seen no changes in the defendant over the years.

The testimony of witnesses who saw defendant immediately after the murder does not support the position that defendant was under the influence of a mental or emotional disturbance when he killed the victim, or that he failed to appreciate the criminality of his actions. Ronald Mitchell and Willie Ed Albrighton both testified that the defendant was not discernibly impaired. When the defendant was arrested the day after the murder, officers noted that he did not appear impaired or intoxicated. Further, the defendant stated that he did not use drugs until after the murder.

Additionally, the defendant's statement to police officers about his conduct leading up to and during the murder demonstrated purposefulness and deliberation. After arguing with McCurdy, defendant walked around the neighborhood for twenty or thirty minutes before returning. The defendant could recall his conversation and his actions in detail. When McCurdy said she was sorry and that she would take the defendant back, he responded that it was "too late." His response demonstrates deliberate thought. Finally, the defendant's actions after killing McCurdy also demonstrate a recognition of the criminality of his conduct. The evidence shows defendant was sufficiently aware of his actions in that he wanted to "get off the street" and he registered in a motel in another county under a false name after removing and hiding his bloody clothes.

We conclude that the evidence is conflicting as to whether defendant was under the influence of a mental or emotional disturbance when he committed the murder and as to whether defendant's capacity to appreciate the criminality of his conduct was impaired. Therefore, the trial court did not err by refusing to give peremptory instructions as to these mitigating circumstances. " '[A] peremptory instruction is inappropriate when the evidence surrounding that issue is conflicting.' " *State v. Lynch*, 340 N.C. 435, 476-77, 459 S.E.2d 679, 700 (1995) (quoting *State v. Noland*, 312 N.C. 1, 20, 320 S.E.2d 642, 654 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985)), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 558 (1996).

We note that even though the trial court refused to give a peremptory instruction on the mitigating circumstance of whether defendant was under the influence of a mental or emotional disturbance, the jury nevertheless found this statutory circumstance to exist.

This assignment of error is overruled.

PRESERVATION ISSUES

The defendant raises seven issues which he concedes have been decided against his position by this Court: (1) the trial court erred by submitting to the jury the especially heinous, atrocious, or cruel aggravating circumstance within the context of instructions that "failed adequately to limit the application of this inherently vague and overly broad circumstance"; (2) the trial court erred by preventing the defendant from asking all jurors whether they would in all cases sentence a convicted murderer to die; (3) the trial court erred by preventing the defendant from addressing the jury in allocution; (4) the

trial court erred by permitting the prosecutor to engage in extensive biblically based argument for death; (5) the trial court erred by using the "inherently ambiguous" terms "satisfaction" and "satisfy" to instruct the jury as to the defendant's burden of proof applicable to mitigating circumstances; (6) the trial court erred by instructing the jurors that they could reject nonstatutory mitigating evidence on the basis that it had no mitigating value; and (7) the trial court's use of the term "may" in sentencing Issues Three and Four made consideration of proven mitigation discretionary with the sentencing jurors. We have fully considered the defendant's arguments relating to these assignments of error and find no compelling reason to depart from our prior holdings. Therefore, we overrule each of these assignments of error.

PROPORTIONALITY REVIEW

[8] Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstance found by the jury; (2) whether passion, prejudice or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). After thoroughly reviewing the record, transcript and briefs in the present case, we conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We defined the pool of cases for proportionality review in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, 513 U.S. 1159, 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. at 198, 443 S.E.2d at 47.

In the case *sub judice*, the jury found the defendant guilty of first-degree murder on the basis of premeditation and deliberation. At sentencing, the trial court submitted the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury unanimously found the existence of this aggravating circumstance. The jury found one of the three statutory mitigating circumstances submitted for its consideration: that the capital felony was committed while the defendant was mentally or emotionally disturbed, N.C.G.S. § 15A-2000(f)(2). The jury declined to find the existence or mitigating value of any one of the ten nonstatutory mitigating circumstances submitted.

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 home; the victim suffered great physical pain before her death; and finally, the victim was of unequal physical strength to defendant. These characteristics collectively distinguish this case from those in which we have held the death penalty disproportionate.

In our proportionality review, it is appropriate 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*, 512 U.S. 1254, 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). 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-eight years old at the time of the crime. In *Stokes*, the defendant was convicted under a theory of felony murder, and there was virtually no evidence of premeditation and deliberation. In the present case, the defendant was convicted upon a theory of premeditation and deliberation. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Finally, in *Stokes*, the victim was killed at his place of business. In this case, the victim was killed in her living room. 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. In the present case, by contrast, the defendant hit the victim's head with a hammer multiple times, ensuring the victim's death. Further, the defendant did not seek medical aid for the victim. Instead, the defendant thrust the broken hammer handle down the victim's throat and then left the house while the victim was still breathing, hid his bloody clothes, and spent the evening using cocaine.

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 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 of death disproportionate or to 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*, 513 U.S. 1135, 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. CHARLES LOUIS PICKENS, JR.

No. 121A92-2

(Filed 24 July 1997)

1. Constitutional Law § 355 (NCI4th)— first-degree murder—Fifth Amendment privilege—asserted by codefendant after plea bargain

The trial court did not err in a noncapital first-degree murder retrial by accepting an assertion of the Fifth Amendment privilege against self-incrimination from a codefendant whom defendant wished to present as a witness and who had been convicted of first-degree murder in the first trial but who pled guilty to second-degree murder after the first-conviction was remanded

and who had been released from prison at the time of defendant's second trial. Although defendant contended that the trial court did not make sufficient findings regarding the codefendant's fear of future prosecution, the court conducted a *voir dire*, the possibility of perjury charges or federal charges was put forth by counsel as grounds upon which the privilege was asserted, and the court concluded that the possibility of perjury charges or federal prosecution constituted sufficient fear of future prosecution to justify the assertion of the privilege. Defendant lodged only a general objection, at no time asked for a more specific enunciation of the fear of future prosecution, and appeared in oral argument to concede the possibility of future federal prosecution.

Am Jur 2d, Criminal Law §§ 703, 937.

2. Constitutional Law § 355 (NCI4th)— first-degree murder—codefendant—plea bargain—Fifth Amendment privilege not waived

There was no waiver of the Fifth Amendment privilege against self-incrimination in a noncapital first-degree murder prosecution where a codefendant whom defendant wished to call as a witness and who had pled guilty to second-degree murder after the first convictions were remanded and been released by the time of this trial asserted his Fifth Amendment privilege based on fear of future prosecution for perjury or federal crimes. Waiver of the privilege against compulsory self-incrimination by a plea is applicable only to the criminal act for which the plea of guilty is entered, not to other criminal acts.

Am Jur 2d, Criminal Law §§ 703, 937.

3. Constitutional Law § 352 (NCI4th)— murder—codefendant—Fifth Amendment—assertion before jury—not required

The trial court did not abuse its discretion by not requiring a proposed witness to assert his Fifth Amendment privilege against self-incrimination in the presence of the jury in a noncapital first-degree murder retrial where the proposed witness was a codefendant who had pleaded guilty to second-degree murder and been released after the remand and before this trial. The probative value of asserting the privilege in front of the jury was substantially less than in *State v. Thompson*, 332 N.C. 204, because the defendant here sought to have the codefendant take respon-

sibility for firing the weapon that killed the victim but was tried under the theory of acting in concert, so that the factual possibility that defendant did not fire the weapon was immaterial. Moreover, the trial court allowed defendant to introduce a transcript of the codefendant's plea of guilty to murder, enabling defendant to present the substance of his desired evidence and to present it more effectively. The evidence was overwhelming that defendant and the witness had a common purpose to fire into an occupied dwelling, that shots were in fact fired into an occupied dwelling, and that the victim was killed as a direct result. Any error in not permitting defendant to place his witness on the stand was harmless.

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

4. Constitutional Law § 355 (NCI4th)— granting of immunity to compel testimony—denied to defendant—not a due process violation

An argument by a first-degree murder defendant that due process required that the State provide a codefendant with immunity from future prosecution so that he could testify for defendant because there are statutory mechanisms for the State to compel testimony was not preserved for appellate review where defendant neither asked the State or the trial court to grant defendant's witness immunity nor objected at the pretrial hearing or *voir dire* on these grounds. In any event, the evidence was available from other sources.

Am Jur 2d, Criminal Law §§ 703, 937.

5. Evidence and Witnesses § 1026 (NCI4th)— first-degree murder—statement of codefendant exonerating defendant—not a statement against penal interest

The trial court did not err in a noncapital first-degree murder retrial where a codefendant whom defendant wished to call as a witness was allowed to assert his Fifth Amendment privilege against self-incrimination and defendant was not allowed to introduce a statement in a letter by the codefendant which tended to exonerate defendant. Although defendant contends that the statement falls within the statement against penal interest hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(3), the statement is not against penal interest because the codefendant had already entered a guilty plea and was serving a sentence for the murder when the letter was written, there were no corroborating circum-

stances to indicate that the letter was trustworthy, and there were circumstances to indicate otherwise.

Am Jur 2d, Criminal Law § 937.

6. Evidence and Witnesses § 86 (NCI4th)— first-degree murder—evidence of threats and assaults by codefendant against victim and family—excluded

The trial court did not err in a noncapital first-degree murder retrial where a codefendant whom defendant wished to call as a witness was allowed to assert his Fifth Amendment privilege against self-incrimination and the trial court excluded evidence detailing repeated threats and physical assaults by the codefendant against his codefendant's girlfriend and her children, including the victim, earlier on the day of the murder. The evidence was duplicative and the codefendant's motive in killing the specific child was irrelevant since all of the evidence showed that neither codefendant could see who was in the apartment and that the shots were fired at random.

Am Jur 2d, Evidence §§ 301, 404-412.

7. Evidence and Witnesses §§ 929, 928 (NCI4th)— first-degree murder—bystanders—testimony admissible through officers—excited utterance—present sense impressions

The trial court did not err in a noncapital first-degree murder retrial by admitting the statements of several unidentified individuals through the testimony of two police officers where the testimony of one officer fit squarely within the excited utterance exception to the hearsay rule in that the scene was still chaotic when the officer arrived, an individual screamed that defendant had shot the victim, and the victim was still "sort of" falling when the officer entered the apartment, and the statements that several individuals made to the other officer identifying defendant as the person who shot the victim were made contemporaneously with the declarants' viewing of the events and were properly admitted as present sense impressions. Evidence which falls within a firmly rooted hearsay exception does not violate a defendant's right to confront and cross-examine witnesses.

Am Jur 2d, Evidence § 865; Hearsay § 330.

Admissibility as part of res gestae, of accusatory utterances made by homicide victim after act. 4 ALR3d 149.

8. Indictment, Information, and Criminal Proceedings § 50 (NCI4th)— discharging a "shotgun, a firearm" into house—evidence that weapon a handgun—no fatal variance

There was not a fatal variance between the indictment and the evidence where the indictment charged that defendant "did discharge a shotgun, a firearm," into a dwelling house while it was actually occupied and the evidence at trial established that the fatal shot came from a handgun. The essential element of discharging a firearm was alleged; the averment to the shotgun was not necessary, making it mere surplusage.

Am Jur 2d, Indictments and Informations §§ 257, 259, 260.

9. Assault and Battery § 81 (NCI4th)— discharging a weapon into occupied property—sufficiency of evidence

There was sufficient evidence of the felony of discharging a weapon into occupied property where the evidence established that defendant and Arrington were half brothers; that defendant became involved in a series of events while breaking up a fight between Arrington and Cannady by pointing a gun at Cannady; that two shots were fired at Cannady by the defendant or Arrington as Cannady fled; that defendant and Arrington were both seen carrying guns outside the apartment where the child was shot; that they threatened to kill Cannady and defendant was heard saying that he was going to kill everyone in the apartment for messing with his brother; shots were fired into the apartment immediately after defendant and Arrington were seen together outside making threats; and the intent of defendant and Arrington was to avenge the beating of Arrington by Cannady and to seek retribution for the perceived mistreatment of Arrington by several of the inhabitants of the apartment into which the shots were fired.

Am Jur 2d, Assault and Battery §§ 90-96.

10. Criminal Law § 222 (NCI4th Rev.)— first-degree murder—statutory speedy trial—no error

The was no error in the trial court's denial of a defendant's motion for a speedy trial under N.C.G.S. § 15A-711(c) on a first-degree murder retrial where defendant was released from the custody of the Department of Correction and returned to

Buncombe County, where he was bonded out within six months of his request. Thus, even though defendant admitted that he failed to properly serve a copy of the motion on the district attorney and was not entitled to relief, the essential requirement of the statute was met.

Am Jur 2d, Criminal Law §§ 652-663, 849-851.

11. Constitutional Law § 321 (NCI4th)— first-degree murder retrial—constitutional speedy trial—no error

The constitutional right to a speedy trial was not violated in a first-degree murder retrial by the extended prosecution and appeal processes in the case where the length of delay was five years and six months from indictment to retrial, but only approximately eighteen months passed from the time of remand on the first appeal to the second trial and the primary reason for delay was defendant's appeal of his first conviction. The only prejudice defendant attributes to the delay was the unavailability of a witness for the prosecution who died before the second trial and whose prior testimony, including the cross-examination by defendant, was read into the record at the second trial at the prosecution's request. A balancing of the factors set out in *State v. McCollum*, 334 N.C. 208, indicates that defendant's constitutional right to a speedy trial was not violated.

Am Jur 2d, Criminal Law §§ 652-663, 849-851.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Patti, J., at the 27 November 1995 Criminal Session of Superior Court, Buncombe County, upon jury verdicts finding defendant guilty of one count of first-degree murder in perpetration of a felony and one count of discharging a weapon into occupied property. Heard in the Supreme Court 17 April 1997.

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

Charles R. Brewer for defendant-appellant.

LAKE, Justice.

This appeal marks the second time this case has come before this Court.

On 7 May 1990, defendant Charles Louis Pickens, Jr. was indicted for first-degree murder and discharging a firearm into occupied property. He and codefendant James Edward Arrington were tried jointly and capitally in September 1991. The jury found defendant guilty, and he was sentenced to life for the murder conviction. On appeal, this Court concluded that the joinder of the defendants for trial was prejudicial error and remanded the case for new, separate trials. *State v. Pickens*, 335 N.C. 717, 440 S.E.2d 552 (1994). Defendant was retried noncapitally to a jury at the 27 November 1995 Criminal Session of Superior Court, Buncombe County, Judge Timothy L. Patti presiding. The jury found defendant guilty of first-degree murder in perpetration of a felony and guilty of discharging a weapon into occupied property. Judge Patti merged the convictions for sentencing and sentenced defendant to a mandatory term of life imprisonment. Defendant appeals to this Court as of right from the first-degree murder conviction.

The State's evidence tended to show that the defendant, Charles Louis Pickens, Jr., is the half brother of James Edward Arrington. On 24 March 1990, Arrington and his longtime girlfriend, Karen Robinson, had an argument that continued for a substantial period of time. Arrington and Robinson lived together in Apartment 4-A of the Erskine Street Apartments in Asheville, North Carolina, with Robinson's three children, one of whom was the victim, nine-year-old Tereca Stewart.

The specific events surrounding the killing of Tereca Stewart on 24 March 1990 began in Apartment 18-B of the same housing complex. This was the apartment of Darryl Cannady and his mother, Gloria Cannady. When Darryl Cannady arrived home from work that day, Arrington and Robinson came to his apartment. They started to argue, and Ms. Cannady told them to leave. Outside, Arrington accused Robinson of "messing around" with Darryl Cannady and angrily slammed Robinson down on the pavement.

The Asheville police were called. Upon arrival, the police informed Robinson that one of her possible remedies was to swear out a warrant for the arrest of Arrington. Robinson and Ms. Cannady went to the magistrate's office and took out two separate warrants against Arrington. When they returned, Robinson began removing Arrington's belongings from Apartment 4-A with the help of several individuals. Just as they were finishing, Arrington arrived at the apartment carrying a gun, a knife and some nunchakus (a martial arts

weapon consisting of two sticks connected by a chain). Arrington ordered everyone but Robinson out of Apartment 4-A.

Arrington grabbed Robinson by the neck. Darryl Cannady then attacked Arrington, and the two began to fight. At approximately the same time, defendant's sister told defendant that Arrington and Cannady were fighting. Defendant proceeded toward Apartment 4-A, where the fight was taking place. At least two residents of the housing complex heard defendant make a statement to the effect that "he was going to kill everybody in that [expletive] apartment for messing with his brother."

Defendant burst into Apartment 4-A, pointed a rifle at Cannady and ordered Cannady to get off Arrington. Cannady fled the apartment as two shots were fired at him. As he was leaving, Cannady heard defendant ask Arrington, "Where's the nine?" He was referring to a nine-millimeter pistol. Cannady ran to Apartment 18-B, where Robinson and several others had also fled, including Robinson's children. Cannady and others saw Arrington and the defendant outside the apartment with guns. Someone yelled for everyone in the apartment to get down, but nine-year-old Tereca ran toward one of the adults in the living room. Just then, two shots were fired. One bullet pierced a living room window and struck young Tereca in the head. She was killed instantly. The bullet, a nine-millimeter round, passed through Tereca's brain and lodged in the apartment wall. A witness reported to the police that he saw defendant "with a gun shooting in the lady's window;" "[h]e was shooting in the living room window."

Calls were made to 911, and several Asheville police officers arrived within minutes. The housing complex was in a state of pandemonium. Sergeant William Wysong arrived while shots were still being fired. A man he believed to be Cannady grabbed him and pulled him to the ground. The man shouted hysterically, "He killed her. He shot—Fella [defendant] shot her. He just [expletive] shot her." While approaching Building 18, Lieutenant Tom Aardema heard several people scream "[t]hat was him," referring to the shooter as the black male driving away in an old Oldsmobile. Sergeant Walter Robertson testified that he saw the defendant driving away from the housing complex in an old model Oldsmobile.

Later that evening, defendant showed up at the Asheville Police Department and gave a statement to the police. Defendant had a conversation with his sister immediately after the interview in which he told her that "he didn't mean to shoot that little girl. He didn't know

she was in there." When his sister returned to her father's house, defendant called and told her to have her father go outside and get the "cigarettes" from under the lawn mower. A nine-millimeter pistol was found under the lawn mower. Two to three months later, a cousin of the defendant bought a nine-millimeter pistol from a man who was accompanied by defendant's father. Defendant's cousin ultimately turned the weapon over to an attorney. Ballistics tests established that this was the nine-millimeter pistol that fired the fatal shot.

As stated above, defendant and Arrington were both convicted of the first-degree murder of Tereca Stewart; both convictions were set aside by this Court; and the case was remanded for new, separate trials. At the time of defendant's second trial, Arrington had already been released from prison after serving a portion of his sentence under a plea arrangement with the State in which he pled guilty to second-degree murder. Defendant informed the trial court that he intended to call Arrington as a witness in his second trial. Arrington was placed on the witness stand in the absence of the jury, and his attorney informed the trial court that Arrington desired to assert his Fifth Amendment right. The trial court, during *voir dire*, confirmed this with Arrington and ruled that Arrington had the right to exercise his Fifth Amendment privilege based on the possibility of perjury charges or federal prosecution. Arrington's plea transcript was then offered into evidence through the testimony of a police officer. Defendant was again found guilty of first-degree murder and sentenced to life imprisonment.

[1] In his first assignment of error, defendant contends that the trial court erred by accepting Arrington's assertion of his Fifth Amendment privilege against self-incrimination, thereby not allowing defendant to present Arrington as a witness. Defendant argues that the trial court made insufficient findings regarding Arrington's fear of future prosecution, and that Arrington's privilege against self-incrimination was waived by virtue of his pleading guilty to and completing his sentence for the murder of Tereca Stewart. In the alternative, defendant claims that under due process Arrington should have been provided immunity from prosecution so that he could testify. Defendant also asserts that the trial court erred by refusing to allow him to introduce other evidence of Arrington's words and conduct tending to exculpate the defendant. Defendant maintains that he was prejudiced by the absence of this evidence because defendant's primary theory of defense was that Arrington was the person who fired the fatal shot. The inability to question

Arrington or to present other evidence of Arrington's words or conduct, defendant argues, prevented him from establishing an adequate defense as guaranteed by our state and federal Constitutions. We do not agree with these several arguments.

Defendant contends the trial court did not make sufficient findings regarding Arrington's fear of future prosecution as required before ruling upon the right of a witness to invoke his Fifth Amendment privilege. The Fifth Amendment right against compulsory self-incrimination was made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653 (1964). It protects an individual from being compelled to give testimony which may incriminate him or which might subject him to fines, penalties, or forfeiture. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964). "When a witness invokes the Fifth Amendment privilege, the trial court is to 'determine whether the question is such that it may reasonably be inferred that the answer may be self-incriminating,' " *State v. King*, 343 N.C. 29, 47, 468 S.E.2d 232, 244 (1996) (quoting *State v. Eason*, 328 N.C. 409, 418, 402 S.E.2d 809, 813 (1991)), and the claim of privilege "should be liberally construed," *Allred*, 261 N.C. at 35, 134 S.E.2d at 189. The privilege applies not only to "evidence which an individual reasonably believes could be used against him in a criminal prosecution," *Maness v. Meyers*, 419 U.S. 449, 461, 42 L. Ed. 2d 574, 585 (1975), but also encompasses evidence that "would furnish a link in the chain of evidence needed to prosecute the claimant," *Hoffman v. United States*, 341 U.S. 479, 486, 95 L. Ed. 1118, 1124 (1951). However, the privilege only "protects against real dangers, not remote and speculative possibilities." *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972). It is for the trial court to determine, "from the implications of the question and in the setting in which it is asked," whether that real danger exists, and the trial court should deny the claim only if there is no such possibility. *State v. Ballard*, 333 N.C. 515, 520, 428 S.E.2d 178, 181, *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993).

As required in this case, the trial court examined the possibility of future prosecution if witness Arrington were to be compelled to testify. When it became apparent that defendant intended to call Arrington as a witness, the trial court conducted a *voir dire* in the absence of the jury. At the *voir dire*, the trial court confirmed with the witness that he intended to assert his Fifth Amendment privilege. The trial court gave counsel for the parties and Arrington's counsel an

opportunity to argue their positions regarding Arrington's claim of privilege. The possibility of perjury charges or other federal charges was put forth by Arrington's counsel as grounds upon which the privilege was asserted. Based on *voir dire* and arguments of counsel, the trial court concluded that the "possibility of perjury charges or federal prosecution" constituted sufficient fear of future prosecution to justify Arrington's assertion of his Fifth Amendment privilege. Regardless of the correctness of this conclusion, defendant lodged only a general objection to this conclusion and ruling, and at no time did he ask the State or the trial court for a more specific enunciation of the witness' fear of future prosecution. In fact, defendant appears in argument to concede the possibility of future federal prosecution. Thus, we hold that, under the circumstances, the trial court's ruling allowing witness Arrington to refuse to testify on Fifth Amendment grounds was proper.

[2] Regarding defendant's argument that Arrington waived his right to invoke his Fifth Amendment privilege because of his guilty plea, we hold that defendant's argument is misplaced. Waiver of the privilege against compulsory self-incrimination by a plea is applicable only to the criminal act for which a plea of guilty is entered, not to other criminal acts. *United States v. Tindle*, 808 F.2d 319, 325 (4th Cir. 1986). Because there was an asserted fear of future prosecution for other crimes, Arrington's plea of guilty did not act as a complete waiver of his privilege against self-incrimination.

[3] A related question remains, however. Defendant contends that he should at least have been able to compel Arrington to take the witness stand and assert his Fifth Amendment privilege in front of the jury. The purpose of doing so would be to raise the inference that someone else pled guilty to or was responsible for this crime, thereby bolstering defendant's claim that he was not involved in the shooting. Defendant analogizes this case to *State v. Thompson*, 332 N.C. 204, 420 S.E.2d 395 (1992), in which this Court held that the trial court did not err by allowing the prosecutor to call a witness to the stand, knowing that the witness would invoke his Fifth Amendment privilege. There, the Court quoted from a federal Sixth Circuit Court of Appeals' decision in stating that, "We believe that this was permissible because the prosecutor's case would be 'seriously prejudiced' by failure to offer [the codefendant] as a witness in light of [the codefendant's] role in the murder." *Thompson*, 332 N.C. at 223, 420 S.E.2d at 406 (quoting *United States v. Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980)). The defendant argues the same privilege as is afforded

prosecutors should be given to defendants. Because there appears to be no North Carolina case directly on point, and because this Court's ruling in *Thompson* was based on the Sixth Circuit's opinion in *Vandetti*, it is appropriate that we review the principles enunciated in *Vandetti* to assess their applicability to this case.

In *Vandetti*, the court noted that the Sixth Circuit had previously allowed the calling of a witness who indicated he would assert his Fifth Amendment privilege where " 'the prosecutor's case would be seriously prejudiced by a failure to offer him as a witness.' " *Vandetti*, 623 F.2d at 1147 (quoting *United States v. Kilpatrick*, 477 F.2d 357, 360 (6th Cir. 1973)) (The court recognized in footnote that most of the federal circuit courts hold it is not error for the judge to disallow such testimony of a witness). The court went on to caution "that it is a practice so imbued with the 'potential for unfair prejudice' that a trial judge should closely scrutinize any such request." *Id.* (quoting *United States v. Maffei*, 450 F.2d 928, 929 (6th Cir. 1971), *cert. denied*, 406 U.S. 938, 32 L. Ed. 2d 138 (1972)). This is because there are two difficulties that may arise when a witness is presented and then refuses to testify by asserting his Fifth Amendment privilege. The first is that it permits the party calling the witness to build or support his case out of improper speculation or inferences that the jury may draw from the witness' exercise of the privilege, which cannot be adequately corrected by trial court instruction. *Id.* at 1148 (citing, *e.g.*, *Namet v. United States*, 373 U.S. 179, 10 L. Ed. 2d 278 (1963)). The second concern is that it encroaches upon the constitutional right to confrontation because the presentation of the exercise of the privilege cannot be tested for relevance or value through cross-examination. *Id.* (citing, *e.g.*, *Douglas v. Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934 (1965)). As a result of these difficulties, "the trial judge must weigh a number of factors in striking a balance between the competing interests." *Id.* at 1149 (citing *Eichel v. New York Central R.R. Co.*, 375 U.S. 253, 11 L. Ed. 2d 307 (1963)). Such a balancing will be left to the discretion of the trial court in determining whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice in accordance with Rule 403 of the Rules of Evidence. *Id.*

In *Thompson*, putting the witness on the stand was significantly probative for its value in identifying the person hired by the defendant to kill the victim in a contract killing case. In the case *sub judice*, the probative value of Arrington asserting his Fifth Amendment privilege in front of the jury was substantially less than in *Thompson*. The

defendant here sought to have Arrington take responsibility for firing the weapon that killed the victim. However, under the theory of acting in concert, by which defendant was tried, the factual possibility that defendant did not fire the weapon which held the fatal bullet was immaterial since the two codefendants had the common purpose to commit a murder, and a murder was in fact committed. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997). Moreover, in this case, the trial court allowed defendant to introduce into evidence a transcript of Arrington's plea of guilty to murder, thereby enabling defendant to present the substance of his desired evidence and to present it more effectively. Allowing Arrington to assert his privilege in front of the jury would have injected the risk of the jury making erroneous inferences about the relative roles and degrees of culpability of the defendant and Arrington, a risk which was unnecessary in light of the trial court's admission of Arrington's transcript of plea. Thus, requiring Arrington to take the stand merely to allow defendant to raise an inference of Arrington's guilt would have been needlessly duplicative and less effective for defendant's purpose. In *Thompson*, the risk of prejudice or confusion was minimal since the defendant's role in the murder was clearly not as the actual shooter. Considering these various factors, we hold that the trial court did not abuse its discretion by not requiring this proposed witness to assert his Fifth Amendment privilege in the presence of the jury.

Assuming *arguendo* that the trial court erred by not permitting defendant to place his proposed witness on the stand, such error was harmless beyond a reasonable doubt. The State prosecuted defendant upon a theory of acting in concert. As this Court recently clarified in *Barnes*:

> The correct statement of the doctrine of acting in concert in this jurisdiction is that . . . :
>
> > [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."
>
> [*State v.*] *Erlewine*, 328 N.C. [626,] 637, 403 S.E.2d [280,] 286 [1991] (quoting [*State v.*] *Westbrook*, 279 N.C. [18,] 41-42, 181 S.E.2d [572,] 586 [1971]) (alterations in original).

Barnes, 345 N.C. at 233, 481 S.E.2d at 71. The evidence was overwhelming in establishing that defendant and Arrington had a common purpose to fire into an occupied dwelling, that shots were in fact fired into an occupied dwelling, and that the victim was killed as a direct result.

[4] In a related argument under his first assignment of error, defendant next contends that in the interest of due process, the State should have provided Arrington with a guarantee of immunity from future prosecution so that he could testify on defendant's behalf. Defendant notes that N.C.G.S. §§ 15A-1051 and -1052 provide the State with mechanisms for compelling the testimony of witnesses by granting them immunity from crimes that might otherwise form the bases for claims of privilege against self-incrimination. N.C.G.S. §§ 15A-1051, -1052 (1988). Defendant contends that due process requires a criminal defendant be afforded the same power, especially where the testimony is likely to be exculpatory.

We note at the outset that defendant has failed to preserve this argument for review. A thorough examination of the record reveals that the defendant neither asked the State or the trial court to grant defendant's proposed witness immunity nor objected at the pretrial hearing or *voir dire* at trial on the grounds asserted here. Thus, this argument was not preserved for review and may not be raised for the first time on appeal. N.C. R. App. P. 10(b). In any event, the evidence defendant sought to introduce to the jury was available from other sources. At trial, defendant testified on his own behalf that he was not directly involved in the murder and that it was Arrington who fired the shots. The trial court allowed defendant to enter into evidence the transcript of Arrington's plea of guilty to the murder, and defendant was allowed to identify Arrington in open court as the other person arrested for the crime.

[5] Defendant further argues that, even if not permitted to call Arrington as a witness, defendant should have been allowed to introduce certain statements made by Arrington that tended to exonerate defendant. Defendant first contends that the trial court erred by sustaining an objection to the attempted admission of a letter written by Arrington that included the statement, "Don't worry about the murder case because I did it and you didn't have nothing to do with it." Defendant claims this falls within the statement against interest hearsay exception contained in Rule 804(b)(3). Defendant is incorrect. The applicable rule reads as follows:

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(3) Statement Against Interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C.G.S. § 8C-1, Rule 804(b)(3) (1992). The letter at issue does not meet either of the two requirements for admission set forth by the exception. First, it is not a statement against penal interest because Arrington had already entered a guilty plea and was serving a sentence for the murder when the letter was written. Second, there are no corroborating circumstances to indicate that the letter was trustworthy, and there are circumstances to indicate otherwise. Arrington is the half brother of the defendant, numerous witnesses testified that defendant was running around the apartments when the shots were fired, and several witnesses testified that it was defendant who fired the shots. These circumstances indicate that the letter was untrustworthy. As a result, the trial court properly refused to admit this evidence.

Defendant further contends that the trial court erred by sustaining objections to several additional statements made by Arrington. Defendant fails, however, to offer any substantive argument as to these or to cite any authority in support of this portion of his assignment of error. As a result, these are deemed abandoned. A thorough review of the statements, however, indicates that each was clearly hearsay and did not fall within any exception to that rule. N.C.G.S. § 8C-1, Rule 802 (1992).

[6] Finally, defendant asserts that the trial court erred by excluding his tender of more evidence detailing repeated threats and physical assaults by Arrington on Karen Robinson and her children, including the deceased child, earlier on the day of the murder. Defendant maintains that this evidence was relevant to defendant's claim that it was

Arrington and not he that killed the victim. Relevant evidence is that which tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). We hold that the evidence was not relevant. First, this evidence was needlessly duplicative in that evidence of the assaults earlier in the day and of Arrington and Robinson's troubled relationship was introduced into evidence several other times during the trial. N.C.G.S. § 8C-1, Rule 403 (1992). Second, evidence of Arrington's motive in killing the specific child was irrelevant to determination of the case since all of the evidence showed that neither the defendant nor Arrington could see who was in the apartment and since the shots were fired at random. For these reasons, the trial court properly excluded the above evidence. N.C.G.S. § 8C-1, Rule 402 (1992). Defendant's assignment of error is overruled.

[7] In his second assignment of error, defendant contends that the trial court erred by improperly admitting the hearsay statements of several unidentified individuals through the testimony of two police officers. Defendant argues that the admission of these statements constitutes a violation of his right to be confronted by the witnesses against him under the Sixth Amendment to the United States Constitution. We disagree.

The statements at issue occurred immediately after the shooting. Two Asheville police officers, Sergeant Wysong and Lieutenant Aardema, arrived at the housing complex shortly after being notified that there was shooting taking place. The officers testified the complex was in a state of pandemonium, with people screaming and running in different directions. Sergeant Wysong testified at trial that an individual he did not know screamed at him, "He killed her. He shot—Fella shot her. He just [expletive] shot her." Other trial evidence established that "Fella" is the nickname of the defendant. Lieutenant Aardema testified that he saw defendant with something in his hand and that people started screaming, "That was him. That was him," referring to the defendant as the shooter. Lieutenant Aardema also testified that "people were screaming. They were all—there was a lot of people out here and they were screaming that 'That was him. That was him,' in the car," referring to a gray Oldsmobile which defendant drove that evening. Defendant objected to all of these statements, and he made motions to strike and motions for mistrial after each of the statements. The trial court overruled the objections and denied the motions in each instance.

" '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). Any hearsay statement as defined in Rule of Evidence 801(c) is inadmissible except as provided by statute or the Rules of Evidence. N.C.G.S. § 8C-1, Rule 802. Rule 803 provides that certain statements are not excluded as hearsay regardless of the availability of the declarant for purposes of testifying. N.C.G.S. § 8C-1, Rule 803 (1992). The first two exceptions, present sense impression and excited utterance, are applicable to this case and provide as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited Utterance.—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.

N.C.G.S. § 8C-1, Rule 803(1), (2). The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation. *State v. Gainey*, 343 N.C. 79, 86, 468 S.E.2d 227, 232 (1996). 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).

The statements at issue in this case are classic examples of statements falling within these two exceptions. Sergeant Wysong testified that when he arrived at the still-chaotic scene, an individual he believed to be Mr. Cannady forced him to the ground and screamed, "He killed her. He shot—Fella shot her. He just [expletive] shot her." Sergeant Wysong testified he arrived at the scene so shortly after the shooting that, after hearing the above statement, he went into the apartment, and the child "was actually still—sort of still falling." The hearsay declarant had just witnessed the shooting of a child and clearly was still experiencing the effects of the extremely startling

event. There was no time to reflect on his thoughts or fabricate a story between the actual shooting and the statement, thus making the declaration spontaneous. Hence, the statement fits squarely within the excited utterance exception to the hearsay rule and was properly admitted. Lieutenant Aardema testified that several individuals made statements identifying the defendant as the person who shot the victim, when defendant was seen running with a gun and when defendant was seen driving an old Oldsmobile. The evidence establishes that these statements were made contemporaneously with the declarants' viewing of the events. As such, they were made while the declarants were perceiving the event or condition, or immediately thereafter, and were properly admitted as present sense impressions.

Defendant's contention that the admission of these statements violated his constitutional right to confront witnesses is similarly without merit. Evidence which falls within a firmly rooted hearsay exception does not violate a defendant's right to confront and cross-examine witnesses. *Gainey*, 343 N.C. at 86, 468 S.E.2d at 231-32; *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991); *State v. Roper*, 328 N.C. 337, 359-60, 402 S.E.2d 600, 613, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). As the statements at issue clearly fall within established exceptions, this assignment of error is overruled.

[8] In his next assignment of error, defendant maintains that the trial court erred by failing to grant his motions to dismiss the charges made at the conclusion of the State's evidence and at the close of all the evidence. This asserted error is based on two grounds: first, that there was a fatal variance between the indictment, which alleged defendant fired into an occupied dwelling with a shotgun, and the evidence at trial, which established that the fatal shot came from a handgun; and second, that there was insufficient evidence to establish that defendant and Arrington acted together with a common purpose to commit the felony of discharging a weapon into occupied property. We find defendant's contentions to be without merit.

Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review. *State v. Francis*, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995). However, assuming *arguendo* that defendant has preserved this argument for review, we hold that the asserted variance does not constitute error in this case. As this Court noted in *State v. Waddell*, 279 N.C. 442, 183 S.E.2d 644 (1971):

> A motion to dismiss [for a variance] is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.

Id. at 445, 183 S.E.2d at 646. In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to "[t]he gist of the offense." *Id.* This means that the defendant must show a variance regarding an essential element of the offense. *State v. Williams*, 295 N.C. 655, 663, 249 S.E.2d 709, 715 (1978). The essential element of the offense at issue here is "to discharge . . . [a] firearm." N.C.G.S. § 14-34.1(2) (Supp. 1996). The indictment in this case alleged that defendant "did discharge a shotgun, *a firearm*, into the dwelling house of Gloria Cannady . . . while it was actually occupied." (Emphasis added.) When an averment in an indictment is not necessary in charging the offense, it will be " 'deemed to be surplusage.' " *State v. Stallings*, 267 N.C. 405, 407, 148 S.E.2d 252, 253 (1966) (quoting 30A C.J.S. *Escape* § 25(6), at 900 (1965)). In this case, the essential element of discharging a firearm was alleged. The averment to the shotgun was not necessary, making it mere surplusage in the indictment. Thus, the first part of this assignment of error is overruled.

[9] At the close of the State's evidence and again at the close of all the evidence, defendant made motions to dismiss the charges against him. These were based in part on the assertion that there was insufficient evidence that the defendant and Arrington acted in concert to commit the crimes charged. 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. Stroud*, 345 N.C. 106, 111, 478 S.E.2d 476, 478 (1996). If substantial evidence of each element is presented, the motion to dismiss is properly denied. *Id.* "Substantial evidence is 'that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *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. *Id.*

Under the doctrine of acting in concert, "one may be found guilty of committing the crime if [1] [defendant] is at the scene acting

together with another [2] with whom [defendant] shares a common plan to commit the crime, [3] although the other person does all the acts necessary to effect commission of the crime." *State v. Abraham*, 338 N.C. 315, 346, 451 S.E.2d 131, 147 (1994); *see also Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. The evidence at trial established the following: (1) that defendant and Arrington were half brothers; (2) that defendant became involved in a series of events while breaking up a fight between Arrington and Darryl Cannady by pointing a gun at Cannady; (3) that two shots were fired at Cannady by the defendant or Arrington as Cannady fled; (4) that the defendant and Arrington were both seen carrying guns outside the apartment where the child was shot; (5) that they threatened to kill Cannady, and defendant was heard saying he was going to kill everyone in the apartment for messing with his brother; and (6) that shots were fired into the apartment immediately after defendant and Arrington were seen together outside making threats. The evidence also showed that the intent of defendant and Arrington was to avenge the beating of Arrington by Cannady and to seek retribution for the perceived mistreatment of Arrington by several of the inhabitants of the apartment into which the shots were fired. Thus, the evidence taken in the light most favorable to the State was clearly sufficient to establish that defendant was present at the scene with Arrington and that the two were carrying out a common plan. The trial court properly denied defendant's motions to dismiss, and this assignment of error is overruled.

[10] In his final assignment of error, defendant contends that the trial court erred by failing to dismiss the charges against him based on the denial of his right to a speedy trial under N.C.G.S. § 15A-711 and the Sixth Amendment to the United States Constitution. This assignment of error is without merit.

Much of defendant's argument centers on rulings made before and during his first trial. Because there are no assignments of error in this record on appeal to rulings which occurred during the first trial, such rulings are not properly before us. N.C. R. App. P. 10(a). After this Court ordered a new trial, defendant made a *pro se* motion for speedy trial pursuant to N.C.G.S. § 15A-711(c) on 15 June 1994, and defendant made a motion through counsel alleging constitutional speedy trial violations just five days before his second trial. These motions are subject to our review. N.C.G.S. § 15A-711 provides in part:

> (a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivi-

> sions and his presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.
>
> . . . .
>
> (c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed.

N.C.G.S. § 15A-711(a), (c) (Supp. 1996). In the case of *State v. Hege*, 78 N.C. App. 435, 337 S.E.2d 130 (1985), Judge Webb (now Justice Webb) authored an opinion for a unanimous court holding that failure to serve a section 15A-711(c) motion on the prosecutor as required by the statute bars relief for a defendant. *Id.* at 437, 337 S.E.2d at 132. In the present case, defendant admitted during the hearing on this motion that he failed to properly serve a copy of his 15 June 1994 motion upon the district attorney. Thus, defendant is not entitled to relief. Moreover, notwithstanding this procedural bar, the undisputed evidence at the motion hearing establishes that the requirements of N.C.G.S. § 15A-711 were met by the prosecution. Defendant was released from the custody of the Department of Correction and returned to Buncombe County, where he was bonded out in October of 1994. This was within six months of defendant's request. This met the essential requirement of the statute, that the defendant be temporarily released from the correctional institution and returned to the custody of an appropriate local law enforcement officer within six months of filing the request. *State v. Dammons*, 293 N.C. 263, 267-68, 237 S.E.2d 834, 837-38 (1977). Thus, no violation of N.C.G.S. § 15A-711 occurred, and the trial court properly denied the defendant's motion.

[11] Defendant also asserts that his constitutional right to a speedy trial was denied by virtue of the extended prosecution and appeal processes in this case. This Court has held that four interrelated factors must be considered and balanced in deciding whether a defendant's Sixth Amendment right to a speedy trial has been violated. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). These factors are: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting from the delay." *Id.* at 231, 433 S.E.2d at 156 (citing *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972)).

A balancing of these factors persuades us that defendant's constitutional right to a speedy trial was not violated in this case. The length of the delay was some five years and six months from indictment to defendant's second trial. However, only approximately eighteen months passed from the time this Court ordered remand on the first appeal until the time of the second trial. The primary reason for the delay of defendant's case was the defendant's appeal of his first conviction and the requisite appellate process that resulted in the overturning of defendant's conviction in the first trial. On this subject, the Supreme Court has stated:

> It is, of course, true that the interests served by appellate review may sometimes stand in opposition to the right to a speedy trial. But, as the Court observed in *United States v. Ewell*, [383 U.S. 116, 121, 15 L. Ed. 2d 627, 631 (1966)]:
>
> > "It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. . . . [This rule] has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. . . . These policies, so carefully preserved in this Court's interpretation given the Double Jeopardy Clause, would be seriously undercut by [an] interpretation given the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on conviction]."

United States v. Loud Hawk, 474 U.S. 302, 313, 88 L. Ed. 2d 640, 653 (1986) (alterations in original). The only prejudice defendant attributes to the alleged delay was the unavailability of Stanley Aiken, a witness for the prosecution in the first trial who died before the second trial. Nonetheless, Aiken's prior testimony, including cross-examination by the defendant, was read into the record at the second trial pursuant to the prosecution's request. We conclude that defendant's Sixth Amendment right to a speedy trial was not violated. This assignment of error is without merit.

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

NO ERROR.

JERRY H. BARGER, H. WAYNE KENNERLY, AND HARRY G. YOUNG, JR. v. McCOY HILLARD & PARKS, A NORTH CAROLINA GENERAL PARTNERSHIP, DAVID R. McCOY, MICHAEL W. HILLARD, BRENT H. PARKS AND SHEILA LEE

No. 262PA96

(Filed 24 July 1997)

1. Corporations § 143 (NCI4th)— accounting malpractice—action brought by shareholders—exceptions to general rule adopted—exceptions not satisfied

The trial court properly granted summary judgment for defendant-accountants on claims for the lost value of plaintiffs' stock where defendants had been employed to provide services to The Furniture House, Inc. (TFH), plaintiffs were the sole shareholders and directors of TFH, and TFH was liquidated in bankruptcy. The general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock; however, two exceptions to the general rule are adopted. A shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from

the injury sustained by the other shareholders or the corporation itself. Plaintiffs here have not alleged a peculiar or personal injury, only the diminution or destruction of the value of the shares, precisely the injury suffered by the corporation, and may not proceed under the special duty doctrine because they have alleged no facts from which it may be inferred that defendants owed plaintiffs in their capacities as shareholders a duty that was personal to them and distinct from the duty defendants owed the corporation. All of the allegations indicate that any duty defendants owed plaintiffs was purely derivative of defendants' duty to provide non-negligent services to TFH and therefore the right to sue defendants for losses plaintiffs suffered as shareholders belonged solely to TFH and perished when the corporation was dissolved in bankruptcy.

Am Jur 2d Corporations §§ 2245, 2246, 2249, 2402, 2404.

Liability of independent accountant to investors or shareholders. 35 ALR4th 225.

2. Corporations § 143 (NCI4th)— sole shareholders as guarantors—action against corporation's accountants—exception to general rule—summary judgment for defendants improperly granted

Plaintiffs may proceed with their individual lawsuit against defendant-accountants even though they are guarantors of a corporation's debt under the special duty exception to the general rule prohibiting individual lawsuits where defendants had been employed to provide services to The Furniture House, Inc. (TFH), plaintiffs were the sole shareholders and directors of TFH, and TFH was liquidated in bankruptcy. Guarantors of a corporation's debts ordinarily may not pursue individual actions to recover damages for injuries to the corporation; however, individual actions may be prosecuted if the guarantor can show either that the wrongdoer owed him a special duty or that the injury suffered is personal to the guarantor and distinct from the injury suffered by the corporation itself. Plaintiffs' allegations here create a genuine issue of material fact as to whether defendants owed them a special duty that was personal to them as guarantors and separate and distinct from the duty defendants owed the corporation.

Am Jur 2d Corporations §§ 2245, 2246, 2249, 2402, 2404.

Liability of independent accountant to investors or shareholders. 35 ALR4th 225.

3. Corporations § 143 (NCI4th)— action by shareholders against corporation's accountants—action not allowed as shareholders—allowed as guarantors—not inconsistent

Court of Appeals holdings in an action by the shareholders of the corporation against accountants employed by the corporation that plaintiffs may proceed in their individual capacities as personal guarantors of the corporation's debt but not in their individual capacities as shareholders were affirmed even though the parties contended that the holdings are internally inconsistent. Although similar rules of law govern the two roles, the rules must be applied to different facts and there simply were no factual allegations here to support a finding that defendant owed a special duty to plaintiffs as shareholders. Although plaintiffs argued that the shareholder is entitled to seek all damages caused by the wrongdoer once a shareholder establishes the special circumstances or special duty that creates the right to maintain a direct action, plaintiffs here have no claims as shareholders and cannot seek damages as shareholders.

Am Jur 2d Corporations §§ 2245, 2246, 2249, 2402, 2404.

Liability of independent accountant to investors or shareholders. 35 ALR4th 225.

4. Limitations, Repose, and Laches § 26 (NCI4th)— accountant malpractice—negligent misrepresentation to third party—shareholders as guarantors—statute of limitations

Plaintiffs' negligent misrepresentation claim arising from accounting services rendered to the corporation of which plaintiffs were the sole shareholders was not barred by the statute of limitations where plaintiffs were allowed to proceed only in their capacities as guarantors of the corporation's debt. Plaintiffs alleged facts that, if true, would bring them within the scope of the duty owed by accountants to persons other than their clients under *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200; in the absence of a professional relationship between the parties, this claim cannot fall under the professional malpractice statute of limitations. The applicable statute of limitations is N.C.G.S. § 1-52(5), which prescribes a three-year statute

of limitations, and which does not accrue until the claimant suffers harm because of the misrepresentation and the claimant discovers the misrepresentation. Plaintiffs' forecast of evidence tends to show that they discovered the alleged misrepresentations in 1990 and their claim was filed in 1992.

Am Jur 2d, Accountants §§ 24, 25, 29.

Application of statute of limitations to actions for breach of duty in performing services of public account. 7 ALR5th 852.

5. Fraud, Deceit, and Misrepresentation § 5 (NCI4th)— constructive fraud—taking advantage of relationship—benefit—allegations insufficient

Plaintiffs' claim for constructive fraud was properly dismissed by the trial court in an action against defendant-accountants by the shareholders of a liquidated corporation where plaintiffs alleged only that they were harmed by specific misrepresentations made negligently by defendants but failed to allege that defendants took advantage of the parties' relationship to the hurt of plaintiffs. Furthermore, plaintiffs have not alleged that defendants sought to benefit themselves in any way; the benefit of continuing their relationship with plaintiffs is not a sufficient benefit to establish constructive fraud. The requirement of a benefit to defendants follows logically from the requirement that a defendant harm the plaintiff by taking advantage of their relationship of trust and confidence and the requirement of a benefit to defendants is implicit throughout the cases allowing constructive fraud claims. The Court of Appeals opinion in *Bumgarner v. Tomblin*, 63 N.C. App. 636, did not eliminate the requirement that defendants in a constructive fraud claim take advantage of, and thus benefit from, their relationship of trust and confidence; in the context of the case as a whole, it is clear that the court in *Bumgarner* merely recognized that defendant's failure to make a profit on a specific transaction did not preclude plaintiffs' claim where there were other allegations that defendant took advantage of the parties' relationship of trust.

Am Jur 2d, Fraud and Deceit § 4.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 326, 462 S.E.2d 252 (1995), *rev'd in part on reh'g*, 122 N.C. App. 391, 469 S.E.2d 593

(1996), affirming in part and reversing and remanding in part an order entered 5 May 1994 by Helms (William H.), J., in Superior Court, Rowan County. Heard in the Supreme Court 12 February 1997.

Caudle & Spears, P.A., by Jeffrey L. Helms and Thad A. Throneburg, for plaintiff-appellees.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe, L. Kristin King, and Jennifer Ingram Mitchell, for defendant-appellants.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Alan W. Duncan, and Larissa Erkman, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by Robert W. Fuller, David C. Wright, III, and Julian H. Wright, Jr., on behalf of the North Carolina Association of Certified Public Accountants, amicus curiae.

WHICHARD, Justice.

Plaintiffs are the sole shareholders and directors of The Furniture House, Inc. (TFH). Defendants are the accountants retained by TFH to perform bookkeeping services. Plaintiffs filed suit alleging that defendants breached several contracts with plaintiffs and made negligent and constructively fraudulent misrepresentations about the financial condition of TFH, with the result that plaintiffs were forced to liquidate TFH in bankruptcy and to pay personally guaranteed corporate debts out of private funds. Plaintiffs sought compensatory and punitive damages.

Plaintiffs' evidence tends to show that TFH was a North Carolina corporation engaged in the catalog and retail sale of furniture and accessories. Plaintiffs, as sole shareholders and directors of TFH, usually carried out corporate action in an informal manner, often at breakfast meetings. In 1987 or 1988, plaintiffs employed defendant accounting firm to provide accounting services and financial advice. Among other things, the parties agreed that the firm would prepare and issue statements showing TFH's financial status.

Plaintiffs allege that defendant McCoy and an independent contractor worked together to create a computer program in late 1987. The purpose of the program was to take data from TFH computers and formulate it into a report from which defendants could produce

financial statements. Defendants subsequently began producing statements based on information from the computer report. According to plaintiffs, defendants misapplied data from the report in one of the financial statements. This resulted in a series of erroneous financial statements that overstated TFH's sales, understated its liabilities, and concealed the fact that TFH was insolvent. The error was not discovered until plaintiffs attempted to sell TFH.

Defendant McCoy met periodically with plaintiffs to explain the financial statements and to advise them on financial matters. In early 1988 plaintiffs were considering an expansion of TFH. At a breakfast meeting with defendant McCoy, plaintiffs asked whether TFH could amortize the debt the expansion would entail. Plaintiffs allegedly informed McCoy that the debt for the expansion would have to be guaranteed by plaintiffs personally. McCoy told plaintiffs that the debt could be amortized if projected sales targets were reached. The error in the financial statements hid the fact that the debt could not be so amortized. TFH then took out loans to expand its operations. Plaintiffs signed personal guarantees to repay the loans in the event of default.

After the expansion TFH's sales actually exceeded defendant McCoy's projected requirements for amortization of the debt. TFH nevertheless experienced a serious cash flow shortage. McCoy advised plaintiffs that the shortage was due to cash being tied up in inventory and accounts receivable and was temporary. The shortage continued, however, and plaintiffs again asked McCoy for an explanation and for advice about whether to take out loans to cover the shortage. McCoy again stated that the cash flow shortage was temporary. Plaintiffs then obtained and personally guaranteed a line of credit to sustain the company during the shortage.

In late 1989 a prospective buyer approached plaintiffs about purchasing TFH. At an informal meeting at plaintiff Barger's home, plaintiffs asked defendant McCoy for an estimate of the value of TFH. McCoy valued plaintiffs' shares at $800,000. Plaintiffs subsequently signed a letter of intent to sell TFH for $504,000 and the assumption of plaintiffs' personal guarantees of the company's debts.

An independent audit of TFH was undertaken on behalf of the potential buyer. The audit revealed the accounting errors and showed that TFH's liabilities greatly exceeded its assets, so that plaintiffs' shares were actually worthless. Consequently, the potential buyer

chose not to pursue the purchase of TFH. In 1990 TFH entered Chapter 7 bankruptcy.

Defendants' evidence indicates that, under a compilation agreement between defendants and TFH beginning in 1987, defendants agreed to issue monthly financial statements based on information supplied by TFH. Defendants stated, however, that they would not audit or review such statements, nor would they express an opinion or other form of assurance on them. Defendants' evidence also tends to show that McCoy did not assist in creating the computer report but merely relied on the data in it. Defendants contend that their financial statements misstated TFH's financial condition solely because of the erroneous data provided by plaintiffs and that the errors could not have been discovered until the independent audit.

Defendant McCoy acknowledges that he did occasionally encounter plaintiffs at the local hotel where they all often ate breakfast and that he discussed business at TFH with plaintiffs on those occasions. He acknowledges having discussions with plaintiffs about whether TFH could afford to expand and about what would cause TFH to experience a cash flow shortage. Defendants contend, however, that they never contracted to provide this information to plaintiffs individually or for plaintiffs' direct benefit. Rather, defendant McCoy understood that plaintiffs were meeting as the board of TFH, and the accounting advice was solely for the benefit of the corporation. Defendant McCoy asserts that he did not know plaintiffs were going to personally guarantee the loans made to TFH.

Plaintiffs filed suit on 31 July 1992. Their complaint included claims for breach of contract (based on the theory that plaintiffs were third-party beneficiaries of several alleged contracts between defendants and TFH), negligent misrepresentation, and constructive fraud. They sought recovery for (1) the loss of the value of their stock in TFH, and (2) their personal obligations to lenders on individually guaranteed debts of TFH. Defendants filed a motion for summary judgment. On 5 May 1994 the trial court entered an order granting defendants' motion for summary judgment and dismissing plaintiffs' claims.

The Court of Appeals in its first opinion affirmed the trial court except as to plaintiffs' claim for constructive fraud, which it remanded. The Court of Appeals held first that plaintiffs could not maintain individual causes of action against defendants for injuries that resulted in the depreciation or destruction of the value of their

stock. It held that plaintiffs' claims for breach of contract were properly dismissed, as plaintiffs were not intended third-party beneficiaries of the alleged contracts between defendants and TFH. It held further that to the extent that plaintiffs sought recovery for the lost value of their stock through their claims of negligent or fraudulent misrepresentations, those claims were actionable only by or on behalf of the corporation itself and could not be brought personally by plaintiffs.

The Court of Appeals next held that plaintiffs could maintain personal causes of action against defendants for personal damages they suffered when they were required to pay the personally guaranteed corporate debt after TFH was dissolved in bankruptcy. The Court of Appeals held that the breach of contract claims were nevertheless properly dismissed, as the alleged contracts were entered into solely for the benefit of the corporation. It held further that the negligent misrepresentation claim was essentially a claim for accounting malpractice, and the trial court's grant of summary judgment on this issue was proper because the statute of limitations had expired. Finally, it held that there was a question of fact as to whether the fiduciary relationship required for a constructive fraudulent misrepresentation claim existed; therefore, summary judgment on that claim was improper.

Upon plaintiffs' petition for rehearing, the same panel revisited the negligent misrepresentation claim. It concluded that it had erred in characterizing that claim as an accounting malpractice claim barred by the three-year statute of limitations. It then reversed summary judgment as to that claim and remanded the case for trial. Two claims therefore remained to be tried after the Court of Appeals' rehearing and remand: constructive fraud and negligent misrepresentation.

We granted defendants' petition for discretionary review on 5 September 1996. For the reasons that follow, we affirm in part and reverse in part the decision of the Court of Appeals. We hold that plaintiffs may proceed, in their individual capacities as personal guarantors of TFH's debt, with their claim for negligent misrepresentation, and we remand the case for trial on that claim only.

I.

The central issue is whether plaintiffs may proceed with this lawsuit, which they brought in their individual capacities as shareholders

of TFH and personal guarantors of TFH's debt, or whether such a suit may be pursued only by the corporation. If plaintiffs are permitted to proceed, then the parties raise additional questions regarding which claims may be pursued and which were properly dismissed. We therefore begin by addressing the question, under what circumstances, if any, may plaintiffs in their individual capacities seek recovery from defendants?

The damages sought by plaintiffs reflect two different roles plaintiffs served with respect to TFH. First, they were the sole shareholders of the corporation. Accordingly, when TFH went bankrupt, they lost the value of their shares. They seek recovery for this loss. Second, plaintiffs were guarantors of the corporation's debts. Thus, TFH's insolvency resulted in plaintiffs becoming personally liable for those debts. They seek to recover the cost of meeting those personal obligations. The rules of law governing plaintiffs' two roles are substantially the same; however, the facts to which we must apply these rules are distinct. We therefore address each of the plaintiffs' two roles in turn.

A.

[1] As shareholders of TFH, plaintiffs seek recovery for the lost value of their stock. The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock. *Jordan v. Hartness,* 230 N.C. 718, 719, 55 S.E.2d 484, 485 (1949); *see also Howell v. Fisher,* 49 N.C. App. 488, 492, 272 S.E.2d 19, 22 (1980), *disc. rev. denied,* 302 N.C. 218, 277 S.E.2d 69 (1981).

> There are two major, often overlapping, exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.

12B *Fletcher Cyclopedia of the Law of Private Corporations* § 5911, at 484 (perm. ed. 1993); *see also* H.A. Wood, Annotation, *Stockholder's Right to Maintain (Personal) Action Against Third Person as Affected by Corporation's Right of Action for the Same Wrong,* 167 A.L.R. 279 (1947) [hereinafter Annotation]. We adopt these exceptions to the general rule and hold that a shareholder may maintain an

individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself. *Accord Howell*, 49 N.C. App. at 492, 272 S.E.2d at 23 ("When the injuries complained of are 'peculiar or personal' to the shareholders, the corporation is not a necessary party to the suit.").

Plaintiffs may not proceed with their lawsuit under the second exception to the general rule because they have not alleged a "peculiar or personal" injury to themselves as shareholders. An injury is peculiar or personal to the shareholder if "a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation." *Id.* The only injury plaintiffs as shareholders allege is the diminution or destruction of the value of their shares as the result of defendants' negligent or fraudulent misrepresentations of TFH's financial status. This is precisely the injury suffered by the corporation itself.

To proceed with their lawsuit under the first exception to the general rule, plaintiffs must allege facts from which it may be inferred that defendants owed plaintiffs a special duty. The special duty may arise from contract or otherwise. *See* Annotation, 167 A.L.R. at 285-87. To support the right to an individual lawsuit, the duty must be one that the alleged wrongdoer owed directly to the shareholder as an individual. *Id.* The existence of a special duty thus would be established by facts showing that defendants owed a duty to plaintiffs that was personal to plaintiffs as shareholders and was separate and distinct from the duty defendants owed the corporation. A special duty therefore has been found when the wrongful actions of a party induced an individual to become a shareholder, *see Howell*, 49 N.C. App. at 498, 272 S.E.2d at 26; when a party violated its fiduciary duty to the shareholder, *FTD Corp. v. Banker's Trust Co.*, 954 F. Supp. 106, 109 (S.D.N.Y. 1997); when the party performed individualized services directly for the shareholder, *Herbert H. Post & Co. v. Sidney Bitterman, Inc.*, 219 A.D.2d 214, 225, 639 N.Y.S.2d 329, 337 (1996); and when a party undertook to advise shareholders independently of the corporation, *Bankruptcy Estate of Rochester v. Campbell*, 910 S.W.2d 647, 652 (Tex. Ct. App. 1995). This list is illustrative; it is not an exclusive list of all factual situations in which a special duty may be found.

We hold that plaintiffs may not proceed with their lawsuit as individual shareholders under the "special duty" exception to the general rule. Plaintiffs have alleged no facts from which it may be inferred that defendants owed plaintiffs in their capacities as shareholders a duty that was personal to them and distinct from the duty defendants owed the corporation. Plaintiffs have not alleged that defendants induced them to become shareholders in TFH; indeed, the parties agree that plaintiffs were the sole shareholders of TFH before the corporation entered into a professional relationship with defendants. Plaintiffs have not alleged that defendants undertook to advise them individually *as shareholders*, nor have they made any allegations of a special relationship giving rise to a fiduciary duty by defendants to protect the value of their shares. All of the allegations indicate that any duty defendants owed plaintiffs was purely derivative of defendants' duty to provide non-negligent services to TFH. Therefore, the right to sue defendants for losses plaintiffs suffered as shareholders belonged solely to TFH and perished when the corporation was dissolved in bankruptcy.

We affirm the Court of Appeals' holding that plaintiffs' claims to recover damages for the lost value of their stock are actionable only by the corporation itself and that the trial court therefore properly granted summary judgment in favor of defendants on those claims.

B.

[2] We turn now to the question whether plaintiffs may proceed with their lawsuit in their individual capacities as personal guarantors of TFH's debt. The Court of Appeals correctly noted that this is a question of first impression in North Carolina. Other jurisdictions faced with this question have adopted rules of law that parallel the rules for shareholders' individual actions. The majority rule was well stated by the United States Court of Appeals for the Eighth Circuit as follows:

> Shareholders, creditors or guarantors of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation. . . . Recovery is available, naturally, when the defendant owes an individual shareholder, creditor, or guarantor a special duty, or when the individual suffered an injury separate and distinct from that suffered by other shareholders, creditors, or guarantors.

Taha v. Engstrand, 987 F.2d 505, 507 (8th Cir. 1993) (citations omitted); *accord Buschmann v. Professional Men's Ass'n*, 405 F.2d

659, 662 (7th Cir. 1969); *Chrysler Credit Corp. v. B.J.M., Jr., Inc.*, 834 F. Supp. 813, 838-39 (E.D. Pa. 1993); *Hengel, Inc. v. Hot 'N Now, Inc.*, 825 F. Supp. 1311, 1318 (N.D. Ill. 1993); *Sacks v. American Fletcher Nat'l Bank & Trust Co.*, 258 Ind. 189, 194-95, 279 N.E.2d 807, 811-12 (1972); *Walstad v. Norwest Bank of Great Falls*, 240 Mont. 322, 327, 783 P.2d 1325, 1328 (1989); *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 20, 424 N.W.2d 870, 874 (1988); *Hershman's, Inc. v. Sachs-Dolmar Div.*, 89 Ohio App. 3d 74, 623 N.E.2d 617, 619 (1993).

We adopt the majority position and hold that guarantors of a corporation's debts ordinarily may not pursue individual actions to recover damages for injuries to the corporation. Individual actions may be prosecuted, however, if the guarantor can show either (1) that the wrongdoer owed him a special duty, or (2) that the injury suffered by the guarantor is personal to him and distinct from the injury sustained by the corporation itself.

The Court of Appeals held first that plaintiffs as guarantors had suffered no injury separate and distinct from that suffered by the corporation. We agree and see no need to elaborate on that court's reasoning. It then held that there were genuine issues of material fact as to whether the parties "had a relationship of trust which defendants breached to the detriment of plaintiffs." *Barger v. McCoy Hillard & Parks*, 120 N.C. App. 326, 335, 462 S.E.2d 252, 259 (1995) (*Barger I*). The Court of Appeals thus determined, implicitly under the special duty exception, that plaintiffs in their capacities as guarantors could proceed with their individual lawsuit.

We apply the same rules for establishing a special duty when plaintiffs are guarantors as we apply when plaintiffs are shareholders. We therefore hold that the existence of a special duty may be established by facts showing that defendants owed a duty to plaintiffs that was personal to plaintiffs as guarantors and was separate and distinct from the duty defendants owed the corporation.

Plaintiffs have alleged the following facts that are relevant to our determination of this issue: (1) that when they sought defendant McCoy's advice about whether to incur the debt necessary to expand TFH, they specifically informed him that the debt would be guaranteed by them personally; and (2) that McCoy's representations about TFH's financial status induced them to personally guarantee several loans subsequently obtained by TFH. Defendant McCoy acknowledges having had conversations with plaintiffs about their desire to

expand TFH but denies that he was aware that they planned to personally guarantee TFH's debt.

The trial court disposed of this case upon defendants' motion for summary judgment. The burden is therefore upon defendants to establish that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 131, 225 S.E.2d 797, 806 (1976). Further, we must view the pleadings and the evidence in the record in the light most favorable to plaintiffs and draw all reasonable inferences in favor of plaintiffs. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974); *see also Yount v. Lowe*, 288 N.C. 90, 94, 215 S.E.2d 563, 565 (1975).

We conclude that plaintiffs' allegations create a genuine issue of material fact as to whether defendants owed them a special duty that was personal to them as guarantors and separate and distinct from the duty defendants owed the corporation. First, we attach particular significance to plaintiffs' allegation that defendant McCoy's representations induced them to become personal guarantors of the corporation's debt. As we noted in the previous section, a special duty has been found when the alleged wrongful actions of a defendant induced a plaintiff to become a shareholder in a corporation. We see no reason not to reach a similar result in the analogous situation of a corporation's guarantor.

Second, our case law regarding accountant liability leads inexorably to the conclusion that, taken in the light most favorable to plaintiffs, defendant McCoy, by his representations to plaintiffs, undertook a duty owed separately to plaintiffs. We held in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988), that an accountant's liability for negligent misrepresentation "should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely." *Id.* at 214, 367 S.E.2d at 617. Thus, if plaintiffs are able to prove at trial their allegations that defendant McCoy knew and intended that plaintiffs would rely on his opinions when they decided whether to personally guarantee TFH's debt, they will establish that defendants owed them a duty of care that was personal to them and distinct from the duty defendants owed the corporation.

We therefore hold that plaintiffs, in their capacities as guarantors of the corporation's debt, may proceed with their individual lawsuit against defendants under the "special duty" exception to the general rule prohibiting individual lawsuits.

C.

[3] We have affirmed the holding of the Court of Appeals that plaintiffs may proceed with their lawsuit in their individual capacities as personal guarantors of the corporation's debt and may accordingly pursue all claims and damages associated with those personal guarantees. We have also affirmed the Court of Appeals' holding that plaintiffs may not proceed with their lawsuit in their individual capacities as shareholders; thus, they may not pursue claims and damages associated with the lost value of their stock. We now acknowledge arguments in both parties' briefs that criticize the Court of Appeals' result as "internally inconsistent."

Defendants note that the same rules of law govern individual claims by shareholders and individual claims by guarantors. They argue that the same result must therefore be reached when the rules are applied to defendants' relationship with plaintiffs in both of their roles; that is, if we conclude that defendants owed no special duty to plaintiffs as shareholders, we must also conclude that defendants owed no special duty to plaintiffs as guarantors. Plaintiffs agree with defendants that we must reach the same result with respect to each of plaintiffs' roles, but wish us to conclude that special duties were owed in both instances.

We do not agree with the parties' reasoning. We believe the plaintiffs' roles as shareholders and as guarantors can be treated separately. Although similar rules of law govern the two roles, the rules must be applied to different facts. Here, there simply were no factual allegations to support a finding that defendants owed a special duty to plaintiffs as shareholders. In contrast, the allegations that defendants' representations actually induced plaintiffs to become personal guarantors of the corporation's debt, when viewed in light of our law of accountant liability as set forth in *Raritan*, support a finding of a special duty owed by defendants to plaintiffs as guarantors. We see no reason why plaintiffs' right to pursue individual actions as guarantors of the corporation's debt should be prejudiced by the fact that plaintiffs also happened to be shareholders without a right to an individual claim. Therefore, we disagree with defendants' contention that plaintiffs' claims as guarantors should be disallowed in the interest of theoretical consistency.

Plaintiffs argue that once a *shareholder* establishes the special circumstances or special duty that creates the right to maintain a direct action, the shareholder is entitled to seek *all* damages caused by the wrongdoer: damages that are personal and peculiar to him *and* damages sustained as a shareholder. Plaintiffs cite several cases from other jurisdictions in support of this proposition. Plaintiffs' argument is misplaced. As our analysis above indicates, plaintiffs cannot pursue actions *as shareholders* because they cannot show either injuries that are peculiar and personal to them or a special duty owing to them as shareholders. Because they have no claims as shareholders, they cannot seek damages as shareholders; the authority they cite is therefore inapposite.

II.

Having concluded that plaintiffs may proceed with a lawsuit in their individual capacities as personal guarantors of TFH's debt, we must decide which, if any, of plaintiffs' claims may proceed to trial. The trial court granted summary judgment for defendants on plaintiffs' breach of contract, negligent misrepresentation, and constructive fraud claims. The Court of Appeals affirmed the trial court's judgment with respect to the breach of contract claims but reversed the trial court as to the negligent misrepresentation and constructive fraud claims. Plaintiffs have not sought review of the affirmation of the trial court's judgment in favor of defendants on the contract claims.

We affirm the Court of Appeals' holding that plaintiffs may proceed with their negligent misrepresentation claim, and we remand that claim for trial. We reverse the Court of Appeals' holding regarding the constructive fraud claim and reinstate the trial court's judgment for defendants on that claim.

A.

[4] Defendants contend that the Court of Appeals erred in allowing plaintiffs' claim for negligent misrepresentation to go forward because the claim was barred by the three-year statute of limitations in N.C.G.S. § 1-15(c) for professional malpractice claims. Plaintiffs argue that the claim was one for negligent misrepresentation rather than professional malpractice and was thus subject to the statute of limitations in N.C.G.S. § 1-52(5). Plaintiffs argue further that a cause of action for negligent misrepresentation does not accrue until the aggrieved party discovers the misrepresentation.

In *Raritan River Steel Co.*, we held that an accountant need not be in privity of contract with a party to be liable to him for negligent misrepresentation. We expressly extended an accountant's liability to "those persons, or classes of persons, whom [the accountant] knows and intends will rely on his opinion, or whom he knows his client intends will so rely." *Raritan*, 322 N.C. at 214, 367 S.E.2d at 617. We did not expressly address whether such a negligent misrepresentation claim would be tantamount to a professional malpractice claim for purposes of determining the appropriate statute of limitations.

N.C.G.S. § 1-15(c) provides, in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action . . . .

By its plain terms, this statute applies to the rendering of "professional services." The term "professional services" refers to "those services where a professional relationship exists between plaintiff and defendant—such as a physician-patient or attorney-client relationship." *Doe v. American Nat'l Red Cross*, 798 F. Supp. 301, 306 (E.D.N.C. 1992) (footnote omitted); *cf. Easter v. Lexington Mem. Hosp., Inc.*, 303 N.C. 303, 305-06, 278 S.E.2d 253, 255 (1981) (requiring medical malpractice litigants to show the existence of a physician-patient relationship); *Chicago Title Ins. Co. v. Holt*, 36 N.C. App. 284, 288, 244 S.E.2d 177, 180 (1978) (holding that claims of attorney malpractice may be brought only by those who are in privity of contract with the attorney).

As our analysis in the previous section indicates, there was no professional relationship between the parties in this case. Indeed, plaintiffs have been permitted to proceed with their lawsuit in the acknowledged absence of a professional relationship only because they have alleged facts that, if true, would bring them within the scope of the duty owed by accountants to persons *other than their clients* under the rule in *Raritan River Steel*. In the absence of a professional relationship between the parties, this claim cannot fall under the professional malpractice statute of limitations.

Plaintiffs contend, and defendants do not dispute, that they have properly pleaded their claim for negligent misrepresentation. The applicable statute of limitations is therefore N.C.G.S. § 1-52(5). That

section also prescribes a three-year statute of limitations. However, we have held that a claim for negligent misrepresentation "does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation." *Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 57, 442 S.E.2d 316, 320 (1994). Plaintiffs' forecast of evidence tends to show that they discovered the alleged misrepresentations in 1990. At that time, they became subject to the three-year statute of limitations for "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated," set forth in N.C.G.S. § 1-52(5). Their claim was filed in 1992. We therefore hold that plaintiffs' negligent misrepresentation claim was not barred by the statute of limitations, and we remand the claim for trial.

B.

[5] We must next decide whether plaintiffs may proceed with their claim for constructive fraudulent misrepresentation. The Court of Appeals held that "[t]he record, when taken in the light most favorable to plaintiffs, suggests [that] their claim for constructive fraudulent misrepresentation is a constructive fraud claim based upon a breach of fiduciary duty." *Barger I*, 120 N.C. App. at 336, 462 S.E.2d at 259. We reverse.

In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a "relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). Constructive fraud differs from actual fraud in that "it is based on a confidential relationship rather than a specific misrepresentation." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678-79 (1981). Implicit in the requirement that a defendant "[take] advantage of his position of trust to the hurt of plaintiff" is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself.

The parties dispute whether plaintiffs' forecast of evidence tends to show that there was a relationship of trust and confidence between defendants and plaintiffs sufficient to support a claim for constructive fraud. We need not decide this issue, however, because we conclude that plaintiffs have failed to allege that defendants *took advantage* of the parties' relationship to the hurt of plaintiffs. Rather,

plaintiffs have alleged only that they were harmed by specific misrepresentations made negligently by defendants. Further, plaintiffs have not alleged that defendants sought to benefit themselves in any way. Plaintiffs contend that their forecast of evidence shows that defendants did benefit from their alleged misrepresentations regarding TFH's financial status because they obtained the benefit of their continued relationship with plaintiffs. This is insufficient to establish the benefit required for a claim of constructive fraud, however. Presumably, defendants would have obtained the benefit of a continued relationship with plaintiffs equally by providing accurate information about TFH's financial health. Moreover, plaintiffs have alleged no facts tending to show that defendants gained anything by negligently misrepresenting the corporation's true financial condition.

Plaintiffs argue that they need not allege a benefit to defendants to maintain their constructive fraud claim. We disagree. The requirement of a benefit to defendants follows logically from the requirement that a defendant harm a plaintiff by taking advantage of their relationship of trust and confidence. Moreover, the requirement of a benefit to defendants is implicit throughout the cases allowing constructive fraud claims. *See, e.g., Terry*, 302 N.C. at 84, 273 S.E.2d at 678 (defendant used position of trust and confidence to take advantage of his ill brother and purchase his business at a price below market value); *Link v. Link*, 278 N.C. 181, 193, 179 S.E.2d 697, 704 (1971) (defendant husband took advantage of relationship with wife to obtain shares of stock as part of a separation agreement); *Vail v. Vail*, 233 N.C. 109, 115, 63 S.E.2d 202, 207 (1951) (defendant son took advantage of relationship of trust to obtain deed to property from his mother).

Plaintiffs argue further that any requirement of a benefit to defendants was discarded by the Court of Appeals in *Bumgarner v. Tomblin*, 63 N.C. App. 636, 306 S.E.2d 178 (1983). Plaintiffs rely on the statement there that "[t]he facts that defendant did not benefit from the deals on the land and that he no longer has an interest in the land are no barrier to a constructive fraud claim." *Id.* at 641, 306 S.E.2d at 183. Plaintiffs misapprehend the import of this statement. In *Bumgarner* the parties agreed to purchase land and sell it for profit. The plaintiffs later accused the defendant of taking advantage of them by selling property without their knowledge and using the proceeds for his own purposes. In concluding that the plaintiffs had forecast sufficient evidence to survive a motion for summary judgment on their constructive fraud claim, the Court of Appeals described one

specific transaction in which the defendant promised to finance a parcel of land until the parties could turn a profit on its sale and then allegedly turned away prospective buyers. The property eventually was subjected to foreclosure, and both parties suffered a loss of profits. It was in this context that the Court of Appeals made the statement quoted above. In the context of the case as a whole, it is clear that the court's statement there merely recognized that the defendant's failure to make a profit on a specific transaction did not preclude the plaintiffs' claim, when there were other allegations that defendant took advantage of the parties' relationship of trust and used proceeds from land sales to his own ends. Any other meaning would be in conflict with our long-standing case law on constructive fraud. We therefore conclude that the Court of Appeals' opinion in *Bumgarner* did not eliminate the requirement that defendants in a constructive fraud claim take advantage of, and thus benefit from, their relationship of trust and confidence with plaintiffs.

Plaintiffs' claim for constructive fraud was properly dismissed by the trial court. We reverse the holding of the Court of Appeals to the contrary.

III.

We hold that plaintiffs may not proceed in their individual capacities as shareholders of TFH with their suit to recover for the lost value of their stock; however, plaintiffs may proceed in their individual capacities as personal guarantors of TFH's loans with their suit to recover damages suffered when they became personally liable for the loans. We affirm the holding of the Court of Appeals that plaintiffs have stated a claim for negligent misrepresentation. We reverse the Court of Appeals' holding that plaintiffs have stated a claim for constructive fraudulent misrepresentation and accordingly reinstate the trial court's judgment in favor of defendants on that claim.

The cause is remanded to the Court of Appeals for further remand to the Superior Court, Rowan County, for trial of plaintiffs' negligent misrepresentation claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE OF NORTH CAROLINA v. RICKY LEE SANDERSON

No. 374A86-3

(Filed 24 July 1997)

1. Constitutional Law § 230 (NCI4th)— capital resentencing—aggravating circumstance—rape—not submitted in prior hearings—not double jeopardy

The trial court did not err in a capital resentencing by denying defendant's motion *in limine* to exclude references to an alleged rape and by submitting the aggravating circumstance that the murder was committed during the commission of a rape. Although defendant contended that submitting rape as an aggravating circumstance would violate double jeopardy principles because rape was not submitted as an aggravating circumstance in the first or second sentencing hearings, jeopardy attaches in a capital sentencing proceeding only after there has been a finding that no aggravating circumstance is present. In this case, neither the first nor the second juries found that no aggravating circumstance existed; to the contrary, each of those juries found at least one aggravating circumstance to exist and recommended death. To the extent that *State v. Silhan*, 302 N.C. 223, can be read as supporting any other rule, it is inconsistent with the more recent decision of the United States Supreme Court in *Poland v. Arizona*, 476 U.S. 147, and must no longer be considered authoritative on this point.

Am Jur 2d, Criminal Law §§ 309, 314.

2. Constitutional Law § 230 (NCI4th)— capital resentencing—aggravating circumstance—not double jeopardy

The trial court did not err in a capital resentencing by submitting as an aggravating circumstance that defendant had committed the murder while engaged in the commission of a rape where the evidence submitted at the sentencing hearing, defendant's third, supported the circumstance. Whether the evidence at the first or second would have supported submission of the circumstance, or whether the trial court in fact submitted the circumstance, is irrelevant. Neither jury in two prior capital sentencing proceedings found that no aggravating circumstance existed and neither recommended a life sentence; double jeopardy considerations do not come into play.

Am Jur 2d, Criminal Law §§ 309, 314.

3. Criminal Law § 1366 (NCI4th Rev.)— capital resentencing—aggravating circumstance—kidnapping—change of kidnapping theory from prior sentencing

The trial court did not err in a capital resentencing by submitting to the jury the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a kidnapping where defendant had pled guilty to kidnapping, the State submitted the aggravating circumstance at the first two sentencing hearings, using language that the kidnapping had been to facilitate flight or avoid arrest, both sentencing juries found this circumstance to exist, and the State shifted its theory at the third hearing to terrorizing the person confined. Defendant contended that the State had failed to produce evidence at the third sentencing hearing that he kidnapped the victim for the purpose of terrorizing her, but it is irrelevant which theory the State later uses as a basis for the submission of this aggravating circumstance once a defendant pleads guilty to a charge. Moreover, the State's evidence at the third hearing satisfied this aggravating circumstance in that the State presented various confessions by defendant that he had kidnapped the victim prior to killing her, defense counsel acknowledged on several occasions that defendant had kidnapped the victim, and the State's evidence tended to show that the 16-year-old victim was clearly subjected to psychological terror prior to her death in that defendant forcibly took her from her home, drove her around in a car for over two hours, took her to a secluded area, raped her, placed her in the trunk of a car while he dug a shallow grave, strangled, and stabbed her.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

4. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstance—innocent man saved by defendant's confession—cumulative

The trial court in a capital resentencing properly refused to submit as cumulative the nonstatutory mitigating circumstance that defendant's voluntary confession may have saved an innocent man from execution.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

5. Criminal Law § 1351 (NCI4th Rev.)— capital resentencing—instructions—mitigating circumstances—unanimity

Under a plain error review, the trial court's instructions in a capital resentencing did not preclude consideration of mitigating circumstances which had not been unanimously found by the jurors where the court instructed the jury on Issue Three that each juror may consider any mitigating circumstance that the jurors determine to exist. When these instructions are viewed in context with the instructions for Issue Two, they neither express nor imply a unanimity requirement for considering mitigating circumstances. The difference between the portion of the trial court's Issue Three instructions and the pattern jury instructions is minimal; it cannot be discerned whether the trial court's Issue Three instructions merely contained a *lapsus linguae* in pluralizing "juror" or whether a mistake was made in the transcript, but no juror was precluded from considering mitigating evidence that he or she found in Issue Two.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

6. Constitutional Law § 312 (NCI4th)— capital sentencing—failure to object to instruction—test for ineffective assistance of counsel—not met

A defendant in a capital resentencing was not denied his Sixth Amendment right to counsel by his trial counsel's failure to object to the Issue Three instruction given by the court. In order to prevail on an ineffective assistance of counsel claim, a defendant must first show that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, and must then show that counsel's performance deprived him or her of a fair trial. Counsel was not deficient in failing to object to the instructions here because the instructions were sufficiently like the pattern instructions and did not require jurors to consider only those mitigating circumstances unanimously found by the jury. In any event, defendant has not made any showing that counsel's performance deprived him of a fair capital sentencing proceeding.

Am Jur 2d, Criminal Law §§ 748, 749, 751, 752.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

7. Constitutional Law § 226 (NCI4th)— resentencing on remand for prosecutorial misconduct—no mistrial—not double jeopardy

The trial court did not err in a capital resentencing by denying defendant's motion for a life sentence where the proceeding was defendant's third, and defendant moved before the proceeding for a life sentence because of the prosecutor's persistent misconduct in the prior sentencing proceeding, which had resulted in the remand for a new proceeding. The United States Supreme Court has noted that double jeopardy principles could bar a state from retrying a criminal defendant when prosecutorial misconduct resulted in a mistrial. No mistrial was granted at the second capital sentencing proceeding in this case; vacating the sentence and remanding for a new proceeding is not the equivalent. Moreover, the North Carolina Supreme Court did not find evidence of bad faith in remanding for a new sentencing proceeding and the principles discussed in *United States v. Dinitz*, 424 U.S. 600, and *Oregon v. Kennedy*, 456 U.S. 667, have no applicability here.

Am Jur 2d, Criminal Law §§ 263, 264, 291.

8. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A sentence of death was not disproportionate where the record fully supports the aggravating circumstance found by the jury, there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration, none of the seven cases in which the death penalty has been found disproportionate was factually similar to this case, none of those seven cases involved a victim who was also kidnapped and sexually assaulted, and this case is also distinguishable in that the murder was physically and psychologically brutal. The victim was only sixteen years old and was at home, sick and alone, when defendant attempted to break into the house; she was kidnapped from her home and driven around for at least two hours before she was taken to an isolated area where she was raped; just after she was raped, defendant placed her in the trunk of his car while he dug her shallow grave; she was choked; and then she was stabbed because defendant was not sure she was dead. The terror the victim must have experienced is staggering and clearly distinguishes this case from those in which the death penalty has been found disproportionate. Moreover, defendant

killed the victim in order to eliminate her as a potential witness after she saw him attempting to rob her home; killing another human being for the purpose of eliminating him or her as a witness reveals a particularly callous and depraved heart.

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 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.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Ross, J., on 3 November 1995, in Superior Court, Iredell County, upon a plea of guilty of first-degree murder. Heard in the Supreme Court 15 April 1997.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, and Ellen B. Scouten, Special Deputy Attorney General, for the State.

Burton Craige for defendant-appellant.

MITCHELL, Chief Justice.

Defendant Ricky Lee Sanderson was indicted in Davidson County on 3 March 1986 for the first-degree kidnapping and murder of Sue Ellen Holliman. He pled guilty to both charges on 7 April 1986. Venue for sentencing was changed to Iredell County. A capital sentencing proceeding was held in May 1987, and the jury recommended the death sentence. The trial court sentenced defendant to death and to a term of forty years' imprisonment for the kidnapping. On appeal, this Court found *McKoy* error in the capital sentencing proceeding and sent the case back for resentencing. *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990). A second capital sentencing proceeding was conducted in May 1991. Again, the jury recommended death, and the trial court sentenced defendant accordingly. On a second appeal

to this Court, we concluded that the proceeding was tainted by the prosecutor's "persistent misconduct" and remanded for another capital sentencing proceeding. *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994). This, defendant's third capital sentencing proceeding, was conducted at the 16 October 1995 Criminal Session of Superior Court, Iredell County. This jury also recommended a sentence of death, and the trial court sentenced defendant accordingly.

The State's evidence tended to show, *inter alia*, that on 14 March 1985, defendant abducted sixteen-year-old Sue Ellen Holliman from her home and drove her to a secluded area. There he raped, strangled, and stabbed her and then buried her body in a shallow grave. Sue Ellen was last seen alive by her father at around 12:30 p.m. on 14 March. She had stayed home from school because of an illness, and Mr. Holliman had come home during lunch to check on her condition. He found his daughter to be feeling better and returned to work after ten or fifteen minutes. When Sue Ellen's mother came home later in the afternoon, she could not find Sue Ellen and called the police.

The body of Sue Ellen Holliman was found on 15 April 1985 in a remote field in the woods. The body was clothed in sweatpants that were gathered around the ankles, a T-shirt that had been pulled up prior to the stabbings, a bra that appeared to have been torn or cut, and a pair of panties pulled down to the lower thighs. The body had three stab wounds just below the breastbone, most likely caused by a knife. Decomposition of the body precluded any possibility for the medical examiner to examine it for physical evidence of strangulation or rape. The victim died of stab wounds to the chest and abdomen.

On 15 May 1985, Elwood "Woody" Jones, an employee of a business managed by the victim's family, confessed to the murder of Sue Ellen Holliman. He was indicted for first-degree murder and was awaiting trial when defendant, in prison for another crime, confessed to the same murder.

On 21 January 1986, defendant, then an inmate at Central Prison, called the Davidson County Sheriff's Department and indicated that he wished to make a statement about a murder. During the initial interview, defendant told officers from the Davidson County Sheriff's Department and the State Bureau of Investigation that he had stabbed, raped, and buried Sue Ellen Holliman.

On 5 February 1986, defendant made another statement to the effect that on 14 March 1985, he had been driving around the Sapona area of Davidson County looking for a home to break into. He selected the Hollimans' house because it was surrounded by woods. As he attempted to enter the home, the victim met him at the door. Defendant, surprised to see her, asked if he could use the phone. When she replied that she was not allowed to let anybody into the house while her parents were away, defendant barged into the house. Defendant asked the victim if there was money in the house, and she told him there was not. Defendant decided to "just get out of there" and took the victim with him to prevent her from reporting his license plate number. He told her to get on the floorboard of his car. He then drove to a secluded area, laid the victim on the ground, and raped her. After this, defendant forced the victim into the trunk of his vehicle while he dug her grave. Defendant then removed the victim from the trunk, forced her to sit down, and began choking her until she lay on her side. Unsure whether she was dead, defendant then got a knife from his car, rolled the victim over, and stabbed her in the chest.

Paint chips recovered from the victim's clothing were consistent with paint from defendant's car, and a pubic hair recovered from the driver's seat was microscopically consistent with the victim's pubic hair. Various fibers recovered from the victim's clothing were found to match fibers taken from defendant's car.

[1] By his first assignment of error, defendant contends that the trial court erred in denying his motion *in limine* to exclude references to the alleged rape and by submitting the aggravating circumstance that the murder was committed during the commission of a rape.

At defendant's first capital sentencing proceeding, the trial court excluded portions of defendant's confession where he confessed to raping the victim. Rape was not submitted for jury consideration as an aggravating circumstance at that capital sentencing proceeding. At defendant's second capital sentencing proceeding, the prosecutor stated that he had no evidence of rape and would not refer to any alleged rape or seek to use it as an aggravating circumstance. At this second capital sentencing proceeding, defendant's brother testified that defendant admitted he raped the victim before killing her, and defense mental health expert Dr. Sultan testified that defendant told her he raped the victim. The prosecutor thereafter requested that rape be submitted as an aggravating circumstance, but the trial court denied the request.

At the third capital sentencing proceeding, defendant filed a motion *in limine* to exclude references to the alleged rape and argued that submitting rape as an aggravating circumstance would violate double jeopardy principles set out in this Court's opinion in *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981). The trial court denied defendant's motion, and the State presented evidence that defendant had raped the victim before he killed her. The trial court also submitted the aggravating circumstance that the murder was committed during the commission of a rape. The jury found that aggravator to exist and used it to support its recommendation of the death sentence. Defendant contends that the denial of the motion *in limine* and the submission as an aggravating circumstance that the murder occurred during the course of a rape violated constitutional principles against double jeopardy. We disagree.

Once a defendant has been tried for and acquitted of a crime, the Double Jeopardy Clause of the Fifth Amendment protects him from being tried again for that crime. *United States v. DiFrancesco*, 449 U.S. 117, 129-30, 66 L. Ed. 2d 328, 343 (1980). The principles of the Double Jeopardy Clause of the Fifth Amendment apply to the states through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969). The prohibition against double jeopardy is also embodied in the "Law of the Land" clause of the North Carolina Constitution. N.C. Const. art. I, § 19; *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954).

In *State v. Silhan*, decided in 1981, this Court was faced with the application of double jeopardy principles to a second sentencing proceeding in a capital case. 302 N.C. 223, 275 S.E.2d 450. We compared a North Carolina capital sentencing proceeding with a determination of guilt or innocence in a trial. We concluded in *Silhan* that the Double Jeopardy Clause could therefore apply to capital sentencing proceedings. We further stated:

> If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the state from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed from and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. The dictates of double jeopardy would preclude the state from relying on any aggravating circumstance of which it offered insufficient evidence at the hearing appealed from.

Id. at 270, 275 S.E.2d at 482. We also enunciated a rule in *Silhan* whereby an aggravating circumstance could properly be submitted at a new capital sentencing proceeding, stating:

> [I]f upon defendant's appeal, this Court vacates a death sentence for trial error, it will remand for a new sentencing hearing only if there are aggravating circumstances which would not be constitutionally or legally proscribed at the new hearing. An aggravating circumstance would not be so proscribed at the new hearing if (1) there was evidence to support it at the hearing appealed from; and (2) it was not submitted to the jury or, if submitted, the jury found it to have existed; and (3) there is no other legal impediment (such as the felony murder merger rule) to its use. If all aggravating circumstances would be constitutionally or legally proscribed at the new hearing, this Court will not remand for a new sentencing hearing but will order that a sentence of life imprisonment be imposed. An aggravating circumstance would be so proscribed at the new hearing if (1) there was no[t] sufficient evidence to support it at the hearing appealed from; or (2) the jury at the hearing appealed from, after considering it, failed to find that it existed; or (3) there would be some other legal impediment . . . to its use.

Id. at 270-71, 275 S.E.2d at 482-83.

At the time that *Silhan* was written, the United States Supreme Court had not ruled directly on the issue of how double jeopardy principles are to be applied to aggravating circumstances in a capital sentencing proceeding. Two months after *Silhan* was filed, the United States Supreme Court handed down an opinion holding that a jury's decision in a capital sentencing proceeding to sentence a defendant to life imprisonment should be considered an "acquittal" of the death penalty under the Double Jeopardy Clause. *Bullington v. Missouri*, 451 U.S. 430, 446, 68 L. Ed. 2d 270, 284 (1981).

Several years later, in *Poland v. Arizona*, the Supreme Court stated that a trial judge's failure in a capital sentencing proceeding to find an aggravating circumstance did not amount to an acquittal of that circumstance for double jeopardy purposes. 476 U.S. 147, 155, 90 L. Ed. 2d 123, 132 (1986). This is so, the Court said, because "the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not

'acquit' a defendant (i.e., preclude the death penalty)." *Id.* at 156, 90 L. Ed. 2d at 132-33.

The petitioners in *Poland* were convicted by an Arizona jury of first-degree murder and sentenced to death by a trial judge in a separate capital sentencing proceeding. At the capital sentencing proceeding, the prosecution argued that two statutory aggravating circumstances were present, to wit: that the petitioners had committed the offense for pecuniary gain and that they had committed the offense in an especially heinous, cruel, or depraved manner. The trial judge failed to find the pecuniary gain circumstance but did find the especially heinous, cruel, or depraved aggravating circumstance and ultimately sentenced the petitioners to death. On appeal, the Arizona Supreme Court found insufficient evidence to support a finding of the aggravating circumstance that the murder was especially heinous, cruel, or depraved but further stated that the trial court "mistook the law" when it did not find the pecuniary gain aggravating circumstance. The Arizona Supreme Court reversed and remanded for a new trial, at which the petitioners were again convicted of first-degree murder and sentenced to death.

In the second capital sentencing proceeding, the prosecution offered evidence of three aggravating circumstances, including the especially heinous, cruel, or depraved circumstance and the pecuniary gain circumstance. The trial judge found all three to exist and sentenced the petitioners to death. On a second appeal, the Arizona Supreme Court again found the evidence insufficient to support the heinous, cruel, or depraved aggravator but sufficient to support the pecuniary gain circumstance. The Arizona Supreme Court then independently weighed the remaining aggravating and mitigating circumstances and concluded that death was the appropriate punishment for each petitioner. The issue before the United States Supreme Court in *Poland* was whether the Double Jeopardy Clause barred reimposition of the death penalty upon the petitioners. The Supreme Court held that it did not. *Id.* at 151, 90 L. Ed. 2d at 130.

The Supreme Court reasoned in *Poland* that since neither the sentencing judges nor the reviewing appellate court had held that the prosecution had failed to prove that the petitioners deserved the death penalty, there was nothing similar to an acquittal. The Court rejected the petitioners' argument that a capital sentencer's failure to find a particular aggravating circumstance constitutes an acquittal of that circumstance for double jeopardy purposes. *Id.* at 155, 90 L. Ed. 2d at 132.

The Court further stated:

> *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate.* We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point.

Id.

In the instant case, the State argues that our interpretation of double jeopardy principles in *Silhan* must now be modified in light of the United States Supreme Court's decisions in *Bullington* and *Poland.* We agree. In accordance with the principles discussed in those cases, we conclude that jeopardy attaches in a capital sentencing proceeding for purposes of double jeopardy analysis only after there has been a finding that no aggravating circumstance is present. To the extent that our opinion in *Silhan* can be read as supporting any other rule, it is inconsistent with the more recent decision of the United States Supreme Court in *Poland* and must no longer be considered authoritative on this point.

In the present case, neither the jury at the first capital sentencing proceeding nor the jury at the second capital sentencing proceeding found that no aggravating circumstance existed. To the contrary, each of those juries found at least one aggravating circumstance to exist and recommended a sentence of death. Therefore, principles of double jeopardy did not prevent the trial court from submitting this case to the jury at defendant's third capital sentencing proceeding for its consideration of all aggravating circumstances supported by evidence adduced at that third capital sentencing proceeding for the jury's determination as to whether death or life imprisonment was the appropriate penalty in this case.

[2] The trial court properly submitted as an aggravating circumstance at the third capital sentencing proceeding that defendant had committed the murder while engaged in the commission of a rape. This is so because the evidence introduced at that third capital sentencing proceeding supported this aggravating circumstance. Whether the evidence at the first or second capital sentencing proceeding would have supported the submission of this aggravating circumstance or whether the trial court in either of those prior capital

sentencing proceedings in fact submitted this aggravating circumstance is irrelevant. Neither jury in the two prior capital sentencing proceedings had found that no aggravating circumstance existed, and neither recommended a sentence of life imprisonment. Therefore, double jeopardy considerations did not come into play in defendant's third capital sentencing proceeding resulting in this appeal.

We conclude that the trial court did not err in denying defendant's motion *in limine* or in submitting the aggravating circumstance that defendant murdered the victim during the course of raping her. This assignment of error is overruled.

[3] By another assignment of error, defendant contends that the trial court erred by submitting to the jury the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a kidnapping. He argues that this aggravating circumstance, as submitted to the jury, was not supported by the evidence. Specifically, defendant contends that at his third capital sentencing proceeding, the State failed to produce evidence that he kidnapped the victim for the purpose of terrorizing her. Thus, defendant argues that the trial court erred by submitting this as an aggravating circumstance. We disagree.

Defendant was indicted for first-degree kidnapping on 3 March 1986. The indictment charged defendant with forcibly confining, restraining, and removing the victim "for the purpose of facilitating the flight of [defendant] following the commission of a felony . . . and for the purpose of terrorizing [the victim]." On 7 April 1986, defendant pled guilty to first-degree kidnapping and first-degree murder. The trial court sentenced defendant to forty years' imprisonment for the kidnapping.

At defendant's first two capital sentencing proceedings, the State submitted kidnapping as an aggravating circumstance, using the language that the kidnapping had been done for the unlawful purpose of "facilitating flight" or "avoiding lawful arrest." Both sentencing juries found this aggravating circumstance to exist. At the third capital sentencing proceeding, the State shifted its theory of unlawful purpose from "facilitating flight following commission of a felony" to "terrorizing the person so confined, restrained or removed." Defendant argues that the State failed to meet its evidentiary burden on the theory supporting this aggravating circumstance. This argument is without merit.

When a defendant pleads guilty to a charge contained in an indictment, "[t]he question of which theory, if there is more than one available, upon which defendant might be guilty does not arise." *Silhan*, 302 N.C. at 263, 275 S.E.2d at 478. The fact that a defendant pleads guilty means that the State does not have to invoke any particular legal theory upon which to convict him. *Id.* On 7 April 1986, defendant pled guilty to kidnapping the victim. As we stated in *Silhan*, once a defendant pleads guilty to a charge, it is irrelevant which theory the State later uses as a basis for the submission of this aggravating circumstance. *Id.* Thus, we conclude that the trial court did not err in submitting this aggravating circumstance.

Moreover, the State's evidence at the third capital sentencing proceeding from which defendant now appeals satisfied the State's burden of proof as to this aggravating circumstance. The State presented various confessions by defendant that he had kidnapped the victim prior to killing her, and defense counsel acknowledged on several different occasions that defendant had kidnapped the victim. The State's evidence also tended to show that the sixteen-year-old victim was clearly subjected to psychological terror prior to her death. Defendant forcibly took her from her home, drove her around in a car for over two hours, took her to a secluded area, and raped her. He then placed her in the trunk of a car while he dug a shallow grave, before he strangled and stabbed her. The jury could reasonably infer from such evidence that defendant intended to terrorize the victim by kidnapping her.

[4] In support of another assignment of error, defendant argues that the trial court erred by refusing to submit a nonstatutory mitigating circumstance. Defendant requested that the trial court submit as a mitigating circumstance that "[defendant's] voluntary confession may well have saved Woody Jones' life and prevented the State of North Carolina from executing an innocent man." The trial court denied the request on the grounds that it was cumulative of other mitigating circumstances already submitted regarding defendant's confession. These mitigating circumstances included the following:

> (9) The defendant's confession led to the dismissal of First Degree Murder charges then pending against Woody Jones, an innocent man.
>
> . . . .

(10) The conduct of defendant in coming forward and confessing to this crime after another man had been charged assisted in the proper administration of justice in Davidson County.

. . . .

(11) The defendant's confession resulted in a tremendous burden being lifted from Woody Jones and his family.

The jury found these three and other related mitigating circumstances to exist and to have mitigating value. Nevertheless, defendant argues that the trial court committed reversible constitutional error in rejecting the requested mitigating circumstance. We disagree.

A trial court does not err in rejecting mitigating circumstances that are subsumed in other mitigating circumstances. *State v. McLaughlin*, 341 N.C. 426, 447, 462 S.E.2d 1, 12 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 879 (1996); *see also State v. Skipper*, 337 N.C. 1, 55-56, 446 S.E.2d 252, 282-83 (1994) (no error where trial court fails to submit a nonstatutory mitigating circumstance that was subsumed in a statutory mitigating circumstance), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). We conclude that defendant's proposed mitigating circumstance was subsumed in the circumstances submitted. The mitigating circumstances submitted as numbers (9), (10), and (11) served as vehicles by which the jury could fully consider defendant's confession and its impact on the case against Woody Jones. Thus, we conclude that the trial court did not err in refusing to submit the requested mitigating circumstance. This assignment of error is overruled.

[5] By another assignment of error, defendant argues that the trial court's instructions precluded consideration of mitigating circumstances which had not been unanimously found by the jurors. He contends that this violated the holding in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We disagree.

The trial court's instructions on Issue Three were as follows:

Issue Three is, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found is, or are, sufficient to outweigh the mitigating circumstance or circumstances found by you." If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances.

> When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the *jurors determine* to exist by a preponderance of the evidence in Issue Two.

(Emphasis added.)

Defendant contends that these instructions could have left the jurors with the mistaken notion that they had to consider only those mitigating circumstances unanimously found by the jury at Issue Two when deciding Issue Three. This assertion is misplaced. When these instructions are viewed in context with the instructions for Issue Two, it is clear the trial court's instructions neither express nor imply a unanimity requirement for considering mitigating circumstances. The trial court gave the following Issue Two instructions:

> Now Ladies and Gentleman, if you will turn back now to Page Two. Following the second issue, you will see in all capital letters some instructions which indicate that before you answer Issue Two, you should consider each of the mitigating circumstances that I have just been over with you, and in the space after each mitigating circumstance *write yes if one or more of you finds the circumstance* by a preponderance of the evidence. *Write no if none of you find the mitigating circumstance.* If you write yes in one or more of the spaces following the mitigating circumstances, then you should write yes in the space after Issue Two as well. If you write no in all of the spaces following the mitigating circumstances, then you should write no in the space after Issue Two.

(Emphasis added.) These instructions make it clear that each juror could find any submitted mitigating circumstance to exist. Moreover, they plainly state that unanimity is not required for a finding of any mitigating circumstance. The difference between the portion of the trial court's Issue Three instructions which defendant finds objectionable and the pattern jury Issue Three instructions is minimal. The pertinent portion of the pattern jury instructions reads as follows:

> When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the *juror determined* to exist . . . .

N.C.P.I.—Crim. 150.10, at 43 (1996) (emphasis added).

We cannot discern whether the trial court's Issue Three instructions merely contained a *lapsus linguae* in pluralizing "juror" where

the word should have been singular or whether a mistake was made in the transcript. In *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), the trial court had instructed in the second paragraph of Issue Three as follows:

> When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the *jury* determined to exist by a preponderance of the evidence in Issue Two.

Id. at 122, 443 S.E.2d at 328 (emphasis added). We concluded in *Robinson* that whether the use of the word "jury" as opposed to the word "juror" was a *lapsus linguae* by the trial court or a mistake in the transcription of the instruction, any error was harmless beyond a reasonable doubt. *Id.* We conclude likewise in the instant case. As in *Robinson*, we conclude here that the jury in the instant case was

> clearly and unambiguously instructed for each of the . . . mitigating circumstances submitted in Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it was deemed mitigating.

Id. at 123, 443 S.E.2d at 328. No juror was precluded in Issue Three from considering mitigating evidence that he or she found in Issue Two. As defendant's counsel made no objection to the Issue Three instructions at trial, our review is therefore limited to one for plain error. *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). We find none.

[6] Defendant also contends that he was denied his Sixth Amendment right to the effective assistance of counsel by his trial counsel's failure to object to the Issue Three instruction. We disagree. The United States Supreme Court held in *Strickland v. Washington* that in order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy a two-pronged test. 466 U.S. 668, 80 L. Ed. 2d 674 (1984). As our statutorily enacted test for prejudice mirrors the *Strickland* test, N.C.G.S. § 15A-1443(a) (1988), we adopted the test in *Strickland* as our own standard by which to measure ineffective assistance of counsel claims. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). To satisfy this test, a defendant must first show that counsel's performance was so deficient that counsel was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. A defendant must then show that counsel's deficient performance

deprived him or her of a fair trial. *Id.* By this test, defendant was not denied the effective assistance of counsel. The Issue Three instructions were sufficiently like the pattern instructions, and did not require the jurors to consider only those mitigating circumstances unanimously found by the jury. Counsel was not deficient in failing to object to the instructions. In any event, defendant has not made any showing that counsel's performance deprived him of a fair capital sentencing proceeding. This assignment of error is overruled.

[7] By another assignment of error, defendant argues that the trial court violated the federal and state constitutional prohibitions against double jeopardy by denying his motion for imposition of a life sentence. Before the capital sentencing proceeding at issue—defendant's third—defendant moved the trial court to impose a life sentence because of the prosecutor's allegedly persistent misconduct in the prior capital sentencing proceeding. The trial court denied the motion. Defendant contends that because this Court found prosecutorial misconduct in defendant's second capital sentencing proceeding, defendant's death sentence should be vacated, and he should be sentenced to life imprisonment. We disagree with defendant's contention.

The United States Supreme Court has noted that double jeopardy principles could bar a state from retrying a criminal defendant when prosecutorial misconduct resulted in a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 679, 72 L. Ed. 2d 416, 427 (1982); *United States v. Dinitz*, 424 U.S. 600, 611, 47 L. Ed. 2d 267, 276 (1976). The Court in *Kennedy* held that circumstances under which this may happen are limited to those cases in which the conduct giving rise to a defendant's motion for a mistrial was *intended* to provoke the motion for a mistrial. *Kennedy*, 456 U.S. at 679, 72 L. Ed. 2d at 427.

No mistrial was granted at the second capital sentencing proceeding in this case. This Court vacated the death sentence and remanded for a new capital sentencing proceeding based on the "persistent misconduct" of the prosecutor during defendant's second capital sentencing proceeding. *Sanderson*, 336 N.C. at 21, 442 S.E.2d at 45. That is simply not the equivalent of a mistrial. Moreover, although defendant contends that the prosecutor's misconduct was intentional, this Court did not find evidence of bad faith in remanding for a new sentencing proceeding. *Id.* Thus, the principles discussed in *United States v. Dinitz* and *Oregon v. Kennedy* have no applicability here. This assignment of error is overruled.

Defendant also raises as preservation issues the following four issues: (1) the trial court improperly refused to permit defendant to question prospective jurors about their conception of parole eligibility on a life sentence, (2) the trial court improperly refused to instruct the jury that it could consider life without parole as the sentencing alternative to death, (3) the trial court improperly defined the burden of proof applicable to mitigating circumstances by using the vague and ambiguous terms "satisfaction" and "satisfy you," and (4) the trial court's use of the term "may" in sentencing Issues Three and Four made consideration of proven mitigating circumstances discretionary with the sentencing jurors. We have previously considered and rejected 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.

[8] Having concluded that defendant's capital sentencing proceeding was free of prejudicial error, we now turn to our statutory duty as codified in N.C.G.S. § 15A-2000(d)(2) and reserved exclusively for this Court in capital cases. We must ascertain whether (1) the record supports the jury's findings of the aggravating circumstances on which the death sentence was based; (2) the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) 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. 1996). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We turn then to our final statutory duty of proportionality review.

In the case *sub judice*, defendant pled guilty to first-degree murder. The jury found three aggravating circumstances; that defendant committed the murder to prevent arrest or effect escape, N.C.G.S. § 15A-2000(e)(4); that defendant committed the murder while he was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5); and that defendant committed the murder while he was engaged in the commission of rape, also N.C.G.S. § 15A-2000(e)(5). The jury found neither of the statutory mitigating circumstances submitted to exist. Of the ten nonstatutory mitigating circumstances submitted, the jury found nine to exist.

In conducting our proportionality review, it is appropriate 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*, 512 U.S. 1254, 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). None of these seven cases is factually similar to the present case; none of these cases involved a victim of first-degree murder who was also kidnapped and sexually assaulted.

This case is also distinguishable from the cases in which we have found the death penalty disproportionate in that the murder was physically and psychologically brutal. The victim was only sixteen years old. She was at home, sick and alone, when defendant attempted to break into the house. She was then kidnapped from her home and driven around for at least two hours before she was taken to an isolated area where she was raped, choked, and stabbed to death. The evidence tended to show that the young victim was subjected to a prolonged period of terror and anguish while defendant "decided what he was going to do with her." Finally, and most reprehensible, is the fact that before defendant killed the victim, but just after he raped her, he placed her in the trunk of his car while he dug her shallow grave. The terror the victim must have experienced in this regard is staggering, and it clearly distinguishes this case from those in which we have found the death penalty to be disproportionate.

It is also proper for this Court to compare this case with cases in which we have found the death penalty to be an appropriate punishment. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. This Court has often found a death sentence proportionate where the defendant sexually assaulted the victim of first-degree murder. *See State v. Perkins*, 345 N.C. 254, 290, 481 S.E.2d 25, 42 (1997); *State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112; *State v. Lee*, 335 N.C. 244, 294, 439 S.E.2d 547, 574, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994).

This case is also comparable to the witness elimination cases in which this Court upheld sentences of death. The victim was murdered to prevent her from identifying the defendant as the perpetrator of a break-in at her home. Similarly, in *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), and *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985), the defendants were motivated to murder their victims in order to avoid detection or arrest. We upheld the death sentences in both of these cases. *See also State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985) (sole purpose of murder was witness elimination—death sentence not disproportionate), *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. Killing another human being for the purpose of eliminating him or her as a witness reveals a particularly callous and depraved heart.

The evidence tended to show that defendant subjected the victim in this case to extreme terror. The evidence tended to show that the victim was raped prior to being choked and stabbed and that defendant stabbed her because he was not sure she was dead after he choked her. Moreover, defendant killed the victim in order to eliminate her as a potential witness after she saw him attempting to rob her home. As we said in *Oliver*, "[t]he motive of witness elimination lacks even the excuse of emotion." 309 N.C. at 375, 307 S.E.2d at 335. This senselessly brutal treatment of another human being and the reprehensible motivation behind it convince us that the death penalty is not a disproportionate punishment for this crime and this defendant.

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

NO ERROR.

STATE OF NORTH CAROLINA v. GEORGE FRANKLIN PAGE

No. 239A96

(Filed 24 July 1997)

1. Indigent Persons § 19 (NCI4th)— capital murder—provision of forensic psychiatrist—denied—no particularized need

The trial court did not abuse its discretion in a capital first-degree murder prosecution by providing the State access to a forensic psychiatrist while denying defendant's request for the same type of expert. Defendant had available at trial both a psychiatric and a psychological expert who had treated him for an extended period prior to the shooting and the diagnosis of the State's expert was in accord with theirs except that she did not believe defendant suffered from post-traumatic stress disorder. Mere suspicion that the classification of the State's witness as a forensic psychiatrist made her better equipped than the defendant's psychologist to testify about defendant's mental status was insufficient to require that defendant be given a court-appointed forensic expert. Defendant did not demonstrate a particularized need for a forensic psychiatrist or a reasonable likelihood that such an expert would materially assist him in the preparation and presentation of his case.

Am Jur 2d, Criminal Law §§ 955, 1006; Expert and Opinion Evidence § 13.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19.

2. Evidence and Witnesses § 2890.5 (NCI4th)— capital murder—defendant's psychologist—license revocation—not suppressed

A first-degree murder defendant was not denied his due-process guarantee of a competent mental-health expert by the denial of his motion *in limine* to suppress evidence of his psychologist's license revocation. The State was entitled to call into question the psychologist's credentials, as with any witness; defendant had another competent mental-health expert witness; and the State's forensic psychiatrist testified largely in accord with the testimony of defendant's experts. The denial of defend-

ant's motion did not have a prejudicial effect on his right to present his psychiatric defense.

Am Jur 2d, Expert and Opinion Evidence §§ 142, 381.

3. Homicide § 523 (NCI4th)— second-degree murder—diminished mental capacity—not a defense to malice

The trial court did not err in a murder prosecution by not instructing the jury that diminished mental capacity could negate the element of malice required for a second-degree murder. Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation and diminished capacity not amounting to legal insanity is not a defense to the element of malice in second-degree murder.

Am Jur 2d, Criminal Law § 41; Expert and Opinion Evidence § 190; Homicide §§ 115, 516.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency. 16 ALR3d 714.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded"—modern cases. 23 ALR4th 493.

4. Assault and Battery § 60 (NCI4th)— assault on an officer—diminished capacity—not a defense—distinction between general intent and specific intent not abolished

The trial court did not err by not instructing the jury to consider diminished mental capacity as a defense to seven counts of assault with a deadly weapon on a government officer. This felony may be described as a general-intent offense because the jury is not required to find that defendant possessed any intent beyond the intent to commit the unlawful act, which will be inferred or presumed from the act itself. Knowledge of the victim's status as a government officer is simply a fact that the State must prove; it is not a state of mind to which the diminished-capacity defense may be applied. Defendant's invitation to dispense with the distinction between specific-intent and general-intent crimes was declined; the diminished-capacity defense is not available to negate the general intent required for a conviction of assault with a deadly weapon on a government officer.

Am Jur 2d, Criminal Law § 41; Homicide § 115.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency. 16 ALR3d 714.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded"—modern cases. 23 ALR4th 493.

5. Jury § 141 (NCI4th)— capital murder—jury selection—conception of parole eligibility

The trial court did not err in a capital murder prosecution by denying defendant's pretrial motion to permit him to examine prospective jurors regarding their conception of parole eligibility when a defendant receives a life sentence. The trial court specifically instructed the jury that a separate sentencing hearing would be held if defendant was convicted of first-degree murder, gave the instruction that a sentence of life imprisonment means life without parole prior to jury selection, and reiterated it during jury selection. Defendant was not prevented from informing jury members that life imprisonment means life without parole and his counsel so indicated several times during the trial.

Am Jur 2d, Jury §§ 198, 206; New Trial § 247.

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

6. Jury § 226 (NCI4th)— capital murder—jury selection—unequivocal opposition to death penalty—no opportunity to rehabilitate

The trial court did not abuse its discretion in jury selection for a capital first-degree murder prosecution where defendant contended that he was not allowed to rehabilitate prospective jurors excused for cause based on opposition to the death penalty. In all but one instance, defendant either did not ask to rehabilitate or was unsuccessful in doing so and on the one occasion when defendant was denied *voir dire*, the prospective juror was unequivocal in his opposition to the death penalty. A defendant is not permitted 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.

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.

7. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A sentence of death was not disproportionate where there was clear evidentiary support for the aggravating circumstances considered and found by the jury, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and this case is distinguishable from the seven cases in which the death penalty was found disproportionate because none of those cases involved the first-degree murder of a police officer from a distance with a high-powered rifle while the officer was engaged in the performance of his duties. This case is similar to cases in which the death penalty was found proportionate.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

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.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Albright, J., on 26 April 1996 in Superior Court, Forsyth County. On 21 April 1997 this Court allowed defendant's motion to bypass the Court of Appeals on judgments entered upon related convictions. Heard in the Supreme Court 12 May 1997.

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

Larry L. Eubanks, David B. Freedman, and Dudley A. Witt for defendant-appellant.

WHICHARD, Justice.

On 31 July 1995 defendant was indicted for first-degree murder, eight counts of assault with a deadly weapon with intent to kill, and one count each of discharging a firearm into an occupied vehicle and discharging a firearm into an occupied dwelling. On 11 March 1996

superseding indictments were issued on seven of the eight charges of assault with a deadly weapon with intent to kill, changing the charges to assault with a deadly weapon on a government officer. Defendant was tried capitally at the 8 April 1996 Criminal Session of Superior Court, Forsyth County. The jury found him guilty of all charges. As to the murder conviction, the jury found defendant guilty on the basis of premeditation and deliberation and under the felony murder rule, specifically finding the seven assault with a deadly weapon on a government officer offenses as the underlying felonies, and recommended that he be sentenced to death. The trial court sentenced defendant accordingly. It also sentenced defendant to imprisonment for thirty-one to forty-seven months on the assault with a deadly weapon with intent to kill conviction, twenty-five to thirty-nine months on the discharging a firearm into an occupied vehicle conviction, and twenty-five to thirty-nine months on the discharging a firearm into an occupied dwelling conviction, the sentences to run consecutive to one another. The court arrested judgment on the assault with a deadly weapon on a government officer convictions. We hold that defendant received a fair trial, free of prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show that at around 8:00 a.m. on 27 February 1995, Sandra McGill was sitting in her apartment when she heard a loud explosion coming from the bar counter. Because she was blind, McGill called maintenance personnel, who discovered that a bullet had gone through her fish tank. The shot was fired by defendant George Franklin Page, who was pointing a high-powered rifle out the window of his apartment directly opposite McGill's building. He fired another shot when the maintenance person, Ellis Hollowell, went outside to take a closer look at a hole in the vertical blinds; this shot hit the wall just above Hollowell's head. Shortly after 9:00 a.m. defendant fired a third shot into a moving vehicle, a cable van.

Police Officers E.A. Newsome, A.N. Swaim, M.R. Bollinger, and J.W. McKenzie of the Winston-Salem Police Department arrived after 9:00 a.m. to inspect McGill's apartment. While Swaim and Newsome were proceeding to defendant's building to question the residents, defendant fired two more shots. While the officers radioed for help, he again fired his rifle, and the officers all took cover. Several testified that they saw defendant moving from window to window.

Officers John Pratt and Stephen Amos arrived at the scene and drove directly to defendant's building. Amos was at the hood of the

car when defendant fired another shot that went through the patrol car's back window, then hit Amos in the chest. Pratt, along with officer Steven Sigmon and others, arrived and took Amos to the ambulance. Sigmon testified that he saw the muzzle flash and heard a shot that passed ten feet above his head.

Around 9:30 a.m. defendant called his ex-girlfriend, Tamara Mitchell, and stated that his apartment was surrounded by police officers and that he thought he had shot someone. At 10:00 a.m. Sergeant Marble, a crisis negotiator, called defendant. After discussion, defendant said he wanted to speak with his clinical psychologist, Dan Pollock, and his psychiatrist, Jason Crandell. Pollock spoke with defendant and implored him to surrender. Defendant told Marble the only people he wanted to approach his apartment were his ex-girlfriend and his "psych." Negotiations continued until 11:45 a.m. when defendant agreed to go, without weapons, with Crandell and Marble to Pollock's office. Defendant was taken into custody shortly thereafter. Marble testified that at the time of the arrest, defendant had no difficulty understanding what he was being told and was not delusional. Defendant told Marble he had been injured in Vietnam and wore a leg brace as a result.

Defendant introduced testimony from both Crandell and Pollock about his mental health. Pollock had treated defendant for several years and diagnosed him with a Cluster B personality disorder, extensive pain syndrome, and post-traumatic stress disorder with flashback symptoms resulting from experiences in Vietnam. Pollock also testified that defendant abused alcohol. Pollock opined that defendant was suffering from post-traumatic stress disorder at the time of the shooting and that because he was experiencing a flashback, defendant was unaware of his surroundings and the actual event.

Defendant also introduced testimony from Crandell. Pollock had referred him to Crandell in February 1994 for medication management of his post-traumatic stress disorder. Crandell also diagnosed defendant with chronic depression and chronic pain disorder as well as episodic alcohol abuse. Crandell testified that at the time of the arrest, defendant was suffering from an Axis II character disorder. This nonpsychotic disorder afflicted defendant on a daily basis; however, Crandell did not think it affected defendant's ability to formulate and carry out plans.

The State presented evidence from Nicole Wolfe, a forensic psychiatrist who evaluated defendant at Dorothea Dix Hospital after the

shooting. She diagnosed defendant with a personality disorder characterized by narcissistic and passive/aggressive traits. She also discovered that defendant had served in Vietnam for only one year and had not seen combat. Given these facts, she did not believe defendant suffered from post-traumatic stress disorder. She similarly testified that defendant had a history of alcohol abuse. Wolfe believed that defendant had the capacity to understand his actions during the shooting and that none of the diagnoses affected his mental abilities.

During the capital sentencing proceeding, the jury found as aggravating circumstances that defendant had committed the murder as part of a course of conduct that included defendant's commission of other violent crimes, that he murdered a law enforcement officer engaged in the performance of official duties, and that the murder was committed to hinder the enforcement of the laws. Four statutory mitigating circumstances were submitted, and the jury found two: that the murder was committed while defendant was under the influence of a mental or emotional disturbance and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Finally, the jury found one of the six nonstatutory mitigating circumstances submitted: that defendant was under the voluntary care of both a psychiatrist and a psychologist on the day of the shooting. The jury found the mitigating circumstances insufficient to outweigh the aggravating circumstances and that the aggravating circumstances found, when considered with the mitigating circumstances found, were sufficiently substantial to call for the imposition of the death penalty.

In his first assignment of error, defendant makes two arguments. First, he argues that the trial court erred in denying his motion for a court-appointed psychiatrist. Second, he contends that denial of the motion *in limine* to suppress evidence of his psychologist's license revocation denied him his due-process guarantee to a competent mental health expert. We conclude that each argument is without merit.

Defendant presented testimony from Pollock, a clinical psychologist who had treated him for several years, and Crandell, a psychiatrist who had treated him for one year. Both characterized defendant as having a personality disorder and abusing alcohol, with Pollock making an additional diagnosis of post-traumatic stress disorder. The State's forensic psychiatric expert, Nicole Wolfe, disagreed with the

finding of post-traumatic stress disorder and agreed with the personality disorder diagnosis. On 7 March 1996 defendant moved for appointment of a third expert, a forensic psychiatrist, arguing that this type of expert was better equipped than a clinical psychologist to prepare a legal defense.

[1] Defendant first contends that the trial court erred in providing the State with access to a forensic psychiatrist while denying his request for the same type of expert. *Ake v. Oklahoma* established a defendant's right of access to a competent psychiatrist upon showing that "his sanity at the time of the offense is to be a significant factor at trial." 470 U.S. 68, 76, 84 L. Ed. 2d 53, 66 (1985). Following *Ake* this Court held that a defendant must be provided a " 'competent psychiatrist for the purpose of not only examining defendant but also assisting defendant in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases.' " *State v. Parks*, 331 N.C. 649, 659, 417 S.E.2d 467, 473 (1992) (quoting *State v. Gambrell*, 318 N.C. 249, 259, 347 S.E.2d 390, 395 (1986)). While we have stated that both psychiatrists and psychologists are trained to recognize and treat mental illness, *State v. Bates*, 333 N.C. 523, 527, 428 S.E.2d 693, 695, *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993), we have not specified that a particular type of mental-health expert must be appointed to assist a defendant in a criminal case to satisfy the requirements of *Ake*.

In accordance with *Ake*, this Court has held that upon a threshold showing of specific need for expert assistance, funds for such must be made available. *State v. Moore*, 321 N.C. 327, 347, 364 S.E.2d 648, 658 (1988). Further, the statutory right to "counsel and the other necessary expenses of representation," N.C.G.S. § 7A-450(b) (1989), includes the assistance of experts upon a showing of a particularized need therefor. *State v. Tucker*, 329 N.C. 709, 718, 407 S.E.2d 805, 811 (1991). The trial court has authority to approve a fee for the service of an expert witness who testifies for an indigent person. N.C.G.S. § 7A-454 (1989).

To establish a particularized need for expert assistance, a defendant must show that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert 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). Although particularized need is a flexible concept and must be determined on a case-by-case basis, *Parks*, 331 N.C. at 656-57, 417 S.E.2d at 471,

"[m]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided," *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). The trial court has discretion to determine whether a defendant has made an adequate showing of particularized need. *State v. Mills*, 332 N.C. 392, 400, 420 S.E.2d 114, 117 (1992). In making its determination the trial court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. *Gambrell*, 318 N.C. at 256, 347 S.E.2d at 394.

Applying these principles, we conclude that the court did not err in denying defendant's motion for psychiatric assistance. The ruling rested on several facts, including that defendant had both a psychiatric and a psychological expert providing evidence on his behalf at trial. Pollock and Crandell treated defendant over an extended period prior to the shooting, and they made similar diagnoses. Wolfe's diagnosis was in accord with theirs except that she did not believe defendant suffered from post-traumatic stress disorder. Defendant thus had substantial assistance from mental-health experts in preparing for and conducting his defense. Mere suspicion that Wolfe's classification as a forensic psychiatrist made her better equipped than Pollock to testify about defendant's mental status was insufficient to require that defendant be given a court-appointed forensic expert. Given the facts before the trial court when it made its ruling, we conclude that defendant did not demonstrate a particularized need for a forensic psychiatrist or a reasonable likelihood that such an expert would materially assist him in the preparation and presentation of his case. Accordingly, the trial court did not abuse its discretion in denying defendant's motion.

[2] Defendant next contends that denial of his motion *in limine* to suppress evidence of Pollock's license revocation discredited this expert witness and resulted in the denial of defendant's due-process guarantee of a competent mental-health expert.

> North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C-1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony.' " 1 Henry Brandis, Jr., *Brandis on*

North Carolina Evidence § 42 (3d ed. 1988) (footnotes omitted) (citations omitted).

State v. Bacon, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1995). As with any witness, the State was entitled to call into question Pollock's credentials; thus, the court's denial of the motion *in limine* was proper. Further, defendant had another competent mental-health expert witness, and the State's forensic psychiatrist testified largely in accord with the testimony of defendant's mental-health experts. On these facts, denial of the motion *in limine* did not have a prejudicial effect on defendant's right to present his psychiatric defense. Accordingly, this assignment of error is overruled.

In his second assignment of error, defendant argues that the trial court erred in failing to instruct the jury on diminished capacity as to all charges submitted. The trial court instructed the jury to consider whether, because of diminished mental capacity, defendant was incapable of forming the specific intent to kill required for a conviction of first-degree murder by malice, premeditation, and deliberation. The trial court refused, however, to instruct the jury to consider whether diminished mental capacity prevented defendant from forming the intent required for a second-degree murder conviction or for conviction of the seven counts of assault with a deadly weapon on a government officer.

[3] Defendant contends the trial court should have instructed the jury that diminished mental capacity could negate the element of malice required for a second-degree murder conviction. We disagree. A defendant is entitled to present evidence that a diminished mental capacity not amounting to legal insanity negated his ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation. *State v. Shank*, 322 N.C. 243, 249, 367 S.E.2d 639, 643 (1988). Further, a defendant who presents such evidence is entitled to a jury instruction on the diminished-capacity defense. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). For a conviction of second-degree murder, however, the jury need not find that a defendant formed a specific intent to kill. Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. N.C.G.S. § 14-17 (Supp. 1996); *State v. Lane*, 344 N.C. 618, 621, 476 S.E.2d 325, 327 (1996). Diminished capacity not amounting to legal insanity is not a defense to the element of malice in second-degree murder. *See Rose*,

323 N.C. at 458-59, 373 S.E.2d at 429. Therefore, the trial court did not err in refusing to instruct the jury to consider diminished capacity when it deliberated whether to convict defendant of second-degree murder.

[4] Defendant next argues that the trial court should have instructed the jury to consider diminished mental capacity as a defense to the seven counts of assault with a deadly weapon on a government officer. This offense is defined in N.C.G.S. § 14-34.2, which provides:

> [A]ny person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State or of any political subdivision of the State . . . in the performance of his duties shall be guilty of a Class F felony.

N.C.G.S. § 14-34.2 (Supp. 1996). This Court has held that knowledge that the victim is an officer or employee of the State is an essential element of this offense. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985).

Defendant argues that the diminished-capacity defense should be available to negate the knowledge element required by *Avery*. This argument is without merit. We allow defendants to assert diminished mental capacity as a defense to a charge of premeditated and deliberate murder because we recognize that some mental conditions may impede a defendant's ability to form a specific intent to kill. *See Shank*, 322 N.C. at 250-51, 367 S.E.2d at 644. This reasoning is not applicable to the knowledge element of the felony of assault with a deadly weapon on a government officer. Knowledge of the victim's status as a government officer is simply a fact that the State must prove; it is not a state of mind to which the diminished-capacity defense may be applied. In this case, the State presented evidence tending to prove this fact. The trial court properly instructed the jury that, in order to convict defendant of these charges, it must find that defendant "knew or had reasonable grounds to know" that the victims were officers performing official duties. The State's evidence indicated that uniformed police officers and marked police cars were directly in defendant's line of vision. Several officers testified that defendant shot in their direction. Also, defendant's ex-girlfriend testified that she received a telephone call from defendant in which he stated that his apartment was surrounded by police officers. This evidence was sufficient to support the jury's conclusion that the knowledge element of assault with a deadly weapon on a government officer was satisfied.

Defendant argues further that the diminished-capacity defense should be available to negate the state of mind required for defendant to be convicted of a violation of N.C.G.S. 14-34.2. "In order to return a verdict of guilty of assault with a firearm upon a law enforcement officer in the performance of his duties, the jury is not required to find the defendant possessed any intent beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself." *State v. Mayberry*, 38 N.C. App. 509, 513, 248 S.E.2d 402, 405 (1978). Thus, this felony may be described as a general-intent offense.

This Court has held that the diminished-capacity defense is not available to negate the general intent required for a conviction of first-degree sexual offense, *State v. Daughtry*, 340 N.C. 488, 516, 459 S.E.2d 747, 761 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 739 (1996), or of second-degree murder, *Rose*, 323 N.C. at 458-59, 373 S.E.2d at 429. Accordingly, we now hold that the diminished-capacity defense is not available to negate the general intent required for a conviction of assault with a deadly weapon on a government officer. Because the diminished-capacity defense is not available, the trial court did not err in refusing to instruct the jury on it.

Finally, defendant invites this Court to dispense with the distinction between specific-intent and general-intent crimes. This we decline to do. Defendant has proffered no compelling reason for us to change this long-standing rule. This assignment of error is overruled.

[5] In his next assignment of error, defendant makes two arguments. He first argues that the trial court erred in denying his pretrial motion to permit him to examine prospective jurors regarding their conception of parole eligibility when a defendant receives a life sentence. He contends that this violated his constitutional right to due process of law. The trial court specifically instructed the jury that if defendant was convicted of first-degree murder, a separate capital sentencing proceeding would be conducted to determine whether defendant would be given the death penalty or life without parole. Defendant, however, argues that these instructions were insufficient to ensure that jury members understood the meaning of life without parole.

Effective 1 October 1994, N.C.G.S. § 15A-2002 requires that the trial court instruct the jury "in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." Further, this Court has repeatedly held that a defendant is not entitled to explore on *voir dire* prospective jurors' perceptions of parole eligibility. *State v. Conner*, 345 N.C. 319, 332,

480 S.E.2d 626, 631 (1997). The required instruction was given prior to jury selection and reiterated during jury selection. Further, defendant was not prevented from informing jury members that life imprisonment means life without parole, and his counsel so indicated several times during the trial. We thus adhere to our prior rulings and conclude that the trial court did not err in denying defendant's motion to permit him to question the prospective jurors on parole eligibility.

[6] Defendant next argues that the trial court erred in refusing to allow him to rehabilitate prospective jurors excused for cause based on their opposition to the death penalty. In all instances except one, defendant either did not ask to rehabilitate or was allowed to rehabilitate but was unsuccessful in doing so. On the one occasion when the court denied defendant *voir dire* of a prospective juror, the prospective juror was unequivocal in his opposition to the death penalty.

The trial court has broad discretion in supervising *voir dire*, and its judgment is deferred to when determining whether prospective jurors would be able to follow the law impartially. *State v. White*, 343 N.C. 378, 388, 471 S.E.2d 593, 598, *cert. denied*, — U.S. —, 136 L. Ed. 2d 229 (1996). Further, a defendant is not permitted 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). Defendant has not met his burden of showing an abuse of discretion in the trial court's refusal to allow him to rehabilitate this juror. Accordingly, this assignment of error is overruled.

[7] In defendant's final assignment of error, he argues that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary considerations, and that the death penalty is disproportionate. Defendant does not argue that the jury's findings of the aggravating circumstances are unsupported by the evidence. This Court nonetheless is statutorily mandated to review all of these factors when a sentence of death is imposed. N.C.G.S. § 15A-2000(d)(2) (Supp. 1996).

The jury found three aggravating circumstances: that the murder was committed to hinder the enforcement of laws, N.C.G.S. § 15A-2000(e)(7); that the murder was committed against a law enforcement officer while he was engaged in the performance of his official duty, N.C.G.S. § 15A-2000(e)(8); and that the murder was com-

mitted as part of a course of conduct that included defendant's commission of other violent crimes, N.C.G.S. § 15A-2000(e)(11). The jury also found two of four statutory mitigating circumstances submitted: that the murder was committed while defendant was under the influence of a mental or emotional disturbance and that defendant did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Of the six nonstatutory mitigating circumstances submitted, the jury found only that defendant was under the care of a psychiatrist and a psychologist. We find clear evidentiary support for the aggravating circumstances considered and found by the jury. Further, we conclude that the death penalty was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

Proportionality review serves to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury," *State v. Lee*, 335 N.C. 244, 294, 439 S.E.2d 547, 573, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994), and it guards "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). In performing proportionality review, we compare this case to others 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 found death sentences 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), *and 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 cases. None of these cases involved the first-degree murder of a police officer from a distance, with a high-powered rifle, and while the officer was engaged in the performance of his duties.

Defendant argues that his case is comparable to *Hill*. There the defendant was convicted of first-degree murder for killing a police

officer with the officer's gun after the two struggled. This Court vacated the sentence of death because of speculative evidence about what the defendant was doing prior to his encounter with the officer and lack of evidence as to who drew the murder weapon out of the officer's holster. We find the present case distinguishable from *Hill* in several respects. First, defendant stood at the window of his apartment and used his own rifle to kill the officer as the officer stood by the hood of his car. Second, prior to the encounter, defendant had shot into the home of a blind woman and at a moving cable van. Third, after shooting the officer, defendant continued to shoot in the direction of other officers at the scene. Fourth, the jury convicted defendant of first-degree murder on the theories of premeditation and deliberation as well as under the felony murder rule. The finding of premeditation and deliberation "indicates a more calculated and cold-blooded crime." *State v. Davis*, 340 N.C. 1, 31, 455 S.E.2d 627, 643, *cert. denied*, — U.S. —, 133 L. Ed. 2d 83 (1995). The jury also found that the murder was committed to hinder law enforcement and that it was committed against an officer in the line of duty.

This case is similar to cases in which we have found the death penalty proportionate. In *State v. Harden*, 344 N.C. 542, 476 S.E.2d 658 (1996), we affirmed a sentence of death where the defendant shot two police officers who were trying to arrest him. The jury there found the same three aggravating circumstances found here and one of the mitigating circumstances found here. *Id.* at 565, 476 S.E.2d at 670; *see also State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *judgment vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). We conclude that this case is similar to cases in which we have found the sentence of death proportionate and not similar to any case where we have found the death penalty disproportionate.

We conclude that the death sentence was not excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. MILTON RAY JONES

No. 357A95

(Filed 24 July 1997)

1. Constitutional Law § 344.1 (NCI4th)— first-degree murder—defendant's right to be present—note from judge to juror

There was no prejudicial error in a capital prosecution for first-degree murder where, during defendant's cross-examination of a prosecution witness, the trial court interrupted defense counsel to have the bailiff deliver a note to an alternate juror; the court said, "She is right here in the courthouse. If you have keys, you can deliver your keys up, sir"; and the court also told the alternate that he could talk to his fellow jurors about the note. The trial court negated the defendant's presence in the courtroom by passing the note to the alternate juror without revealing the contents to defendant or his counsel but the transcript reflects the benign substance of the communication between the court and the juror. The trial court's instruction that the juror was free to discuss the note with his fellow jurors was particularly significant.

Am Jur 2d, Criminal Law § 692; Trial §§ 1573, 1579.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-*Parker* cases. 35 ALR4th 890.

2. Constitutional Law § 344.1 (NCI4th)— first-degree murder—defendant's right to be present—paper handed from bench to counsel

The right of a defendant to be present at his capital prosecution for first-degree murder was not violated where, following the guilt-innocence charge conference, the court asked the attorneys to step to the bench to be handed a sheet of paper. No comments were made at the bench, the contents of the paper provided to counsel were not revealed, defendant was actually present in the courtroom and was able to inquire of his counsel regarding the substance of the paper, defendant had constructive knowledge through his counsel of the substance of the paper, and defendant was not excluded from any private conversations between the court, the prosecutor, and defendant's counsel. Defendant's presence was not negated by the court's actions.

Am Jur 2d, Criminal Law §§ 692, 695.

3. Evidence and Witnesses § 1776 (NCI4th)— first-degree murder—time period in which murder occurred—demonstration by prosecutor

The trial court did not err in a capital prosecution for first-degree murder by overruling defendant's objection to a demonstration by the prosecutor during guilt-innocence closing arguments where an expert witness had testified that the victim would have lost consciousness between two and five minutes after receiving the fatal knife wounds and the prosecutor silently timed five minutes, then argued that five minutes was a long time to be slashed, cut, and stabbed; that the victim had up to five minutes to experience the pain of being stabbed thirty-one times; that the victim had the experience of seeing her own blood; and asked the jury to consider what the victim was thinking during the five-minute period. The evidence presented at trial permitted the prosecutor to argue that defendant pursued, stabbed, and slashed the victim during the five-minute period after defendant inflicted the fatal wounds, the demonstration was designed to give the jury a better grasp of what occurred during this period, and the demonstration was proper.

Am Jur 2d, Evidence §§ 996, 997, 1005; Trial § 566.

4. Criminal Law § 454 (NCI4th Rev.)— capital murder—prosecutor's argument—victim's thoughts—not grossly improper

An argument by a prosecutor in a capital prosecution for first-degree murder that described what the victim may have seen and felt and asked the jury to speculate about what the victim may have been thinking was not so grossly improper as to require the trial court to intervene *ex mero motu*. The description of what the victim may have seen and felt was based upon the evidence presented at trial and the comments with respect to what the victim may have been thinking as she died were similar to the prosecutor's remarks in *State v. King*, 299 N.C. 707.

Am Jur 2d, Trial §§ 554, 664, 665.

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. Homicide § 493 (NCI4th)— capital murder—instructions—lack of provocation by victim

The trial court did not err in a capital prosecution for first-degree murder by instructing the jury that it could consider the lack of provocation by the victim in determining whether defendant acted with premeditation and deliberation. The instruction was not biased in favor of the State's position.

Am Jur 2d, Homicide §§ 498, 501; Trial § 1165.

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

6. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—no significant history of prior criminal activity—not submitted—error

The trial court erred in a capital sentencing proceeding by not submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence tended to show that defendant had pled guilty to four counts of misdemeanor larceny for stealing money and merchandise from his employer over a period of four or five years; had pled guilty to two or three felony counts for stealing jewelry left in a room by a guest in the motel in which defendant worked; was sentenced to probation and ordered to pay restitution in connection with both the felony and misdemeanor counts; there was evidence that defendant had smoked marijuana since the seventh or eighth grade and had used cocaine since 1988; and no evidence presented at trial suggested that defendant had committed any violent crimes prior to the killing of the victim. Defendant's prior convictions consisted solely of property crimes, there was no evidence that defendant had engaged in any prior violent criminal activity, defendant did not receive an active prison sentence for any of those convictions, and, given the number, age, and nature of defendant's prior criminal activities, a rational juror could have concluded that defendant had no significant history of prior criminal activity. The submission of the nonstatutory mitigating circumstance that defendant had no prior criminal convictions or criminal history for violent criminal behavior did not render the error harmless beyond a reasonable doubt because the jury was not required to give mitigating value to the circumstance. Defendant's criminal history was submitted to the jury, but the

jury was not allowed to consider whether this history was significant under the statutory (f)(1) circumstance.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Strickland, J., at the 24 July 1995 Criminal Session of Superior Court, Onslow County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 18 March 1997.

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

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

PARKER, Justice.

Defendant was indicted 26 April 1994 for one count of first-degree murder. In July 1995 he was tried capitally and found guilty of first-degree murder. Following a capital sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment accordingly. We find no error meriting reversal of defendant's conviction. However, for the reason stated herein, we conclude that defendant is entitled to a new capital sentencing proceeding.

On the evening of Wednesday, 15 December 1993, defendant killed Sherry Koonce, his wife's sister. The State's evidence tended to show that defendant's marriage was failing and that defendant placed some of the blame on the victim. Prior to the murder defendant told co-workers that he and his wife were having marital problems and that he had thought about killing himself, his wife, and other family members. On a number of occasions defendant told friends or co-workers that he was going to kill the victim.

At approximately 9:00 or 9:30 p.m. on 15 December, defendant went to the victim's home, ostensibly to tell her that her husband had been unfaithful. A violent altercation ensued during which defendant stabbed and slashed the victim thirty-one times. Blood was discovered in the living room; in the kitchen; and on the front door, the front

steps, and the front doorknob. Two of the three knives found at the scene were found in the kitchen, and a third knife was found under the victim's body in the living room. The physical evidence at the scene permits the inference that defendant initially attacked the victim in the kitchen, that the victim attempted to flee out the front door, that defendant forced her back inside, and that defendant inflicted the final wounds in the living room.

Dr. John Almeida, Jr., who performed the autopsy, identified three potentially fatal wounds to the central chest and back of the victim's body. Almeida concluded that the victim bled to death as a result of these wounds. He opined that the victim probably lost consciousness between two and five minutes after the fatal wounds were incurred.

On 17 December defendant made a statement to the police in which he admitted that he had killed the victim. At trial defendant testified that he did not have a knife when he entered the victim's home and that he had not planned to hurt the victim. Defendant's testimony tended to show the following. When he told the victim that her husband had been unfaithful, the victim became angry, told defendant that he was lying, and "smacked" him in the face and kicked his shin. The victim then told defendant that she was going to get a shotgun and kill him. When defendant responded by preventing the victim from going to her bedroom, the victim slapped him and kicked him in the groin. The victim subsequently ran into the kitchen, retrieved a knife, and said that she was going to kill defendant. As they struggled defendant took the knife from the victim and stabbed her three times in the stomach. Defendant dropped the knife and walked to the front door. At this point the victim obtained a second knife and again threatened to kill defendant. Defendant took this knife away from the victim and, at this point, "lost control."

Additional facts will be presented as needed to discuss specific issues.

GUILT-INNOCENCE PHASE

[1] By his first assignment of error, defendant contends that the trial court violated his right to be present at every stage of the trial by passing a note to an alternate juror without disclosing to defendant or his counsel the contents of the note. We hold that the error was harmless beyond a reasonable doubt.

> 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. Workman, 344 N.C. 482, 497, 476 S.E.2d 301, 309 (1996).

During defendant's cross-examination of a prosecution witness, the trial court interrupted defense counsel to deliver a message to alternate juror Clifford Burt:

THE COURT: Just one moment. Let me deliver this message to Mr. Burt. Mr. Bailiff? And he can accommodate you right here without any comment.

(NOTE PASSED TO MR. BURT—ONE OF THE JURORS)

THE COURT: She is right here in the courthouse. If you have keys, you can deliver your keys up, sir. Mr. Burt, you are free to talk to your fellow jurors about that note if you want to—if you'd like to, sir.

All right. You may continue, Mr. Medlin.

While defendant was present in the courtroom when the court passed the note to the alternate juror, the court did not disclose the contents of the note to defendant or defendant's counsel. The "trial court errs when it communicates with a juror in the absence of the defendant." *State v. Williams*, 343 N.C. 345, 361, 471 S.E.2d 379, 387 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 618 (1997). A defendant's actual presence in the courtroom can be "negated by the court's cloistered conversations" with jurors or prospective jurors. *State v. Buchanan*, 330 N.C. 202, 222, 410 S.E.2d 832, 844 (1991). Such actions may prevent the defendant from participating in the proceeding, either personally or through counsel; and they deprive the defendant of "any real knowledge of what transpired." *Id.* at 222-23, 410 S.E.2d

at 844. In the present case we conclude that when the trial court during the presentation of evidence passed a note to an alternate juror without revealing the contents of the note to defendant or his counsel, this action negated defendant's presence in the courtroom and constituted a violation of his right to be present at all stages of his capital trial.

Once a violation of the right to be present is apparent, the State then has the burden to show that the violation was harmless beyond a reasonable doubt. *State v. Meyer*, 345 N.C. 619, 623, 481 S.E.2d 649, 651-52 (1997). "The State may show that the error was harmless beyond a reasonable doubt where the transcript reveals the substance of the trial court's conversation with the juror, or where the trial judge reconstructs the substance of the conversation on the record." *State v. Lee*, 335 N.C. 244, 262, 439 S.E.2d 547, 555, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994).

In this case the transcript "reflects the benign substance" of the communication between the court and the juror. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). After giving the juror the note, the trial court told the juror that "[s]he is right here in the courthouse"; that "you can deliver your keys up, sir"; and that "you are free to talk to your fellow jurors about that note if you want to." From this record we are able to conclude that the message delivered to the juror did not relate in any way to defendant's trial. Particularly significant was the trial court's instruction to the alternate juror that he was free to discuss the note with his fellow jurors. Throughout the trial the court instructed the jurors not to discuss the case. The fact that the court in the presence of defendant and defendant's counsel gave the jurors permission to discuss the note strongly suggests that it was unrelated to the case. Accordingly, we conclude that the error is harmless beyond a reasonable doubt. This assignment of error is overruled.

[2] By his next assignment of error, defendant contends that the trial court violated his right to presence by engaging in a private communication with the attorneys at the bench without defendant being present. The record shows that the following occurred after the guilt-innocence phase charge conference:

> THE COURT: Without my making any comments, I will ask the attorneys to step up to the bench to be handed a sheet of paper.

(Counsel approach bench with no comments being made.[ )]

THE COURT: You may be seated. All right. All right, Mr. Bailiff, let's take us a recess until 9:15 tomorrow morning.

(RECESS TAKEN UNTIL AUGUST 10, 1995)

The record does not reveal the substance of the paper which was provided to counsel.

A defendant's 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." *Buchanan*, 330 N.C. at 223, 410 S.E.2d at 845; *accord State v. Speller*, 345 N.C. 600, 605, 481 S.E.2d 284, 286 (1997). The record in this case shows that defendant was actually present in the courtroom when counsel approached the bench. For this reason he was able to inquire of his counsel regarding the substance of the paper. *See Buchanan*, 330 N.C. at 222-23, 410 S.E.2d at 844-45. Defendant had constructive knowledge through his counsel of the substance of the paper. *See id.* No comments were made at the bench; and defendant was not excluded from any private conversations between the court, the prosecutor, and defendant's counsel. Thus, defendant's "actual presence was not negated by the trial court's actions." *Id.* at 223, 410 S.E.2d at 844. Under these circumstances we conclude that defendant's constitutional right to be present was not violated. This assignment of error is overruled.

[3] Defendant next contends that the trial court erred by overruling his objection to a demonstration by the prosecutor during the guilt-innocence phase closing arguments. At trial a prosecution expert witness testified that the victim would have lost consciousness between two and five minutes after receiving the fatal knife wounds. During his guilt-innocence phase closing argument, prosecutor Ernest R. Lee silently timed five minutes to demonstrate the length of this period of time.

Now, what is 5 minutes? Well, Ladies and Gentlemen of the Jury, for the next 5 minutes, we're going [to] sit here. We're going [to] let you see how long 5 minutes really is. We're going [to] let you see how long the victim was in the presence of this defendant as he cut, slashed, and stabbed and pursued her around that residence.

[DEFENSE COUNSEL]: Your Honor, I object for the record.

THE COURT: Overruled.

([THE PROSECUTOR] IS TIMING 5 MINUTES AND THERE'S NO TALKING GOING ON DURING THAT TIME)

After silently timing five minutes, the prosecutor argued that five minutes was a long time to be slashed, cut, and stabbed; that the victim had up to five minutes to experience the pain of being stabbed thirty-one times; and that the victim had the experience of seeing her own blood. The prosecutor also asked the jury to consider what the victim was thinking about during the five-minute period:

> Was she thinking about her mother at that time? Was she thinking about her father? Was she thinking about her sisters? Was she thinking about those children she played with earlier that evening? What was she thinking about those five minutes while he's doing these horrible things to her?

Defendant neither objected nor assigned error to the arguments which followed the prosecutor's demonstration. Defendant assigned error only to the court's overruling his objection to the demonstration.

"A prosecutor in a capital trial is entitled to argue all the facts submitted into evidence as well as any reasonable inferences therefrom." *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). "Counsel are afforded wide latitude in arguing hotly contested cases, and the scope of this latitude lies within the sound discretion of the trial court." *Id.* "Prosecutors may create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable." *State v. Bishop*, 343 N.C. 518, 543, 472 S.E.2d 842, 855 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 723 (1997).

In the present case the State's evidence tended to show that defendant stabbed and slashed the victim thirty-one times. Blood was discovered in the living room; in the kitchen; and on the front door, the front steps, and the front doorknob. Two of the three knives found at the scene were found in the kitchen, and a third knife was found under the victim's body in the living room. The physical evidence at the scene permits the inference that defendant initially attacked the victim in the kitchen, where a significant amount of blood was found; that the victim attempted to flee out the front door;

that defendant forced her back inside; and that defendant inflicted the final wounds in the living room. Dr. Almeida, the State's pathologist, testified that three of the thirty-one stab and slash wounds were potentially fatal and that the victim would have lost consciousness between two and five minutes after these wounds were inflicted. Almeida further testified that he could not determine when the nonfatal wounds had been inflicted in relation to the infliction of the fatal wounds. The evidence presented at trial permitted the prosecutor to argue that defendant pursued, stabbed, and slashed the victim during the five-minute period after defendant inflicted the fatal wounds. We conclude that the prosecutor's demonstration was designed to give the jury a better grasp of what occurred during this period of time. The demonstration was proper, and defendant's argument that the demonstration unfairly prejudiced him has no merit.

[4] Defendant also contends that the prosecutor improperly asked the jury to speculate about what the victim may have been thinking and feeling during the five-minute period of time which was the subject of the prosecutor's demonstration. Defendant neither objected nor assigned error in the record on appeal to the comments made by the prosecutor. Rule 10(a) of the Rules of Appellate Procedure provides, in pertinent part:

> 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). By failing to assign error in the record on appeal, defendant waived appellate review of his contentions with respect to the substance of the prosecutor's arguments. *See State v. Elliott*, 344 N.C. 242, 277, 475 S.E.2d 202, 218 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997). Nevertheless, pursuant to our discretion under Rule 2 of the Rules of Appellate Procedure, we review the prosecutor's comments for gross impropriety.

We have previously reviewed closing arguments which suggested what a victim may have been thinking as he or she was dying. *See id.* at 274-75, 475 S.E.2d at 216-17; *State v. Hunt*, 339 N.C. 622, 651-52, 457 S.E.2d 276, 293-94 (1994); *State v. King*, 299 N.C. 707, 711-13, 264 S.E.2d 40, 43-44 (1980). In each of these cases we concluded that the arguments at issue were not grossly improper. In *King* we reviewed an argument similar to the argument in the present case:

> [W]hat did he think of as he lay there dying and the blood rolling out of his neck on the dirt road, did he think about his mother that he lived with and cared for? Did he think will the roses bloom in Heaven, are there any gardens there? Will the branches bloom with blossoms and in winters fill with snow? Will the roses bloom in Heaven, tell me mother ere I go. Did he think of his brothers and sisters when he knew that his life was sputtering from his neck that he would never see again. Did he think of them?

King, 299 N.C. at 711-12, 264 S.E.2d at 43-44. The *King* Court concluded that the argument did not require any action from the trial court to correct any gross improprieties. *Id.* at 713, 264 S.E.2d at 44.

In the present case the prosecutor described what the victim may have seen and felt as she was being stabbed to death and asked the jury to speculate about what the victim may have been thinking during this time period. The prosecutor's description of what the victim may have seen and felt was based upon the evidence presented at trial. The prosecutor's comments with respect to what the victim may have been thinking as she died were similar to the prosecutor's remarks in *King*; as in *King*, we conclude that 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.

[5] Defendant next contends that the trial court erred by giving the following instruction:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred; such as, lack of provocation by the victim; conduct of the defendant before, during, and after the killing; threats and declarations of the defendant; use of grossly excessive force; infliction of lethal wounds after the victim is felled; brutal or vicious circumstances of the killing; and manner in which or the means by which the killing was done.

Defendant argues that the court erred by instructing the jury that it could consider the lack of provocation by the victim in determining whether defendant acted with premeditation and deliberation. He suggests that the court's instruction was biased in favor of the State's position that defendant killed the victim without provocation. Defendant recognizes that this Court has ruled against his position. *See Elliott*, 344 N.C. at 270-71, 475 S.E.2d at 214; *State v. Leach*, 340

N.C. 236, 241-42, 456 S.E.2d 785, 788-89 (1995). In *Leach* this Court found no error in a jury instruction that is virtually identical to the instruction given by the trial court in this case. *Leach*, 340 N.C. at 241, 456 S.E.2d at 788. 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, 456 S.E.2d at 789. We conclude that the instruction in this case was not biased in favor of the State's position. This assignment of error is overruled.

SENTENCING PROCEEDING

[6] Defendant brings forth several issues for review with respect to his capital sentencing proceeding, but we need focus only on defendant's contention that the trial court erroneously failed to submit the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (Supp. 1996).

During the sentencing proceeding jury charge conference, defendant argued against the submission of the (f)(1) mitigating circumstance. Defendant now asserts that the trial court should have submitted the (f)(1) mitigating circumstance because the evidence would permit a rational juror to find that defendant did not have a significant history of prior criminal acts. Defendant's opposition at trial to the submission of the (f)(1) mitigating circumstance does not concern us here.

> A "trial court has no discretion as to whether to submit statutory mitigating circumstances when evidence is presented in a capital case which may support a statutory circumstance." *State v. Skipper*, 337 N.C. 1, 44, 446 S.E.2d 252, 276 (1994), *cert. denied*, 513 U.S. 1134, [130] L. Ed. 2d 895 (1995). The trial court must submit the circumstance if it is supported by substantial evidence. The trial court is required "to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988) (emphasis added).

State v. McCarver, 341 N.C. 364, 398-99, 462 S.E.2d 25, 44-45 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996). The activity is significant if it is "likely to have influence or effect upon the determination by the jury of its recommended sentence." *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995), *cert. denied*, —— U.S. ——, 134

L. Ed. 2d 794 (1996). "When the trial court is deciding whether a rational juror could reasonably find this mitigating circumstance to exist, the nature and age of the prior criminal activities are important, and the mere number of criminal activities is not dispositive." *State v. Geddie*, 345 N.C. 73, 102, 478 S.E.2d 146, 161 (1996).

In the present case the evidence tended to show that defendant in 1988 pled guilty to four counts of misdemeanor larceny for stealing money and merchandise from his employer over a period of four or five years. In 1993 defendant pled guilty to two or three felony counts for stealing jewelry left in a room by a guest in the motel in which defendant worked. Defendant was sentenced to probation and ordered to pay restitution in connection with both the misdemeanor and felony convictions listed above. In addition to the crimes for which defendant had been convicted, the evidence at trial tended to show that he had smoked marijuana since the seventh or eighth grade and that he had used cocaine since 1988. No evidence presented at trial suggested that defendant had committed any violent crimes prior to the killing of the victim.

We have previously held that similar histories permitted a rational juror to find "no significant history of prior criminal activity" as a mitigating circumstance. *See State v. Ball*, 344 N.C. 290, 310-11, 474 S.E.2d 345, 357 (1996) (the defendant had a history of drug use, a 1980 conviction for robbery, a 1991 conviction for felonious assault, and three convictions for forgery), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 561 (1997); *State v. Rowsey*, 343 N.C. 603, 619-20, 472 S.E.2d 903, 911-12 (1996) (the defendant had been convicted of two counts of larceny seven months before the shooting, fifteen counts of injury to property less than two years before the shooting, and an alcoholic beverage violation less than two years before the shooting; had been charged with five counts of felony breaking and entering and felony larceny offenses at the time of trial; and had illegally possessed marijuana and a concealed weapon prior to the shooting), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 221 (1997); *State v. Buckner*, 342 N.C. 198, 234, 464 S.E.2d 414, 434-35 (1995) (the defendant had seven breaking and entering convictions, a common-law robbery conviction, and a drug-trafficking conviction), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 47 (1996); *State v. Lloyd*, 321 N.C. 301, 313, 364 S.E.2d 316, 324 (the defendant had two felony convictions and seven alcohol-related misdemeanor convictions), *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

In this case defendant's prior convictions consisted solely of property crimes, and there was no evidence that defendant had engaged in any prior violent criminal activity. While defendant's prior convictions were relatively recent, defendant did not receive an active prison sentence for any of those convictions; rather, he was placed on probation and ordered to pay restitution. *Cf. Ball*, 344 N.C. at 310-11, 474 S.E.2d at 357 (the defendant had been given a suspended sentence for a prior felonious assault conviction); *Buckner*, 342 N.C. at 234, 464 S.E.2d at 435 (the defendant had received probation and a suspended sentence for his prior convictions). Given the number, age, and nature of defendant's prior criminal activities, we conclude that a rational juror could have concluded that defendant had no significant history of prior criminal activity. For this reason the trial court erred by failing to submit the (f)(1) mitigating circumstance for the jury's consideration.

The trial court's error "is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt." *State v. Quick*, 337 N.C. 359, 363, 446 S.E.2d 535, 538 (1994). In the present case defendant's criminal history was presented to the jury, but the jury was not allowed to consider whether this history was significant under the statutory (f)(1) mitigating circumstance. "We cannot state that had this mitigating circumstance been submitted to the jury, the jury would not have found its existence." *Wilson*, 322 N.C. at 146, 367 S.E.2d at 606; *accord Quick*, 337 N.C. at 363, 446 S.E.2d at 538. "Further, we cannot conclude positively 'that had this statutory mitigating circumstance been found and balanced against the aggravating circumstances, the jury would still have returned a sentence of death.' " *Quick*, 337 N.C. at 363, 446 S.E.2d at 538 (quoting *State v. Mahaley*, 332 N.C. 583, 599, 423 S.E.2d 58, 67-68 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995)). We note that the trial court submitted the nonstatutory mitigating circumstance that "[t]he defendant has no prior criminal convictions or criminal history for violent criminal behavior" and that the jury rejected this circumstance. We have previously held that the submission of this nonstatutory mitigating circumstance does not render the trial court's error harmless beyond a reasonable doubt "[b]ecause the jury was not required to give mitigating value to the nonstatutory mitigating circumstance if the jury found the circumstance's existence." *Quick*, 337 N.C. at 364, 446 S.E.2d at 538. We are unable to conclude that the failure to submit the (f)(1) mitigating circumstance was harmless beyond a reasonable doubt. Accordingly, defendant is entitled to a new capital sentencing proceeding.

We conclude that the guilt-innocence phase of defendant's trial was free from prejudicial error. However, we also conclude that the trial court during the sentencing proceeding committed reversible error by failing to submit the (f)(1) mitigating circumstance. For this reason defendant's death sentence is vacated, and this case is remanded for a new capital sentencing proceeding.

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

STATE OF NORTH CAROLINA v. GUY TOBIAS LEGRANDE

No. 215A96

(Filed 24 July 1997)

1. Constitutional Law § 281 (NCI4th)— capital murder—request for pro se defense—mental condition of defendant—court's inquiry

The trial court did not err in a capital first-degree murder prosecution by initially granting defendant's request to represent himself and later by not revoking his right of self-representation. When defendant first expressed his desire to represent himself, the trial court conducted the required inquiry and entered an order committing defendant for evaluation of his competency to proceed; the director of Forensic Psychiatry at Dorothea Dix Hospital found defendant competent to waive representation by an attorney and to proceed to trial; and the court found defendant competent to waive counsel, made the appropriate inquiry, and allowed defendant to sign a waiver of counsel. The trial court's findings show that defendant was able to respond to the court's inquiry in a manner that demonstrated that he understood the nature of the proceedings, comprehended the serious nature of his situation, and was prepared to proceed with his defense in a rational or reasonable manner. The trial court's inquiry was sufficient to determine that defendant's decision to proceed *pro se* was knowing and voluntary.

Am Jur 2d, Criminal Law §§ 759-768.

Waiver or estoppel in incompetent legal representation cases. 2 ALR4th 807.

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

2. Constitutional Law § 282 (NCI4th)— capital sentencing—pro se defense—comments by defendant—stand-by counsel not required to assume defense—no error

The trial court did not err in a capital sentencing proceeding by not revoking defendant's right to represent himself and by not requiring standby counsel to assume the conduct of the defense where, during the sentencing testimony, defendant called the jurors the "antichrists"; declared that the jurors could "kiss his natural black ass in the window of Helig-Meyers"; that the jurors could "pull the switch and let the good times roll"; and that defendant would meet them in hell where they would be required to worship him. As in *State v. Cunningham*, 344 N.C. 341, defendant was allowed to continue representing himself, as he wanted.

Am Jur 2d, Criminal Law §§ 759-768.

Waiver or estoppel in incompetent legal representation cases. 2 ALR4th 807.

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

3. Constitutional Law § 280 (NCI4th)— capital sentencing—pro se defense—nature of sentencing hearing—defendant adequately informed

The trial court adequately advised a first-degree murder defendant who waived his right to counsel of the nature of the capital sentencing proceeding where the court clearly advised defendant of his right to counsel, made sure defendant understood that he was waiving his right to have stand-by counsel take over the case, and informed defendant that he had been convicted of first-degree murder and that the jury would be deciding whether he was sentenced to life imprisonment or to death.

Am Jur 2d, Criminal Law §§ 759-768.

Waiver or estoppel in incompetent legal representation cases. 2 ALR4th 807.

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

4. Appeal and Error § 155 (NCI4th)— capital murder—pro se defendant—restriction of stand-by counsel—error not assigned on appeal

A first-degree murder defendant's assignment of error concerning whether the trial court had impermissibly restricted stand-by counsel was overruled where the *pro se* defendant did not raise the issue at trial and did not specifically and distinctly assign plain error in the record on appeal.

Am Jur 2d, Appellate Review §§ 614, 616.

5. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—evidence of attempts to evade detection—relevant to pecuniary gain aggravating circumstance

The trial court did not err in a capital sentencing proceeding by admitting evidence that defendant put plastic bags on his feet so that dogs could not pick up his scent and that he wore a stocking cap so that no hair would fall out. This evidence would have been admissible during the trial and, although defendant contended that these matters did not relate to the sole aggravating circumstance presented, killing for pecuniary gain, the jury heard evidence regarding the payment defendant was to receive for the murder. Testimony that he took great pains to make sure that he left no incriminating evidence supports the inference that this was a cold-blooded, calculated, contract killing for money.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

6. Criminal Law § 1402 (NCI4th Rev.)— death sentence—proportionate

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

death penalty was found proportionate. The proportionality pool contains several cases in which the death penalty has been upheld for contract killings and defendant was convicted of first-degree murder on both the basis of premeditation and deliberation and lying in wait. Defendant here murdered the victim after lying in wait and watching her for hours from the woods surrounding her home; he was willing to kill a person he had never met for money; he made elaborate plans to accomplish the murder and do it without getting caught; and he never showed any remorse for what he did and bragged to his friend.

Am Jur 2d, Criminal Law § 628; Homicide §§ 439, 553.

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 Helms, J., on 26 April 1996 in Superior Court, Stanly County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his conviction for conspiracy to commit murder was allowed by the Supreme Court on 5 December 1996. Heard in the Supreme Court 14 May 1997.

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

J. Clark Fischer for defendant-appellant.

MITCHELL, Chief Justice.

Defendant, Guy Tobias LeGrande, was indicted for first-degree murder and conspiracy to commit murder. He was tried capitally at the 15 April 1996 Criminal Session of Superior Court, Stanly County, and was found guilty of first-degree murder on the basis of premeditation and deliberation and on the basis of lying in wait, and guilty of conspiracy to commit murder. After a capital sentencing proceeding, the jury recommended a sentence of death for the murder, and the trial court sentenced defendant accordingly. In addition, the trial court sentenced defendant to a nine-year consecutive sentence for conspiracy to commit murder.

The State's evidence tended to show *inter alia* that on 27 July 1993, defendant entered the home of Ellen Munford and shot her twice in the back, killing her. Defendant worked with the victim's husband, Tommy Munford, at Jay's Downtowner Restaurant in Albermarle. Tommy Munford and defendant conspired to kill the victim. Mr. Munford and the victim had been estranged for two years.

At the time of the murder, the victim was living with another man. Mr. Munford had repeatedly harassed the victim and trespassed on the property where she was living with her new boyfriend. Mr. Munford told numerous people that he wanted to "do in" the victim. Mr. Munford took out a life insurance policy in the amount of $50,000 on the victim's life, naming himself as the sole beneficiary. He promised to pay defendant $6,500 if defendant would kill Mrs. Munford. On the day of the murder, Mr. Munford arranged to take his and Mrs. Munford's two children to the beach so that she would be alone in the house. Prior to picking up the children, Mr. Munford dropped defendant off in the woods next to the victim's house. Defendant was carrying a shotgun. As Mr. Munford left the victim's house, he blew his horn to signal to defendant that the victim was alone. Defendant watched Mrs. Munford for hours from the woods before he entered her home and killed her.

[1] By an assignment of error, defendant contends that the trial court erred initially by granting his request to represent himself and later by failing to revoke his right of self-representation.

First, defendant argues that the trial court improperly allowed him to waive counsel and proceed *pro se* because he was not competent to make these decisions. Defendant points to two letters that he wrote to the prosecution which he signed as coming from Lucifer and in which he contends he exhibited delusional thinking. Defendant also relies on the diagnosis of Dr. Rollins at Dorothea Dix Hospital that he was suffering from a mixed personality disorder with grandiose, narcissistic, and hypomanic traits. Defendant contends that to allow him to proceed *pro se* when the record clearly reflected his mental instability made his death sentence a foregone conclusion and resulted in a capital sentencing proceeding that was fundamentally unfair.

We conclude that the trial court properly granted defendant's request to proceed *pro se*. Before a defendant is allowed to waive appointed counsel, the trial court must insure that constitutional and statutory standards are satisfied. *State v. Thomas*, 331 N.C. 671, 673,

417 S.E.2d 473, 475 (1992). First, the defendant must "clearly and unequivocally" waive his right to counsel and instead elect to proceed *pro se*. *Id.* Second, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waived his right to in-court representation. *Id.* at 674, 417 S.E.2d at 476; *accord 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).

> N.C.G.S. § 15A-1242 sets forth the duties of the trial court in determining the validity of a defendant's waiver of his right to counsel and decision to proceed *pro se*. Under the statute, a trial court must conduct an inquiry thorough enough to satisfy itself that the defendant
>
> (1) [h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) [u]nderstands and appreciates the consequences of this decision; and
>
> (3) [c]omprehends the nature of the charges and proceedings and the range of possible punishments.
>
> N.C.G.S. § 15A-1242 (1988).

State v. Rich, 346 N.C. 50, 62, 484 S.E.2d 394, 402 (1997).

The transcript reveals that when defendant first expressed his desire to represent himself, the trial court conducted the required inquiry and entered an order committing defendant to Dorothea Dix Hospital for evaluation of his competency to proceed. The order was entered due to the assertions of Mr. Walter Johnson, defendant's counsel at the time. Mr. Johnson stated that defendant had demonstrated wide mood swings and emotions that were indicative of possible mental problems.

Dr. Robert Rollins, director of the Forensic Psychiatry Division at Dorothea Dix Hospital, conducted an evaluation of defendant's capacity to proceed and to waive counsel. Dr. Rollins described defendant's mental status as follows:

> At the time of admission Mr. LeGrande is cooperative, pleasant, and has normal speech and a normal mood. No suicidal feelings, disorganized thinking, hallucinations, or delusions are noted. Concentration, orientation, memory, intellectual functions are

> intact. In the impression of the admitting physician judgment and insight are good. The admitting physician did not make a diagnosis.

Defendant denied any alcohol or substance abuse. He told Dr. Rollins that he was charged with first-degree murder and asserted his innocence. As part of the evaluation, a psychological assessment was done. This assessment was summarized as follows:

> Mr. LeGrande did not appear to have a serious mental disorder, such as schizophrenia or bipolar disorder. Although at times he appeared hypomanic, he seemed to be able to control his behavior when he so desired. Mr. LeGrande also demonstrated characteristics of a personality disorder with antisocial and narcissistic features.

Dr. Rollins found defendant to be competent to proceed to trial and competent to waive representation by an attorney. Based on Dr. Rollins' report, Judge Steelman found defendant to be competent to waive counsel and, after making the appropriate inquiry, allowed defendant to sign a waiver of counsel on 9 February 1996.

The test for competence to proceed is whether a defendant has " 'a rational as well as factual understanding of the proceedings against him' " and " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.' " *Godinez v. Moran*, 509 U.S. 389, 396, 125 L. Ed. 2d 321, 330 (1993) (quoting *Dusky v. United States*, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 825 (1960) (per curiam)). The statutory test for competency in North Carolina is essentially the same. A defendant is incapable of proceeding when "by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C.G.S. § 15A-1001(a) (1988). The trial court's findings of fact show that defendant was able to respond to the court's inquiry in a manner that demonstrated that he understood the nature of the proceedings, comprehended the serious nature of his situation, and was prepared to proceed with his defense in a rational or reasonable manner. The trial court noted in its order that it accepted defendant's waiver of counsel after considering

> the responses of the defendant to the questions set forth above, the age of the defendant, his educational background, his famil-

iarity with the English language, the apparent ability of the defendant to understand the nature of these proceedings, and to communicate his positions and desires in this matter to the court, the mental condition of the defendant revealed in the report from Dorothea Dix Hospital, and the complexity of the crime charged.

We conclude that the trial court's inquiry was sufficient to determine that defendant's decision to proceed *pro se* was knowing and voluntary.

[2] Defendant next argues that the trial court erred by failing to revoke his right to represent himself and by not requiring standby counsel to assume the conduct of the defense. During his sentencing testimony, defendant called the jurors the "antichrists" and declared that they could "kiss his natural black ass in the window of Heilig-Meyers," that they could "pull the switch and let the good times roll," and that he would meet them in hell where they would be required to worship him. Defendant maintains that when faced with a defendant such as the one in this case who is determined to commit legal suicide by berating the jury at the capital sentencing proceeding, the trial court should terminate the right of self-representation and require standby counsel to assume the role of defense counsel for the remainder of the proceeding. We disagree.

A defendant's right to represent himself is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; by Article I, Section 23 of the North Carolina Constitution; and by N.C.G.S. § 15A-1242. *State v. Williams*, 334 N.C. 440, 454, 434 S.E.2d 588, 596 (1993), *sentence vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819-20, 45 L. Ed. 2d 562, 572-73 (1975). In *State v. Cunningham*, 344 N.C. 341, 474 S.E.2d 772 (1996), the defendant also argued that his conduct at trial amounted to a waiver of his right to self-representation, and this Court stated, "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." *Id.* at 352, 474 S.E.2d at 776.

[3] Finally, defendant contends that even assuming *arguendo* that he fully understood the nature of the proceedings against him and knowingly waived his right to counsel at the trial, his subsequent waiver of counsel at the capital sentencing proceeding was made without the

trial court's adequately advising him of the nature of the capital sentencing proceeding. We disagree.

A review of the transcript reveals that the trial court conducted the inquiry required by both the federal and state Constitutions and by N.C.G.S. § 15A-1242 by clearly advising defendant of his right to counsel, by making sure he understood that he was waiving his right to have standby counsel take over the case, and by informing defendant that he had been convicted of first-degree murder and that the jury would be deciding whether he was sentenced to life imprisonment or death. The Court in *Faretta* made it clear that a defendant's technical legal knowledge is not relevant to the determination of whether he knowingly waives the right to counsel. 422 U.S. at 836, 45 L. Ed. 2d at 582.

For the foregoing reasons, we conclude that the trial court properly accepted defendant's waiver of counsel at both the trial and the capital sentencing proceeding and did not err in failing to revoke his right of self-representation. This assignment of error is overruled.

[4] By another assignment of error, defendant contends that the trial court erred by impermissibly restricting the efforts of his standby counsel in violation of N.C.G.S. § 15A-1243. Defendant did not raise this issue at trial, and he did not "specifically and distinctly" assign plain error in the record on appeal as required by Rule 10(c)(4) of the Rules of Appellate Procedure. Therefore, this assignment of error is not properly before this Court and is overruled.

[5] By his final assignment of error, defendant contends that the trial court erred by allowing the prosecution to interject irrelevant and prejudicial matters at sentencing that did not relate to the sole aggravating circumstance presented, killing for pecuniary gain. Specifically, defendant argues that the trial court erred by allowing testimony at the capital sentencing proceeding that defendant put plastic bags on his feet so that dogs could not pick up his scent and that he wore a stocking cap so that no hair would fall out, leaving evidence pointing to him.

For capital sentencing proceedings, the legislature has provided:

> (3) In the 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.

N.C.G.S. § 15A-2000(a)(3) (Supp. 1996). We conclude that the evidence complained of would have been admissible during the trial and was also admissible during the capital sentencing proceeding. The jury had heard evidence during the trial regarding the money Tommy Munford was to pay defendant in exchange for the murder of Munford's wife. However, Kristian Gaddy's testimony that defendant described how he took great pains to make sure that he left no incriminating evidence at the crime scene by covering his feet with plastic bags, wearing extra large shoes, and wearing a stocking cap over his head and face supports the inference that this was a cold-blooded, calculated, contract killing for money. This assignment of error is overruled.

[6] Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In the present case, defendant was convicted of first-degree murder on the basis of premeditation and deliberation and on the basis of lying in wait. The jury found the aggravating circumstance that defendant committed the crime for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). The jury found as the sole statutory mitigating circumstance that defendant has no significant history of prior criminal

activity, N.C.G.S. § 15A-2000(f)(1). Of the five nonstatutory mitigating circumstances that were submitted, the jury did not find a single one to be mitigating.

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*, 512 U.S. 1254, 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997), *and 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). Defendant contends that this case is similar to three of the seven cases; however, we conclude that each of the cases cited by defendant is distinguishable from the present case.

In *State v. Benson*, the defendant was sentenced to death based on a theory of felony murder. This Court noted that the evidence showed he intended only to rob the victim because he shot at the victim's legs. The defendant confessed, pled guilty during the trial, and acknowledged wrongdoing in front of the jury. The jury found five mitigating circumstances, including mental or emotional disturbance.

In *State v. Stokes*, the defendant was only seventeen years old and had an IQ of 63. He was convicted of first-degree murder solely on the basis of felony murder, and this Court noted that the defendant planned to rob, not kill, the victim. A codefendant who participated in "the same crime, same manner," but who was older and had a significant criminal record, had been sentenced to life in prison. Finally, the jury found four statutory and eight nonstatutory mitigating circumstances, including mental or emotional disturbance and impaired capacity.

The defendant in *State v. Young* had two codefendants who entered the victim's house with him and participated in killing and robbing the victim. In addition, this Court noted that the defendant was only nineteen years old.

The facts in these three cases are distinguishable from the facts in this case for several significant reasons. First, defendant here was

thirty-four years old when he committed the murder. He attended college, was an aircraft mechanic, worked for the post office for six years, and was described as a "very intelligent young man." Second, defendant planned to kill Ellen Munford and was convicted of first-degree murder on the bases of premeditation and deliberation and lying in wait. Although Tommy Munford was sentenced to life plus twenty years in prison, he did not participate directly in the killing in the same manner as defendant. Tommy Munford did not lie in wait, watching Ellen Munford for hours before sneaking up on her in her own home and shooting her in the back twice at close range. Tommy Munford also acknowledged his wrongdoing and accepted responsibility for his conduct. Finally, the jury in the instant case found only one statutory mitigating circumstance, no significant criminal history. 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. The proportionality pool contains several cases in which the death penalty has been upheld for contract killings. Two of those cases are very similar to this case. In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), the jury found the only aggravating circumstance submitted, that the murder was committed for pecuniary gain. The defendant was convicted of conspiracy to commit murder and first-degree murder on the theory of premeditation and deliberation. As in the present case, the defendant in *Bacon* conspired with the victim's spouse to kill the victim for a portion of insurance proceeds. The codefendant in *Bacon* received a life sentence even though the killing was her idea and the defendant was dominated by her. This Court found the death penalty to be proportionate despite the codefendant's life sentence because the two defendants did not commit the same crime in the same manner. Several significant factors were noted, such as the defendant was the only one to wield the knife; the codefendant confessed; and the codefendant had an emotional relationship with the victim, whereas the defendant had never met the victim until killing him in a preplanned, cold, calculated, and unprovoked manner.

In *State v. Basden*, 339 N.C. 288, 451 S.E.2d 238 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 845 (1995), the sole aggravating circumstance found by the jury was pecuniary gain. The first-degree

murder conviction was based on premeditation and deliberation. The defendant in *Basden* "planned and committed a cold, calculated, unprovoked killing, in the hope of receiving a portion of the victim's life insurance proceeds." *Id.* at 313, 451 S.E.2d at 252.

Defendant in the present case was convicted of first-degree murder on both the basis of premeditation and deliberation and the basis of lying in wait. This Court has recognized 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). A defendant's lying in wait to commit murder has also been recognized by this Court as a significant consideration in proportionality review.

> The Court in [*State v.*] *Brown*, [320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987),] emphasized that the crime of first-degree murder by lying in wait at the victim's residence "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure." *Id.* at 231, 358 S.E.2d at 34. "The victim, unaware of the threat, had no opportunity to defend [her]self. Unlike the victim felled in a face-to-face confrontation, this victim had no chance to fight for [her] life." *Id.* at 232, 358 S.E.2d at 34 (citation omitted).

State v. Ward, 338 N.C. 64, 128, 449 S.E.2d 709, 745 (1994) (alterations in original), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995). Defendant in this case murdered Ellen Munford after lying in wait, watching her for hours from the woods surrounding her home. Defendant was willing to kill a person he had never met before for money. Defendant made elaborate plans to accomplish the murder and to do it without getting caught. He never showed any remorse for what he did and, in fact, bragged to his friend about having "capped that ass." Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

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

NO ERROR.

STATE OF NORTH CAROLINA v. ERNEST GARLAND ALLEN

No. 115A96

(Filed 24 July 1997)

1. Criminal Law § 1032 (NCI4th Rev.)— first-degree murder—life without parole—constitutional power to parole—no violation of separation of powers

A sentence of life imprisonment without parole for first-degree murder did not violate the Separation of Powers Clause of the North Carolina Constitution. Although defendant argues that the power to parole has been a right of the executive branch upon which the legislative branch may not infringe, the present Constitution in Article III, Section 5(6) explicitly states that the Governor's power to affect the sentence of a defendant does not include the ability to parole.

Am Jur 2d, Criminal Law §§ 627, 630; Pardon and Parole §§ 73-75.

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes. 100 ALR3d 431.

2. Criminal Law § 1604 (NCI4th Rev.)— first-degree murder—life without parole—clemency power of Governor—not infringed

The clemency power of the Governor is not infringed upon by N.C.G.S. § 15A-1380.5, which allows defendants sentenced to life imprisonment without parole the right to have their cases reviewed by a superior court judge after twenty-five years of imprisonment and every two years thereafter if the sentence has not been altered or commuted. This statute allows defendants not already benefitted by the Governor to have their case reviewed by a superior court judge but does not affect the Governor's clemency power in any way.

Am Jur 2d, Pardon and Parole §§ 14, 15, 79, 80.

3. Constitutional Law § 374 (NCI4th)— life without parole—constitutional

"Life imprisonment without parole" falls within the meaning of the constitutional term "imprisonment" and is authorized by

the North Carolina Constitution. N.C. Const. Art. XI, § 1 (amended 1996).

Am Jur 2d, Criminal Law §§ 627, 630; Pardon and Parole §§ 73-77.

4. Constitutional Law § 374 (NCI4th)— first-degree murder—life without parole—no violation of Due Process or Law of the Land

The sentencing scheme employed by the trial court when sentencing a first-degree murder defendant to life does not violate the Due Process Clause or the Law of the Land Clause embodied in the United States or the North Carolina Constitutions. Defendant argued that N.C.G.S. § 14-17 provides as punishment for first-degree murder death or life without parole pursuant to N.C.G.S. § 15A-2000 and that N.C.G.S. § 15A-2000(b) only uses "life imprisonment" and does not include "life without parole," so that the trial court should have sentenced defendant only to life imprisonment, but the purpose of N.C.G.S. § 15A-2000 is to supply the procedural guidelines for the sentencing proceeding and any ambiguity is cleared by N.C.G.S. § 15A-2002, through which the legislature defines life imprisonment as life without parole.

Am Jur 2d, Criminal Law §§ 627, 630; Pardon and Parole §§ 73-77.

5. Constitutional Law § 374 (NCI4th)— life without parole—not unusual

A sentence of life imprisonment without the possibility of parole does not violate North Carolina's constitutional prohibition against cruel and unusual punishment by being unusual in restricting the governor's clemency power. Furthermore, defendant cites no authority showing that his sentence is unusual under North Carolina law.

Am Jur 2d, Criminal Law §§ 627, 630; Pardon and Parole §§ 73-77.

6. Assault and Battery § 81 (NCI4th)— discharging firearm into occupied property—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of discharging a firearm into occupied property and felony murder based on that charge where the evidence tended to show that the victims were sitting alone in a car in the

parking lot where they worked; defendant appeared outside the car and remained there, firing the shots that killed one victim and wounded the other; and direct testimony by the survivor described defendant as lying about halfway across the hood of a truck that was parked next to the survivor's vehicle.

Am Jur 2d, Assault and Battery §§ 90-96.

7. Evidence and Witnesses § 339 (NCI4th)— first-degree murder of spouse—prior assault—admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence of a prior assault on the murder victim by defendant (her husband). Under N.C.G.S. § 8C-1, Rule 404(b), evidence of other wrongs, crimes, or acts is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, entrapment, or accident, and, where a husband is accused of killing his wife, the State may introduce evidence that encompasses his married life in order to prove malice, intent, and ill will toward the victim. The prior assault on the victim is relevant to show defendant's intent to kill his wife.

Am Jur 2d, Evidence § 324; Homicide §§ 310, 311.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

8. Appeal and Error §§ 147, 341 (NCI4th)— limiting instruction not given—not raised at trial—no assignment of error—not before Supreme Court

A first-degree murder defendant's argument that the trial court erred by not giving a limiting instruction as to a prior assault was not properly before the Supreme Court where defendant did not raise the issue at trial and did not specifically and distinctly assign plain error in the record.

Am Jur 2d, Appellate Review §§ 614-617.

9. Evidence and Witnesses § 222 (NCI4th)— flight—instructions—evidence sufficient

The trial court did not err in a first-degree murder prosecution by instructing the jury on the issue of flight where defendant shot and killed his wife and wounded another victim as they sat in a parked car, drove from the scene, and was not apprehended until later that night in another county. Jury instructions relating

to the issue of flight are proper as long as there is some evidence reasonably supporting the theory that defendant fled after commission of the crime charged.

Am Jur 2d, Evidence §§ 532-535.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Downs, J., on 12 October 1995 in Superior Court, Buncombe County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments for attempted first-degree murder, assault with a deadly weapon with intent to kill, and discharging a firearm into occupied property was allowed 27 November 1996. Heard in the Supreme Court 12 May 1997.

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

Harry C. Martin, J. Matthew Martin, and John A. Martin for defendant-appellant.

MITCHELL, Chief Justice.

Defendant, Ernest Garland Allen, was indicted on 6 March 1995 for the first-degree murder of Kathy Allen, attempted first-degree murder of Gerald Ross Freeman, assault with a deadly weapon with the intent to kill inflicting serious injury against Gerald Ross Freeman, and discharging a firearm into occupied property. Defendant was tried capitally at the 2 October 1995 session of Superior Court, Buncombe County, and was found guilty of first-degree murder under the felony murder rule, attempted first-degree murder, assault with a deadly weapon with intent to kill, and discharging a firearm into occupied property. After a separate capital sentencing proceeding, the jury was unable to reach unanimous agreement as to a recommendation for punishment. The trial court therefore imposed a sentence of life imprisonment as required by law. In addition, the trial court sentenced defendant to a minimum of 238 months and a maximum of 295 months for attempted first-degree murder. The trial court arrested judgment on the assault with a deadly weapon with intent to kill conviction and merged the conviction of discharging a firearm into occupied property with the felony murder conviction.

The State's evidence tended to show *inter alia* that on 23 January 1995, defendant shot and killed his wife, Kathy Allen, and attempted

to kill Gerald Ross Freeman, while the two victims sat alone in a parked car. The victims worked at Charles D. Owen Manufacturing, where they had worked together for a number of years. Mrs. Allen had separated from defendant in November of 1994.

On the morning of the murder, Mrs. Allen met Ross Freeman in the parking lot of their employer. Mrs. Allen was not working on this morning due to injuries she had sustained when defendant shot her six times on Thanksgiving Day of 1994. The two victims sat alone in Freeman's car, which was parked between a pickup truck and Mrs. Allen's car. At some point, Freeman looked up and saw defendant "l[y]ing about halfway across the hood of that [pickup] truck," pointing the barrel of a shotgun at him. Defendant fired the shotgun, striking Freeman in the neck and throat and killing Kathy Allen. Freeman then jumped out of the car and ran to the guard house to call for help. After viewing the body of his dead wife, defendant left the scene and was not apprehended until later that evening in another county.

By his first assignment of error, defendant contends that the sentence of life imprisonment without parole, pursuant to N.C.G.S. § 14-17, violates the North Carolina Constitution. Specifically, defendant argues that life imprisonment without parole violates the Separation of Powers Clause, is unrecognized by the North Carolina Constitution, violates the Due Process and Law of the Land Clauses of the federal and state Constitutions, and violates North Carolina's constitutional prohibition against cruel and unusual punishment. We disagree.

[1] First, defendant argues that life imprisonment without parole is unconstitutional because it violates Article I, Section 6 of the North Carolina Constitution, the Separation of Powers Clause. Defendant contends that this sentence infringes on the power of the Executive Branch, specifically the Governor's power to parole. Defendant argues that the power to parole has historically been a right of the Executive Branch of government. Since the present North Carolina Constitution does not continue to specifically divest the Governor of this power, defendant argues that the legislature may not pass a statute such as N.C.G.S. § 14-17 that infringes on this right of the Executive Branch.

Prior to 1953, the Governor's power to parole had been recognized by the General Assembly when it passed legislation allowing the Governor to appoint a Board of Paroles. *See* N.C.G.S. § 148-52 (1935) (amended 1953). In 1953, amendments to the North Carolina

Constitution were adopted which divested the Governor of the power to parole and specifically vested this right in the legislature. Article III, Section 6, thus amended, provided:

> **Reprieves, commutations, and pardons.**—The governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. . . . *The terms reprieves, commutations and pardons shall not include paroles.* The General Assembly is authorized and empowered to create a Board of Paroles, provide for the appointment of the members thereof, and enact suitable laws defining the duties and authority of such Board to grant, revoke and terminate paroles. *The Governor's power of paroles shall continue until July 1, 1955, at which time said power shall cease and shall be vested in such Board of Paroles as may be created by the General Assembly.*

N.C. Const. of 1868, art. III, § 6 (1953) (emphasis added).

Defendant relies on the fact that the present North Carolina Constitution no longer contains the language that divests the Governor of the power to parole. However, the present Constitution does explicitly state that the Governor's power to affect the sentence of a defendant does not include the ability to parole. Article III, Section 5(6) provides the following:

> *Clemency.* The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. *The terms reprieves, commutations, and pardons shall not include paroles.*

N.C. Const. art. III, § 5(6) (emphasis added). Therefore, we conclude that the Governor does not possess the constitutional power to parole.

[2] Defendant also contends that N.C.G.S. § 15A-1380.5 infringes upon the clemency power of the Governor. This statute allows defendants sentenced to life imprisonment without parole the right to have their cases reviewed by a superior court judge after twenty-five years of imprisonment. The statute further provides that after the twenty-five year period, the "defendant's sentence shall be reviewed

every two years as provided by this section, unless the sentence is altered or commuted before that time." N.C.G.S. § 15A-1380.5(b) (Supp. 1996). Defendant's contention that this statute seeks to limit the clemency power of the Governor is incorrect. This statute allows a defendant not already benefited by the merciful hand of the Governor to have his case reviewed by a superior court judge; it increases a defendant's chance of parole but does not affect the Governor's clemency power in any way.

After reviewing each of the statutes questioned by defendant, we conclude that they do not violate the Separation of Powers Clause.

[3] Defendant next argues that life imprisonment without parole is a type of punishment not recognized by our state Constitution because the term "life imprisonment without parole" is not found in Article XI, Section 1 (punishments, corrections, and charities), which provides:

> The following punishments only shall be known to the laws of this State: death, imprisonment, fines, suspension of jail or prison term with or without conditions, restitutions, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

N.C. Const. art. XI, § 1 (amended 1996). In this case, defendant was convicted of, among other things, first-degree murder, which is punishable by death or life imprisonment without parole. *See* N.C.G.S. § 14-17 (Supp. 1996) (effective 1 October 1994). Defendant received the prescribed sentence of imprisonment for life without parole. This Court has already settled that the General Assembly alone prescribes the maximum and minimum punishment which can be imposed on those convicted of crimes. *State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986). We conclude that the term "life imprisonment without parole" falls within the meaning of the constitutional term "imprisonment," so the sentence was authorized by the Constitution.

[4] Defendant also contends that the statutory scheme established by the legislature and employed by the trial court to determine his sentence is flawed because it violates the Due Process and the Law of the Land Clauses of the federal and state constitutions. N.C.G.S. § 14-17 provides that any person who commits specific types of first-degree murder "shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000." Defendant argues that N.C.G.S. § 15A-2000

provides that defendant can receive life imprisonment instead of life imprisonment without parole. Specifically, 15A-2000(b) does not include the language "life without parole" but only uses "life imprisonment." It provides:

> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

N.C.G.S. § 15A-2000(b) (Supp. 1996). Because defendant's jury was not unanimous in its sentencing decision, defendant argues the trial court is bound by the language in 15A-2000(b) and should not have sentenced him to life imprisonment without parole, but only to life imprisonment.

Under N.C.G.S. § 14-17, the only two possible punishments provided in the statute are death and life imprisonment without parole. *See* N.C.G.S. § 14-17. The purpose of N.C.G.S. § 15A-2000 is to supply the procedural guidelines for the sentencing proceeding. This section prevents a defendant from receiving a sentence of death when the jury cannot unanimously agree on that punishment. N.C.G.S. § 15A-2002 clearly reads that "[t]he judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." Through this section, the legislature defines the meaning of life imprisonment as life without parole and clears up any ambiguity that might surround the term. The sentencing scheme under which defendant was convicted does not violate the Due Process or Law of the Land Clause embodied in the United States Constitution or the North Carolina Constitution.

[5] Finally, defendant contends that his sentence of life imprisonment without the possibility of parole violates North Carolina's constitutional prohibition against cruel and unusual punishment. Defendant argues that his sentence is not cruel, but rather that his sentence is unusual because it does not allow for him to be paroled and inhibits clemency.

We have already shown that defendant's sentence and applicable statutes do not restrict the Governor's clemency power. Furthermore, defendant cites no authority showing that his sentence is unusual under North Carolina law.

For the foregoing reasons, we conclude that the sentence of life imprisonment without parole does not violate the North Carolina Constitution.

[6] By another assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge of discharging a firearm into occupied property, Freeman's vehicle, and the charge of felony murder based on the felony of discharging a firearm into occupied property. Defendant argues that the State failed to show that the firearm was discharged from outside the vehicle and therefore failed to establish a required element of the crime. We disagree.

When considering a motion to dismiss for insufficiency of the evidence, the court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Hood*, 332 N.C. 611, 621, 422 S.E.2d 679, 684 (1992), *cert. denied*, 507 U.S. 1055, 123 L. Ed. 2d 659 (1993). The court must also consider whether all the elements of the crime are supported by substantial evidence. *Id.* "Substantial evidence" is relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). Discharging a firearm into an occupied vehicle is the willful or wanton discharging of a firearm into any vehicle while it is occupied. N.C.G.S. § 14-34.1 (1995); *State v. Bray*, 321 N.C. 663, 670, 365 S.E.2d 571, 575 (1988); *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988). In *Mancuso*, this Court held that even though defendant, while remaining outside the vehicle, placed the firearm inside the vehicle when discharging it, the firearm was discharged "into" the vehicle within the meaning of N.C.G.S. § 14-34.1. 321 N.C. at 468, 364 S.E.2d at 362.

In this case, the State's evidence tended to show that the victims, Kathy Allen and Ross Freeman, were sitting alone in Freeman's car in the parking lot where they worked. Defendant appeared outside the car in which the victims were sitting and remained there, firing the shots that killed Mrs. Allen and wounded Freeman. Direct testimony by Freeman, the attempted murder victim, described defendant before the shooting as "laying about halfway across the hood" of a truck that was parked next to Freeman's vehicle. We conclude that this is substantial evidence requiring that the trial court submit to the jury the charges of discharging a firearm into occupied property and felony murder based on that charge. This assignment of error is overruled.

[7] By another assignment of error, defendant contends that the trial court erred in admitting evidence of a prior assault on the murder victim. Defendant concedes that such evidence can be elicited through Rule 404(b) of the North Carolina Rules of Evidence to prove intent; however, he contends that the trial court failed to limit the jury's consideration of this prior assault to the theory for which it might offer support. The State submitted three different theories of murder: felony murder, premeditated and deliberate murder, and murder by lying in wait. Defendant maintains that of these three theories, only one, premeditated and deliberate murder, has the element of intent.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith"; nevertheless, it may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1992). Furthermore, in cases where a husband is accused of killing his wife, the State may introduce evidence that encompasses his married life in order to prove malice, intent, and ill will toward the victim. *State v. Syriani*, 333 N.C. 350, 377, 428 S.E.2d 118, 132, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). We conclude that, in this case, the prior assault on the victim is relevant to show defendant's "intent" to kill his wife. Therefore, this evidence was properly admitted by the trial court.

[8] Next, we turn to defendant's argument that the trial court erred in not giving a limiting instruction as to the evidence of the prior assault. Defendant did not raise this issue at trial, and he did not "specifically and distinctly" assign plain error in the record on appeal as required by Rule 10(c)(4) of the Rules of Appellate Procedure. Therefore, this assignment of error is not properly before this Court and is overruled.

[9] By another assignment of error, defendant contends that the trial court erred in instructing the jury on the issue of flight. Defendant admits he left the scene of the crime, but he argues that as a matter of law his departure from the scene was not enough evidence from which to conclude that he fled. Therefore, he maintains that it was improper for the trial court to instruct the jury that it could consider defendant's leaving the scene as an indication of guilt. We disagree.

Because defendant did not object to the jury instructions at trial, we review only for plain error. *State v. Odom*, 307 N.C. 655, 300

S.E.2d 375 (1983); N.C. R. App. P. 10(c)(4). In the present case, defendant shot and killed his wife, Kathy Allen, and wounded Ross Freeman while they sat in a parked car. Defendant then drove away from the scene of the crime and was not apprehended until later that night in another county. This Court has held that jury instructions relating to the issue of flight are proper as long as there is "some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994), *cert. denied*, 513 U.S. 1098, 130 L. Ed. 2d 665 (1995); *see also State v. Tucker*, 329 N.C. 709, 722, 407 S.E.2d 805, 813 (1991). In reviewing the evidence in the present case, we conclude that the trial court had sufficient evidence from which to conclude that defendant had fled the scene of the crime and, therefore, properly instructed the jury on the issue of flight. This assignment of error is overruled.

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

NO ERROR.

JAMES E. HENDERSON AND WIFE, GLENDA J. HENDERSON v. UNITED STATES FIDELITY & GUARANTY COMPANY, GLENDA LINTON AND GREAT AMERICAN INSURANCE COMPANY

No. 490PA96

(Filed 24 July 1997)

Insurance § 895 (NCI4th)— indemnity policy for builder—sale of residence in drainage area—advertising liability coverage—unfair trade practice not included

The term "unfair competition" was not ambiguous as used in insurance policies where plaintiffs purchased from a builder a residence situated in a drainage area subject to severe flooding, plaintiffs brought this action against the builder's insurers alleging bad faith and unfair trade practices, the trial court granted summary judgment for plaintiffs, determining that coverage existed under the advertising injury and advertising liability coverage of the policies, and the Court of Appeals reversed, holding

that "unfair competition" as contained in the policies does not include statutory unfair and deceptive practices prohibited by chapter 75 of the North Carolina General Statutes. Although plaintiffs contend that coverage exists because the acts committed by the builder were found in the underlying action to have been "unfair or deceptive" in violation of Chapter 75, neither policy defines "unfair competition" and the offenses surrounding the term in the policies refer to causes of action brought between business rivals pertaining to the disparagement or appropriation of another's name, style, identity, or other form of representation of products. The North Carolina Supreme Court agrees with those decisions from other states in which the term "unfair competition" requires some component of competitive injury and thus refers only to acts against competitors. A competitor of the insured, but not its customer, can assert a claim which may be covered under the unfair competition category of the advertising injury coverage; this result is consistent with the overall definition of advertising injury in the two policies and is consistent with this State's interpretation of the common law tort of unfair competition as an offense committed in the context of competition between business rivals.

Am Jur 2d, Insurance §§ 703 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 124 N.C. App. 103, 476 S.E.2d 459 (1996), reversing a judgment granting summary judgment in favor of plaintiffs entered on 28 July 1995 by Cashwell, J., in Superior Court, Wake County, and remanding the cause for entry of summary judgment in favor of defendant insurance companies. Heard in the Supreme Court 14 May 1997.

James M. Kimzey and Katherine E. Jean for plaintiff-appellants.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, for defendant-appellee United States Fidelity & Guaranty Company.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey, for defendant-appellee Great American Insurance Company.

PARKER, Justice.

THE UNDERLYING ACTION

The underlying action arose out of a real estate transaction in which James and Glenda Henderson ("plaintiffs") purchased from Clifton Hicks Builder, Inc. ("Hicks") a residence situated in a drainage area subject to severe flooding. The evidence at trial demonstrated that before signing the contract to purchase, plaintiffs asked Hicks' president whether there had been or would be any water problems on the lot, to which he responded "no." In fact, the lot had flooded once during construction of the house. The jury found that Hicks had engaged in unfair and deceptive practices as follows: (i) Hicks falsely represented to the Hendersons that they would not have any water problems on lot 82 (the lot the Hendersons purchased from Hicks), (ii) Hicks concealed from the Hendersons the existence of a surface-water flooding problem on lot 82, and (iii) Hicks concealed from the Hendersons the existence and location of a drainage grate and piping system which were installed on lots 83 and 84 and which piped water through lot 82. The trial court concluded that Hicks' acts and omissions constituted unfair and deceptive trade practices in violation of chapter 75 of the North Carolina General Statutes and entered judgment for plaintiffs against Hicks in the amount of $1,375,000 plus pre- and post-judgment interest, costs, and attorneys' fees. Hicks appealed the trial court's decision in the underlying action to the Court of Appeals, which affirmed the trial court. *Henderson v. Clifton Hicks Builder, Inc.*, 117 N.C. App. 731, 453 S.E.2d 877 (unpublished), *disc. rev. denied*, 340 N.C. 112, 456 S.E.2d 314 (1995).

THE PRESENT ACTION

In addition to the underlying action, plaintiffs instituted the present action on 18 May 1993 against United States Fidelity & Guaranty Company ("USF&G"), Glenda Linton, and Great American Insurance Company ("Great American"). Plaintiffs alleged claims for bad faith and unfair trade practices in their complaint. Plaintiffs dismissed their extracontractual claims on 21 August 1995. These extracontractual claims were the only claims brought against defendant Glenda Linton, an employee of USF&G. Plaintiffs seek recovery in satisfaction of the judgment, costs, and attorneys' fees assessed against Hicks, defendants' insured.

Plaintiffs moved for partial summary judgment against USF&G and Great American on the issue of coverage. At the hearing, defend-

ants also moved for partial summary judgment on the coverage issue. On 28 July 1995 the trial court granted partial summary judgment for plaintiffs, determining that coverage exists for plaintiffs' damages, costs, attorneys' fees, and interest under the "advertising injury" coverage of the USF&G policy and the "advertising liability" coverage of the Great American policy. The trial court also determined that no coverage exists under the "property damage" and "personal injury" provisions of either policy.[1]

Defendants appealed to the Court of Appeals, and plaintiffs asserted cross-assignments of error. On 15 October 1996 the Court of Appeals reversed the trial court's entry of summary judgment in favor of plaintiffs and remanded the case to the trial court for entry of judgment for defendants. The Court of Appeals held that the term "unfair competition" as contained in the "advertising injury" and "advertising liability" coverages of the two policies does not include statutory unfair and deceptive practices prohibited by chapter 75 of the North Carolina General Statutes. *Henderson v. U.S. Fidelity & Guar. Co.*, 124 N.C. App. 103, 109, 476 S.E.2d 459, 463 (1996). The Court of Appeals also held that plaintiffs' damages did not arise out of an "occurrence" as required for coverage under the "bodily injury" and "property damage" provisions of USF&G's insurance policy and the "personal injury" and "property damage" provisions of the Great American policy. *Id.* at 111, 476 S.E.2d at 464. Finally, the Court of Appeals held that there is no coverage under USF&G's policy for "personal injury." *Id.* at 112, 476 S.E.2d at 464. On 7 February 1997 this Court allowed plaintiffs' petition for discretionary review. We agree with the Court of Appeals' decision and affirm, although on different grounds.

THE POLICIES

Hicks maintained an insurance policy with USF&G that included comprehensive general liability and broad form property damage liability coverage with limits of $1,000,000 per occurrence, and an excess "catastrophe liability policy" through Great American with limits of $1,000,000 per occurrence.

The USF&G policy provides coverage for "advertising injury" as follows:

1. Although the trial court did not specifically mention the "bodily injury" provisions of the two policies, the parties have stipulated that "the issue of coverage based on bodily injury was briefed, argued and ruled on by the court in addition to the issue of coverage based on personal injury referred to in the judgment entered by the court."

> (A) The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the named insured's business, within the policy territory . . . .

The policy defines an "advertising injury" as

> injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

The Great American policy provides coverage for damages which the insured is legally obligated to pay because of "advertising liability." The policy defines an "advertising liability" as

> liability arising out of the named insured's advertising activities for libel, slander or defamation of character; invasion of rights of privacy; infringement of copyright, title or slogan; and piracy or unfair competition or idea misappropriation committed or alleged to have been committed during the policy period.

DISCUSSION

Plaintiffs contend that coverage exists because the acts committed by Hicks were found by the trial court in the underlying action to have been "unfair or deceptive practices" in violation of chapter 75 of the North Carolina General Statutes and because defendants' insurance policies provide coverage for "advertising injury" and "advertising liability," which includes coverage for "unfair competition." Defendants contend that their respective policies do not provide coverage for Hicks' liability because the applicable provisions of their respective policies do not extend coverage to the violation of statutory unfair or deceptive practices.

Neither policy defines "unfair competition"; however, the rules for determining the meaning of terms used in an insurance policy have been well established. *See Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). Any ambiguity as to the meaning of words used in an insurance policy must be construed in the policyholder's favor. *Id.* at 354, 172 S.E.2d at 522. For an ambiguity to exist the language of the policy must be,

in the opinion of this Court, fairly and reasonably susceptible to either of the constructions for which the parties contend. *Id.* Unless the context requires otherwise, definitions provided in the policy should be applied to terms, and in the absence of such definitions, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech. *Id.* The court may not under the guise of interpretation rewrite the contract and impose liability where none was intended by the parties to the contract. *Id.*

The context of the term "unfair competition" in the policies is relevant to the term's interpretation. *See id.* "Unfair competition" is listed in both policies among such offenses as libel; slander; defamation; violation of right of privacy; piracy; copyright, title, or slogan infringement; and idea misappropriation. The USF&G policy lists "unfair competition" directly between the offenses of piracy and infringement of copyright, title, or slogan. The Great American policy groups "unfair competition" in a subset of the advertising injury offenses along with the offenses of piracy and idea misappropriation. The offenses surrounding the term at issue all refer to causes of action brought between business rivals for offenses pertaining to the disparagement or appropriation of another's name, style, identity, or other form of representation of products.

The Court of Appeals in the instant case held that, "[g]iven the context in which 'unfair competition' appears in the policies at issue here, it is reasonable to construe the term as a reference to the common law tort of unfair competition, long recognized in North Carolina." *Henderson*, 124 N.C. App. at 109, 476 S.E.2d at 463. The Court of Appeals went on to hold that "the term 'unfair competition' as contained in the 'advertising injury' and 'advertising liability' coverages of the USF&G and Great American policies does not include statutory unfair and deceptive trade practices prohibited by [chapter 75 of the North Carolina General Statutes]." *Id.*

Although an issue of first impression in North Carolina, numerous courts in other jurisdictions have interpreted the meaning of "unfair competition" in the context of "advertising injury" or "advertising liability" provisions of comprehensive general liability policies. Several courts have held consistently with the Court of Appeals that the term "unfair competition" is limited to the common law tort. *See, e.g., Standard Fire Ins. Co. v. Peoples Church of Fresno*, 985 F.2d 446 (9th Cir. 1993); *Gencor Indus., Inc. v. Wausau Underwriters Ins. Co.*, 857 F. Supp. 1560 (M.D. Fla. 1994); *Atlantic Mut. Ins. Co. v.*

Brotech Corp., 857 F. Supp. 423 (E.D. Pa. 1994), *aff'd without op.*, 60 F.3d 813 (3d Cir. 1995); *Nationwide Mut. Ins. Co. v. Dynasty Solar, Inc.*, 753 F. Supp. 853 (N.D. Cal. 1990); *Globe Indem. Co. v. First Am. State Bank*, 720 F. Supp. 853 (W.D. Wash. 1989), *aff'd without op.*, 904 F.2d 710 (9th Cir. 1990); *Pine Top Ins. Co. v. Public Util. Dist. No. 1*, 676 F. Supp. 212 (E.D. Wash. 1987); *A-Mark Fin. Corp. v. CIGNA Prop. & Cas. Cos.*, 34 Cal. App. 4th 1179, 40 Cal. Rptr. 2d 808 (1995); *McLaughlin v. National Union Fire Ins. Co.*, 23 Cal. App. 4th 1132, 29 Cal. Rptr. 2d 559 (1994); *John Markel Ford, Inc. v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

Other courts have declined to adopt the conclusion that the term "unfair competition" refers only to the traditional common law tort but have concluded that the term refers exclusively to conduct between competitors. *See, e.g.*, *Keating v. National Union Fire Ins. Co.*, 995 F.2d 154 (9th Cir. 1993); *Practice Mgmt. Assocs., Inc. v. Old Dominion Ins. Co.*, 601 So. 2d 587 (Fla. Dist. Ct. App.), *disc. rev. denied*, 613 So. 2d 8 (Fla. 1992); *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 422 N.E.2d 518, 439 N.Y.S.2d 858 (1981); *Aetna Cas. & Sur. Co. v. M&S Indus., Inc.*, 64 Wash. App. 916, 827 P.2d 321 (1992); *Boggs v. Whitaker, Lipp & Helea, Inc.*, 56 Wash. App. 583, 784 P.2d 1273, *disc. rev. denied*, 114 Wash. 2d 1018, 791 P.2d 535 (1990).

We agree with those decisions which conclude that the term "unfair competition" requires some component of competitive injury and thus refers only to acts against competitors. We find particularly persuasive the Third Circuit Court of Appeals' discussion in *Granite State Ins. Co. v. Aamco Transmissions, Inc.*, 57 F.3d 316 (3d Cir. 1995), applying Pennsylvania law. In *Granite* the plaintiffs brought suit against Aamco Transmissions, Inc. (Aamco), asserting that Aamco was liable pursuant to Pa. Stat. Ann. tit. 73, § 201-3 of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Granite State Insurance Company (Granite) insured Aamco under a comprehensive general liability insurance policy for personal injury or advertising injury arising out of the conduct of Aamco's business. Aamco contended that it had coverage under the "unfair competition" category of the "advertising injury" coverage. The court held that the Granite policy did not provide coverage for these claims, although the court did not base its decision on the reasoning that the phrase "unfair competition" unambiguously refers only to the traditional common law tort. *Granite*, 57 F.3d at 319. The *Granite* court reasoned as follows:

> [C]ourts are not uniform in describing the tort of unfair competition. . . . Therefore, it is not so easy to conclude that there is one narrow and clear category of the common law tort.
>
> Furthermore, regardless of the scope of the common law tort of unfair competition, a person reading the term "unfair competition" as a category of "advertising injury" within an insurance policy would not necessarily understand the term to be limited to a common law definition. . . . In short, we see no valid reason to exclude conduct described in the statute simply because it might not be regarded as unfair competition in a common law sense.
>
> Yet even if the term "unfair competition" within an insurance policy is construed broadly with respect to the character of an insured's conduct, that construction does not determine the class of persons who can present claims against the insured which will be regarded as being claims for unfair competition within the policy. Thus, in order for [the insured] to succeed, it must show that claims by its customers injured by its own practices reasonably can be described as unfair competition claims within the context of the insurance coverage. In this endeavor [the insured] fails for, regardless of the nature of the insured's conduct, a claim by a consumer of its products or services arising from that conduct hardly can be characterized as a claim for unfair competition. After all, "competition" connotes an insured's relationship with other persons or entities supplying similar goods or services.

Id. at 319. The *Granite* court held that Granite's insurance policy was "not ambiguous with respect to the relationship required between a plaintiff in an underlying action and an insured for that plaintiff's claim to be considered unfair competition within the policy." *Id.* at 320. The court held that a competitor of the insured, but not its customer, can assert a claim which may be covered under the "unfair competition" category of the "advertising injury" coverage. *Id.*

The statute involved in the underlying action in *Granite* is the "Pennsylvania Unfair Trade Practices and Consumer Protection Law." The Pennsylvania statute distinguishes between "unfair methods of competition" and "unfair or deceptive acts or practices," although it lists them together in one subsection. Pa. Stat. Ann. tit. 73, § 201-2(4) (1993) (amended 1996). Our comparable statute similarly distinguishes between the two concepts. N.C.G.S. § 75-1.1(a) provides that "[u]nfair methods of competition in or affecting commerce, *and* unfair or deceptive acts or practices in or affecting commerce, are

declared unlawful." (Emphasis added.) Our statute is patterned after section 5 of the Federal Trade Commission Act, 150 U.S.C. § 45(A)(1), and we look to federal case law for guidance in interpreting the statute. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). In *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, 31 L. Ed. 2d 170, 179 (1972), the United States Supreme Court clarified that the "unfair methods of competition" language refers to acts against competitors, while the "unfair and deceptive practices" language protects consumers.

We agree with the *Granite* court that a competitor of the insured, but not its customer, can assert a claim which may be covered under the "unfair competition" category of the "advertising injury" coverage. *See Granite*, 57 F.3d at 320. This result is consistent with the overall definition of "advertising injury" in the two policies. As we have indicated, the term "unfair competition" is listed in both policies among such offenses as libel; slander; defamation; violation of right of privacy; piracy; copyright, title, or slogan infringement; and idea misappropriation. These categories all define claims which an insured's competitor might assert against it.

This result is also consistent with this State's interpretation of the common law tort of unfair competition as an offense committed in the context of competition between business rivals. *See, e.g., Charcoal Steak House of Charlotte v. Staley*, 263 N.C. 199, 139 S.E.2d 185 (1964); *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269, 20 S.E.2d 59 (1942); *D-E-W Foods Corp. v. Tuesday's of Wilmington, Inc.*, 29 N.C. App. 519, 225 S.E.2d 122, *disc. rev. denied*, 290 N.C. 660, 228 S.E.2d 451 (1976). In *Extract Co. v. Ray*, 221 N.C. 269, 20 S.E.2d 59, this Court stated: "Unfair competition is not confined to the palming off by one competitor of his goods as the goods of another. The same wrongful result may be brought about by other means or practices." *Id.* at 274, 20 S.E.2d at 62 (citing *International News Service v. Associated Press*, 248 U.S. 215, 63 L. Ed. 211 (1918)). The gravamen of unfair competition is the protection of a business from misappropriation of its commercial advantage earned through organization, skill, labor, and money. *International News Service*, 248 U.S. at 239-40, 63 L. Ed. at 221. *See also Ruder & Finn, Inc.*, 52 N.Y.2d at 671, 422 N.E.2d at 522, 439 N.Y.S.2d at 862.

We conclude that, read in context, the term "unfair competition" as used in these policies is not ambiguous. In the context of these

policies, the definition of unfair competition refers to claims which an insured's competitor might assert against it and should not be expanded to include conduct such as that at issue in the underlying action.

The Court of Appeals also held that plaintiffs' damages did not arise out of an "occurrence" as required for coverage under both policies and that there is no coverage under USF&G's policy for "personal injury." We agree with the Court of Appeals' decision and affirm on these issues as well. Accordingly, as modified herein, the decision of the Court of Appeals is

AFFIRMED.

STATE OF NORTH CAROLINA v. JOHNNY ANTIONE BECK, JR.

No. 447A96

(Filed 24 July 1997)

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

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where defendant came out of a bathroom as the victim was making a telephone call, walked toward the back door of the house, and turned and shot the victim in the back of the head; there was no evidence of provocation or that the victim was armed; defendant was seen leaning over the victim's body after shooting him in the back of the head and an additional shot was fired to the front of the victim's head at some point; the cause of death was the two gunshot wounds; there was medical testimony that either wound would have been fatal and that either would have rendered the victim unconscious almost immediately, which permits the inference that one of the shots was fired after the victim was felled; and defendant left the house, leaving the victim to die.

Am Jur 2d, Homicide §§ 437 et seq.

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

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

2. Criminal Law § 279 (NCI4th Rev.)— noncapital first-degree murder—motion for recess to locate witness—denied—no abuse of discretion

The trial court did not abuse its discretion in a noncapital first-degree murder prosecution by denying defendant's motion for an overnight recess so that he could locate a witness where the only information before the court was defense counsel's unsworn statements in which he represented that he had been in contact with the witness, that the witness had originally said he would testify but was refusing to come to court, and that a subpoena had been issued but defense counsel was uncertain whether it had been served. The unsworn statements of defendant's trial counsel are not sufficient to establish a colorable need for the person to be summoned so as to justify delaying the trial to secure the witness. Defendant's counsel here also represented that the police had five outstanding warrants for the witness but were unable to locate him, so that the likelihood of his availability the next morning was *de minimis*.

Am Jur 2d, Continuance §§ 62-81.

Right of accused to continuance because of absence of witness who is fugitive from justice. 42 ALR2d 1229.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case. 9 ALR3d 1180.

3. Criminal Law § 267 (NCI4th Rev.)— noncapital first-degree murder—motion for continuance—time to prepare defense—denied

There was no error in a noncapital first-degree murder prosecution in denying defendant's motion for a continuance where defendant argued that he was not afforded a reasonable time to investigate and prepare his case, but this contention was not the basis for the request at trial and was not assigned as error on appeal. Moreover, the record shows that counsel was appointed for defendant in March 1995, so that defendant and his counsel had almost six months to prepare defendant's defense.

Am Jur 2d, Continuance §§ 107-109.

4. Evidence and Witnesses § 222 (NCI4th)— noncapital first-degree murder—instruction on flight—no error

The trial court did not err in a noncapital first-degree murder prosecution by giving an instruction on flight. Defendant fired two gunshots at the victim, left the residence without rendering any assistance to the victim or seeking to obtain any medical aid for him, two telephone calls were made from defendant's father's house to a local cab company, a young black male signaled the cab driver on the street where the murder occurred and requested a ride to the street where defendant resided, police vehicles were at the residence when defendant arrived, and the passenger told the cab driver to leave that area as well. This evidence permits an inference that defendant not only left the crime scene, but took steps to avoid apprehension.

Am Jur 2d, Evidence §§ 463, 464, 472, 474.

5. Appeal and Error § 147 (NCI4th)— erroneous instruction—no objection to wording—no plain error

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the trial court's instruction on flight was erroneous. Defendant was given the opportunity to object to the wording of the instruction and failed to do so.

Am Jur 2d, Appellate Review §§ 614 et seq.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Barnette, J., at the 5 September 1995 Criminal Session of Superior Court, Wake County, upon a jury verdict of guilty of first-degree murder in a noncapital trial. Heard in the Supreme Court 20 March 1997.

Michael F. Easley, Attorney General, by Teresa L. Harris, Associate Attorney General, for the State.

Lemuel W. Hinton for defendant-appellant.

PARKER, Justice.

Defendant Johnny Antione Beck, Jr. was charged in a proper bill of indictment with first-degree murder in the death of Samuel Leon

Gregory ("victim"). At the noncapital trial defendant was found guilty as charged and sentenced to life imprisonment.

The State presented evidence at trial tending to show that on 25 February 1995, Torrey Grimes left his apartment at 3544 Nealy Street in Raleigh, North Carolina, and went to the nearby apartment of Karen Ross to visit with the victim. The victim was a friend of Karen Ross' and sometimes stayed at her apartment. When Grimes arrived he saw defendant sitting on the couch. As Grimes sat down on the couch beside defendant, defendant got up and walked to the bathroom. The victim asked to use Grimes' cordless telephone. As the victim stood using the telephone, defendant returned from the bathroom, "walked like he was going out the back door," turned around, and shot the victim in the back of the head.

Grimes saw the victim fall and saw defendant leaning over the victim. Grimes ran to the front door, looked back, saw defendant going to the back door, went back and picked up his cordless phone, and then ran from the scene.

Excel Wilson, a cab driver for the Acme Cab Company, received a dispatch on 25 February to go to 4032 Nealy Street. Johnny Beck, Sr., defendant's father, resided at this address. Telephone records indicated that two telephone calls were made from defendant's father's house to Acme Cab Company. Three men were standing on the corner when Wilson turned onto Nealy Street. One of the men waved Wilson down and said, "I'm the one." Wilson picked up a young black male who told Wilson to take him to Melvid Court. As Wilson left Nealy Street, he passed several police cars heading to the Nealy Street area at a "high rate of speed." When Wilson turned into the Melvid Court area, he observed more police cars. Wilson told his passenger that the police were there and asked the man what he was going to do. The man said, "Leave." Wilson left the area and eventually dropped the man off on another street. Wilson told police officers that he did not get a good look at his passenger. At the time of the murder, defendant resided at 2440 Melvid Court, Apartment B.

Dr. James Edwards testified that he performed an autopsy on the victim and determined the cause of death to be two gunshot wounds. Dr. Edwards testified that either wound would have been fatal and that either wound would have rendered the victim unconscious almost immediately.

Defendant did not present any evidence.

[1] Defendant brings forth four assignments of error. Defendant first argues that the trial court erred by denying his motion to dismiss the first-degree murder charge. Defendant contends there was insufficient evidence to show premeditation and deliberation. We disagree.

When a defendant moves for dismissal based on insufficiency of the evidence, the trial court need determine only whether the State has presented substantial evidence demonstrating each essential element of the offense charged and that the defendant was 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. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Defendant was convicted of first-degree murder based 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. 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.

In defining premeditation and deliberation, this Court has stated:

> Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Brown, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985) (citations omitted), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986),

overruled on other grounds by State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988), *quoted in State v. Scott*, 343 N.C. 313, 341, 471 S.E.2d 605, 621-22 (1996).

In the instant case the State presented substantial evidence to support a reasonable inference that defendant committed this murder with premeditation and deliberation. As the victim was making a phone call, defendant came out of the bathroom and walked toward the back door of the house. Defendant then turned around and shot the victim in the back of the head. The record is devoid of any evidence of provocation by the victim or evidence that the victim was armed with a weapon.

The manner in which the victim was killed also establishes premeditation and deliberation. After shooting the victim in the back of the head, defendant was seen leaning over the victim's body. At some point an additional shot was fired to the front of the victim's head. The cause of the victim's death was determined to be the two gunshot wounds. Dr. Edwards testified that either wound would have been fatal and that either wound would have rendered the victim unconscious almost immediately. The evidence thus permits the inference that one of the shots was fired after the victim was felled.

Defendant's actions after the shooting also show premeditation and deliberation. Defendant left the house, leaving the victim to die. Taking the evidence in the light most favorable to the State, the trial court did not err in denying defendant's motion to dismiss the charge of first-degree murder.

[2] In defendant's second assignment of error, he contends the trial court committed prejudicial error by denying defendant's motion for an overnight recess so that defendant could locate a witness necessary for his defense. At trial defendant was granted a two-hour recess at the conclusion of the State's evidence. After the recess defendant requested that the trial court issue a bench warrant for Patrick Swain, a defense witness. Defense counsel informed the court that he had subpoenaed Swain, that he had been in contact with Swain, and that Swain had earlier indicated he would testify in this matter, but that defense counsel had spoken with Swain within the last few hours and Swain had refused to appear. Defense counsel later conceded to the court that he was not able to determine whether the Raleigh Police Department had actually served the subpoena on Swain. The trial judge denied defendant's request to issue a bench warrant for Swain.

Defendant, through counsel, informed the court that it wanted to "get in the record a motion to recess" until the next morning in order to have "a last opportunity" to get Swain to testify. Defense counsel stated that Swain would testify that he was the person who caught the cab at 4032 Nealy Street the night of the murder. The trial judge denied defendant's request for an overnight recess, stating, "If you had a served subpoena, then I would have been more inclined to allow your request until [Swain] could be brought to court. I have no indication that he's even available, except what you've told me, much less served with a subpoena." Defendant contends that the failure of the trial court to grant his requested recess violated his Sixth Amendment right under the United States Constitution to have compulsory process to obtain witnesses and his right under the North Carolina Constitution to confront his accusers with witnesses and other testimony pursuant to Article I, Section 23. We disagree.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial judge, and the ruling will not be disturbed absent a showing of abuse of discretion. *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341 (1982). However, when a motion to continue raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable on appeal by examination of the particular circumstances revealed in the record. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). If defendant demonstrates that the denial of a motion for continuance was erroneous and that the error was a constitutional violation, defendant is entitled to a new trial unless the State shows that the error was harmless beyond a reasonable doubt. *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988); *see also State v. Tunstall*, 334 N.C. 320, 328-29, 432 S.E.2d 331, 336-37 (1993).

Continuances should not be granted unless the reasons for the delay are fully established. *State v. McCullers*, 341 N.C. 19, 32, 460 S.E.2d 163, 170 (1995). "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986). " '[A] postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts.' " *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (quoting *State v. Gibson*, 229 N.C. 497, 502, 50 S.E.2d 520, 524 (1948)) (alteration in original).

In the instant case defendant failed to provide any "form of detailed proof indicating sufficient grounds for further delay." *State v.*

Searles, 304 N.C. 149, 155, 282 S.E.2d 430, 434 (1981). The only information before the trial court was defense counsel's unsworn statements. In these statements defense counsel represented that he had been in contact with Swain, that Swain had originally said he would testify but was refusing to come to court, and that a subpoena had been issued but defense counsel was uncertain whether it had been served. Regarding service of the subpoena, we note that the record does not contain a copy of the subpoena so this Court has nothing before it from which to determine when the subpoena was issued, the name designated in the subpoena, or the address shown.

In *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978), this Court stated:

> Furthermore, as was said in *Hoskins v. Wainwright*, 440 F.2d 69, 71 (5th Cir., 1971), "The right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests."

Id. at 206, 244 S.E.2d at 663. The unsworn statements of defendant's trial counsel that Swain would testify that he was the person who hailed the taxi on Nealy Street the night of the murder are not sufficient to establish the "colorable need for the person to be summoned" so as to justify delaying the trial to secure the witness. *See State v. Kuplen*, 316 N.C. at 404, 343 S.E.2d at 803. Defendant's counsel also represented that the police had five outstanding warrants for Swain but were unable to locate him. Hence, the likelihood of Swain's availability the next morning was *de minimis*.

[3] Defendant also argues that he was not afforded a reasonable time to investigate and prepare his case. This contention was not the basis upon which defendant asked for the continuance at trial or assigned error on appeal. Moreover, the record shows that counsel was appointed for defendant in March 1995. Defendant and his counsel, therefore, had until defendant's trial on 5 September 1995, almost six months, to prepare defendant's defense. This argument is without merit.

Given the facts and circumstances surrounding defendant's motion for a continuance, the trial court did not err in denying the motion. This assignment of error is overruled.

[4] Defendant's third and fourth assignments of error relate to the trial court's instruction to the jury on flight. Defendant first contends the instruction on flight was not supported by the evidence.

Over defendant's objection the trial court instructed the jury as follows:

> The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you, together with all other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of the circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990) (*quoting State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

The evidence in the instant case permits an inference that defendant not only left the crime scene, but also took steps to avoid apprehension. Defendant fired two gunshots at the victim and then left the residence without rendering any assistance to the victim or seeking to obtain any medical aid for him. Thereafter, two telephone calls were made from defendant's father's house to a local cab company. A young black male signaled the cab driver on Nealy Street, where the murder occurred, and requested a ride to Melvid Court, where defendant resided. When the cab arrived at Melvid Court, police vehicles were at the residence. The passenger told the cab driver to leave that area as well. This evidence was sufficient to support the trial court's instruction on flight, and this assignment of error is overruled.

[5] Finally, defendant contends the jury instruction on flight given by the trial court was erroneous. Defendant challenges the wording of

the instruction and maintains that the trial court incorrectly stated defendant's contention regarding the issue of flight. Specifically, defendant takes issue with the trial court's statement that defendant denied that he fled. Defendant argues that this was "a gross distortion" of his position. Defendant contends he did not deny that he fled, "for that implies that he was at the murder scene when the homicide was committed."

We note initially that defendant did not specifically object to the trial court's wording of the flight instruction at trial. During the charge conference defendant objected to any instruction concerning flight on the grounds that no evidence in the record supported this instruction. After the jury had been instructed, the trial court gave each party the opportunity to make for the record any objections to the instructions given and to request any additions, deletions, or amendments to the instructions given. At this time defense counsel made a general objection to the instruction on flight.

Pursuant to N.C. R. App. P. 10(b)(2),

> [a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

In the instant case defendant was given the opportunity to object to the wording of the instruction on flight and failed to do so. Defendant has not alleged, nor do we find, plain error. This assignment of error is overruled.

Defendant makes additional arguments as to this instruction which he concedes we have previously rejected. *See State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995); *State v. Jefferies*, 333 N.C. 501, 428 S.E.2d 150 (1993). Defendant has failed to offer any argument sufficient to warrant this Court's reconsideration of its prior holdings on this issue. This assignment of error is overruled.

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

NO ERROR.

HATTIE SAUMS, EMPLOYEE v. RALEIGH COMMUNITY HOSPITAL, EMPLOYER, CONTINENTAL INSURANCE COMPANY (CONTINENTAL LOSS ADJUSTING, ADJUSTING AGENT), CARRIER

No. 494PA96

(Filed 24 July 1997)

Workers' Compensation § 235 (NCI4th)— job created for injured employee—no presumption of availability in job market

There is no presumption that a newly created, post-injury job offered to an employee is of a type generally available in the competitive job market. Therefore, the Industrial Commission did not err by finding that plaintiff, who had been employed as a housekeeper in defendant hospital when injured, was not required to return to a job as a quality control clerk which had been created for her to return to the workplace where the Commission found that the evidence was insufficient to show that the newly created job had not been so modified to fit plaintiff's limitations that it was ordinarily available in the job market.

Am Jur 2d, Workers' Compensation §§ 395-399.

On writ of certiorari to review a unanimous decision of the Court of Appeals, 124 N.C. App. 219, 476 S.E.2d 372 (1996), reversing an opinion and award of the Industrial Commission entered on 22 March 1994 and remanding for entry of a new opinion and award. Heard in the Supreme Court 15 May 1997.

Law Offices of Robin E. Hudson, by Robin E. Hudson, and Law Offices of Nancy P. White, by Nancy P. White, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare and Mallory A. Taylor, for defendant-appellees.

ORR, Justice.

Plaintiff-employee, Hattie Saums, sustained an injury to her back on 22 September 1989 while employed as a housekeeper at defendant Raleigh Community Hospital. On 23 October 1989, the parties entered into North Carolina Industrial Commission Form 21, which is an "Agreement for Compensation for Disability." The Form 21 agreement was approved by the Commission on 28 December 1989. The

agreement provided that defendants agreed to compensate plaintiff $168.01 per week for her disability continuing for the number of weeks deemed necessary. Plaintiff underwent surgery for her injuries in November 1989 and January 1990.

In March 1990, plaintiff was released to return to work with restrictions of "[lifting] no more than 25 pounds . . . [and] no prolonged climbing[] or crawling." Plaintiff resumed her job as a housekeeper at the hospital, but continued to complain of leg pain. Because of this pain, she once again left work to undergo further testing. However, the surgical reexploration and diagnostic tests revealed no evidence of any recurrent disc problems, and plaintiff returned to work. On 4 April 1990, after working for only two days, plaintiff reported to her orthopedic surgeon, Dr. David Fajgenbaum, that she had begun experiencing back and hip pain again. As a result of plaintiff's complaints, Dr. Fajgenbaum performed a laminectomy and fusion on plaintiff on 7 June 1990.

Plaintiff once again returned to work on 21 January 1991. Upon returning to her employment with defendant Raleigh Community Hospital, plaintiff was offered the position of quality control clerk. This position was, as stated by defendant's director of human resources, "a new position created for [plaintiff's] return to the work place." The duties of the quality control clerk included filing, coordinating quality control inspection sheets, counting linens, taking inventory of supplies, and picking up master checkout sheets. Subsequent to plaintiff's return to work, Dr. Fajgenbaum assigned a thirty percent permanent partial disability rating to plaintiff's back. Plaintiff continued to complain of an increase in pain and difficulty with her restricted work duty and left work on 7 February 1992. Between February and July of 1992, plaintiff had numerous additional tests, none of which revealed the cause for plaintiff's continued pain.

Plaintiff was paid compensation for several periods of temporary total disability through 1 July 1992, when she filed a Form 33 request for a hearing. The issues to be decided at the hearing were (1) whether plaintiff was entitled to compensation benefits from 7 February 1992 through 25 February 1992 and from 7 March 1992 through 21 July 1992, and (2) whether plaintiff was entitled to any additional compensation benefits beyond her medical release in December 1992. After the Form 33 was filed, plaintiff underwent additional surgery to remove the hardware used in the fusion. A Form

26 agreement was then prepared, which provided plaintiff compensation of $168.01 per week beginning on 22 July 1992 and lasting for the number of weeks deemed necessary. On 16 December 1992, Dr. Fajgenbaum released plaintiff from his care and stated in a letter to defendant hospital that he could not "find any hard reason why this patient should not be allowed to return to the job that was created by you which would eliminate any strenuous activities." However, plaintiff did not return to the position of quality control clerk. A controversy arose over whether plaintiff was required to return to the job that had been created for her return to the workplace or whether she had a right to continue receiving compensation benefits.

This case was heard before Deputy Commissioner Scott M. Taylor on 20 April 1993. Both parties presented evidence and submitted stipulated medical records. On 24 November 1993, the deputy commissioner issued an opinion and award granting, *inter alia*, compensation benefits for temporary total disability beginning 22 July 1992 and continuing "until plaintiff returns to work or defendants obtain permission from the Industrial Commission to cease payment of temporary total disability compensation, whichever first occurs." The deputy commissioner further found in his opinion and award that plaintiff's refusal to return to work in the "newly created" position was justified. The Industrial Commission affirmed the deputy commissioner's award on 22 March 1994.

Defendants appealed to the Court of Appeals, which, in a unanimous opinion, reversed the Commission and remanded for "entry of a new Opinion and Award." In the opinion below, the Court of Appeals held that "the Commission failed to give the employer the benefit of the presumption that the newly created job of Clerk was ordinarily available in the competitive job market." *Saums v. Raleigh Community Hosp.*, 124 N.C. App. 219, 221, 476 S.E.2d 372, 374 (1996). Plaintiff subsequently filed a petition for discretionary review with this Court. On 7 February 1997, plaintiff's petition was allowed as a writ of certiorari because the petition for discretionary review was not timely filed.

The principal issue in this case is whether the Court of Appeals erred in creating a presumption that a newly created, post-injury job offered to an employee is of a type generally available in the competitive job market. Plaintiff argues that no such presumption exists under North Carolina law. We agree with plaintiff and, accordingly, reverse the Court of Appeals.

"In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment, and (3) that the plaintiff's incapacity to earn was caused by his injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Further, our case law has consistently held that once a Form 21 agreement is entered into by the parties and approved by the Commission, a presumption of disability attaches in favor of the employee. *See Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137-38, 181 S.E.2d 588, 592 (1971); *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 76-77, 476 S.E.2d 434, 436-37 (1996), *disc. rev. denied*, 345 N.C. 343, 483 S.E.2d 169 (1997); *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 282-83, 458 S.E.2d 251, 256-57, *disc. rev. denied and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995); *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994). After the presumption attaches, "the burden shifts to [the employer] to show that plaintiff is employable." *Dalton*, 119 N.C. App. at 284, 458 S.E.2d at 257.

"[A]bsent a settlement with the employee, an award of [permanent partial] disability cannot be undone without resort to a lawful determination by the Commission that the employee's disability no longer exists—which will require the application of law to fact and, therefore, a hearing." *Kisiah*, 124 N.C. App. at 80, 476 S.E.2d at 438. N.C.G.S. § 97-83 provides, in pertinent part:

> [I]f [the employer and employee] have reached such an agreement [for disability payments] which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

N.C.G.S. § 97-83 (1991). The employee need not present evidence at the hearing unless and until the employer, "claim[ing] that the plaintiff is capable of earning wages[,] . . . come[s] forward with evidence

to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

Here, a Form 21 agreement was signed by defendants on 23 October 1989 and provided that defendants agreed to compensate plaintiff $168.01 per week for her disability continuing for the number of weeks deemed necessary. The agreement was approved by the North Carolina Industrial Commission on 28 December 1989. Thus, plaintiff was cloaked in the presumption of disability, and the burden was on the employer to rebut that presumption.

In an attempt to rebut the presumption of disability, defendant hospital presented evidence demonstrating that the job as quality control clerk was available to plaintiff and paid the same wages plaintiff had earned prior to her disability. Defendant's director of human resources, Jo Zane, testified at the hearing and described the quality control clerk job as "a new position created for [plaintiff's] return to the work place." The job consisted of general office-type duties such as filing and answering the telephone, and counting linens. The evidence showed that no one else had been placed in the position, either before or after plaintiff held the job, and that ordinarily the duties were included in other jobs. Additionally, based on the job description stipulated into evidence by the parties, plaintiff was not qualified for the job. The "Position Summary" lists the job as requiring a high school education, while plaintiff had only a ninth-grade education.

Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity. N.C.G.S. § 97-2(9) (1991). However, the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986). As this Court has previously stated:

> If the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The

> rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated.

Id. at 438, 342 S.E.2d at 806. The Court went on to conclude that

> [t]he Workers' Compensation Act does not permit [defendant] to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which [defendant] could terminate at will or, as noted above, for reasons beyond its control.

Id. at 439, 342 S.E.2d at 806.

In this case, it has not been established that the quality control clerk position offered to plaintiff is an accurate measure of plaintiff's ability to earn wages in the competitive job market. There is no evidence that employers, other than defendant, would hire plaintiff to do a similar job at a comparable wage.

Based upon the principles enunciated by this Court in *Peoples*, it is clear that the presumption created by the Court of Appeals is contrary to the law which has been established in this area. Accordingly, we hold that there is no presumption that a newly created, post-injury job offered to an employee is of a type generally available in the competitive job market.

Having concluded that no such presumption exists in North Carolina, we next address plaintiff's contention that the Court of Appeals erred by rejecting the findings of fact made by the Industrial Commission. Plaintiff argues that the Court of Appeals exceeded its scope of review by rejecting findings of fact which were fully supported by the evidence.

"In workers' compensation cases the Industrial Commission is the fact-finding body." *Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997). "On appeal from an order of the Industrial Commission, '[t]he reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact.' " *Id.* at 157, 484 S.E.2d at 367 (quoting *Hendrix*, 317 N.C. at 186, 345 S.E.2d at 379). "When the Commission's findings of fact are supported by competent evidence, they are bind-

ing on the reviewing court in spite of the existence of evidence supporting contrary findings." *Hendrix*, 317 N.C. at 186, 345 S.E.2d at 379.

In the present case, the deputy commissioner made the following findings of fact regarding the plaintiff's post-injury employment:

> 13. On 16 December 1992, plaintiff was released to return to work by Dr. Fajgenbaum. . . . [A]fter the hardware removal surgery on 22 July 1992, plaintiff was capable of returning to work at the Quality Control Clerk position.
>
> 14. The Quality Control Clerk position, however, which [the hospital] offered plaintiff, was a new position which was created for plaintiff upon her previous return to work on 21 January 1991. There is insufficient evidence of record from which to determine by its greater weight that the newly created job position had not been so modified to fit plaintiff's limitations that it was ordinarily available in the competitive job market.
>
> 15. Following plaintiff's release to return to work on 16 December 1992, plaintiff refused to return to work as the Quality Control Clerk. Since the Quality Control Clerk position was a new position which was created for plaintiff upon her return to work, plaintiff's refusal to return to work in that position was justified.

Based on the deputy commissioner's findings of fact, he concluded that

> [a]s a result of plaintiff's compensable injury on 22 September 1989, plaintiff is entitled to temporary total disability compensation at the weekly rate of $168.01, from 22 July 1992 and continuing until plaintiff returns to work or defendants obtain permission from the Industrial Commission to cease payment of temporary total disability compensation, whichever first occurs. Defendants, however, are entitled to a credit for the amount of compensation paid to plaintiff following 22 July 1992.

The full Commission affirmed the award issued by the deputy commissioner in a separate opinion and award.

As noted above, the Court of Appeals reversed and remanded this case for "entry of a new Opinion and Award," stating that the Commission erred by failing to "give the employer the benefit of the presumption that the newly created job of Clerk was ordinarily avail-

able in the competitive job market." *Saums*, 124 N.C. App. at 221, 476 S.E.2d at 374. Because no such presumption exists in North Carolina and because there is sufficient evidence to support the Commission's findings, we reverse the Court of Appeals. This case is remanded to that court for further remand to the Industrial Commission for reinstatement of its opinion and award.

REVERSED AND REMANDED.

TONY B. NICHOLSON v. AMERICAN SAFETY UTILITY CORPORATION, DUKE POWER COMPANY AND NORTH HAND PROTECTION, A DIVISION OF SIEBE NORTH, INC., SIEBE NORTH HOLDINGS CORP., SIEBE, INC., SIEBE INDUSTRIES, INC., AND SIEBE PLC

No. 486PA96

(Filed 24 July 1997)

Products Liability § 18 (NCI4th)— electrical safety gloves—products liability action by lineman—contributory negligence

Summary judgment was improperly granted for defendants on the issue of plaintiff's contributory negligence where plaintiff was an electrical lineman; his protective helmet was blown off by the wind three times while he was working on an overhead power line; he did not replace it the third time; an energized line either touched plaintiff or came within a short distance of his unprotected head; electricity ran from the overhead line through his body and exited by his gloved hands, which were holding a grounded cable; and defendants were the manufacturer and seller of the gloves. N.C.G.S. § 99B-4(1) and (3) merely codify the common law doctrine of contributory negligence as it applies in products liability actions, and N.C.G.S. § 99B-4 sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action. It does not create a different rule for products liability actions but clarifies the common law contributory negligence standard with respect to these actions and clearly provides that one who is negligent under the circumstances in the use of the product will be barred from recovery. All of the circumstances during the plaintiff's use

of the product must be considered, not just plaintiff's conduct with respect to the product itself. Here, defendants' and plaintiff's affidavits contest whether plaintiff's conduct was reasonable under the circumstances and an issue of fact exists as to the reasonableness of plaintiff's conduct under the circumstances.

Am Jur 2d, Products Liability §§ 1047, 1333, 1346, 1431, 1451.

Products liability: product misuse defense. 65 ALR4th 263.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 124 N.C. App. 59, 476 S.E.2d 672 (1996), affirming in part and reversing in part judgments entered by Farmer, J., at the 13 February 1995 Civil Session of Superior Court, Wake County. Heard in the Supreme Court 13 May 1997.

Twiggs, Abrams, Strickland & Trehy, P.A., by Douglas B. Abrams, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner and H. Lee Evans, Jr., for defendant-appellant American Safety Utility Corp.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Richard W. Ellis, and Leslie C. O'Toole, for defendant-appellant Siebe North, Inc., and Siebe Holdings Corp.

John N. Hutson, Jr., and Scott A. Miskimon, amici curiae.

Battle, Winslow, Scott & Wiley, P.A., by Sam S. Woodley, on behalf of The North Carolina Association of Defense Attorneys, amicus curiae.

FRYE, Justice.

In the main issue on this appeal, we consider the defense of contributory negligence as codified in N.C.G.S. § 99B-4(3) and its application to products liability claims brought by plaintiff to recover for injuries sustained in an accident. We affirm the Court of Appeals on the issues of defendants' negligence and defendant Siebe's breach of implied warranty for the reasons stated in its opinion. We further conclude that the Court of Appeals erred in its interpretation of N.C.G.S. § 99B-4(3) and hold that N.C.G.S. § 99B-4(3) codifies the common law standard of contributory negligence and does not limit the defense to

a plaintiff's misuse of the product. Finally, we hold that summary judgment was not proper on the issue of plaintiff's contributory negligence, and therefore, we affirm the Court of Appeals as to that issue but on different grounds.

On 26 January 1990, plaintiff, an experienced Class A electrical lineman for Harrison-Wright, Inc., was working on a project for Duke Power Company extending an overhead power line across the road from one utility pole to another. Plaintiff and a co-worker were standing in an insulated utility bucket elevated beneath energized overhead lines which carried approximately 7,200 volts of electricity. The energized lines were covered with rubber hoses to shield plaintiff and his helper from the high voltage while in close proximity to the lines. In addition, the men wore protective helmets and rubber safety gloves.

At the time of the incident, plaintiff was connecting a de-energized conductor to a de-energized underground cable. Plaintiff's helmet had blown off twice, and each time, he had immediately lowered the utility bucket to retrieve it. After retrieving the helmet the second time, plaintiff was tightening a "split bolt" when the wind blew his helmet off a third time. Without retrieving his helmet, plaintiff continued to tighten the split bolt. An energized line from above him either touched or came within an extremely short distance of plaintiff's unprotected head. Electricity raced from the overhead line to plaintiff's head and through his body and exited via his gloved hands, which were holding a de-energized, grounded cable. Plaintiff suffered severe and permanent brain damage and nervous system injuries.

The gloves worn by plaintiff at the time of his injury were manufactured by defendant Siebe North, Inc. (Siebe), and were subsequently purchased by defendant American Safety Utility Corporation (ASU) on 18 March 1989. Thereafter, the gloves were sold and delivered by ASU to plaintiff's employer, Harrison-Wright, on or about 14 January 1990. According to affidavits submitted by defendants, before plaintiff's accident, the gloves had passed two industry-standard safety tests—a visual and dielectric safety test at Siebe on 16-17 February 1989 and a second similar test at ASU on 12 January 1990. Siebe sold the gloves as Class II lineman's gloves, safe for use with energized lines up to 17,000 volts. Plaintiff obtained the gloves from his employer on 23 January 1990 and suffered the injury on 26 January 1990.

After the accident, plaintiff commenced a products liability action by filing a complaint against defendants ASU and Duke Power Company on 9 December 1992, alleging that defendant ASU (1) negligently failed to properly test rubber gloves which it contracted to test; (2) negligently supplied defective rubber gloves to plaintiff when it knew or should have known that rubber gloves are a safety device used by persons working on energized power lines and when it knew or should have known that defective rubber gloves would put the lives and health of persons such as plaintiff in jeopardy; (3) negligently represented that the subject rubber gloves had been properly tested and that the rubber gloves were suitable for use by persons working on energized power lines, when in fact the rubber gloves were defective and were unsuitable for such use; and (4) negligently inspected the subject rubber gloves. Plaintiff alleged that his injuries were caused when the electrical current "completed as a result of the defective condition of the subject rubber gloves." Plaintiff also alleged that defendant Duke Power Company was legally responsible for the negligence of ASU under the doctrine of *respondeat superior*.

On 19 January 1993, plaintiff amended his complaint to add the Siebe defendants (collectively referred to herein as "Siebe" or "defendant Siebe") as parties to this action, alleging Siebe's negligence and breach of warranties, and to add a claim for breach of warranties against defendant ASU. Plaintiff's claims were brought against defendant Siebe as manufacturer of the gloves worn by plaintiff at the time of the accident and against ASU as the seller of the gloves. Plaintiff alleged claims of negligence against Siebe and ASU based upon their failure, *inter alia*, to "exercise due care in the testing, inspection, marketing, promotion, sale and/or delivery of the subject safety gloves." Plaintiff's complaint also contained claims of breach of express and implied warranties, including specifically the failure to warn. Defendant Duke Power Company is not a party to this appeal.

The Siebe defendants filed answers on 17 March 1993, and defendant ASU filed its answer on 26 March 1993. Defendants denied any breach of warranty or negligence and asserted several affirmative defenses, including contributory negligence, assumption of risk, and damage to the gloves subsequent to defendants' release of possession and control thereof.

On 1 February 1995, defendant ASU filed a motion for summary judgment as to all claims, and on 3 February 1995, defendant Siebe

made a similar motion for summary judgment. Plaintiff moved for partial summary judgment on the issues of breach of implied warranty and contributory negligence and filed a notice of filing in opposition to defendant Siebe's motion for summary judgment and in support of plaintiff's motion for partial summary judgment on 3 February 1995.

On 21 February 1995, the trial court, having considered the affidavits, briefs, and other materials submitted by the parties, granted summary judgment in favor of defendants Siebe and ASU and denied plaintiff's motion for summary judgment. In granting defendants' motions for summary judgment, the trial court found that there was no genuine issue as to any material fact and that plaintiff was contributorily negligent as a matter of law.

Plaintiff appealed to the North Carolina Court of Appeals, which affirmed the entry of summary judgment in favor of ASU on the issue of breach of implied warranty and in favor of all defendants on the issue of breach of express warranty. However, regarding the issues of plaintiff's contributory negligence, defendants' negligence, and Siebe's breach of implied warranty, the Court of Appeals reversed the trial court's grant of summary judgment in favor of defendants. This Court granted defendants' petitions for discretionary review on the issues of defendants' negligence, Siebe's breach of implied warranty, and plaintiff's contributory negligence.

As to the issue of defendants' negligence, the Court of Appeals reversed the summary judgment entered in favor of defendants, holding that a genuine issue of material fact existed as to "the alleged failure of defendants Siebe and ASU to test and inspect the gloves properly and to convey adequate warning of potential deficiencies in the gloves." *Nicholson v. American Safety Util. Corp.*, 124 N.C. App. 59, 66, 476 S.E.2d 672, 677 (1996). On plaintiff's claim of breach of implied warranty against defendant Siebe, the Court of Appeals reversed the summary judgment in favor of Siebe because of "a genuine issue of material fact regarding the existence of a defect in the gloves at the time they left Siebe's possession." *Id.* at 69, 476 S.E.2d at 678. We agree that genuine issues of material fact exist with respect to defendants' negligence and Siebe's breach of implied warranty, and therefore, we affirm the Court of Appeals on these issues for the reasons stated in that court's opinion.

The central issue on this appeal is plaintiff's alleged contributory negligence and the scope of that defense as it is defined in N.C.G.S.

§ 99B-4(3). N.C.G.S. § 99B-4, as it existed at the time of the accident, provided as follows:

> No manufacturer or seller shall be held liable in any product liability action if:
>
> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; provided, that in the case of prescription drugs or devices the adequacy of the warning by the manufacturer shall be determined by the prescribing information made available by the manufacturer to the health care practitioner; or
>
> (2) The user discovered a defect or unreasonably dangerous condition of the product and was aware of the danger, and nevertheless proceeded unreasonably to make use of the product and was injured by or caused injury with that product; or
>
> (3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant.

N.C.G.S. § 99B-4 (1989). N.C.G.S. § 99B-4(2) addressed discovered defects or unreasonably dangerous conditions of the product and a plaintiff's conduct with respect to those defects or conditions. We have said that N.C.G.S. § 99B-4(1) and (3) "merely codify the common law doctrine of contributory negligence" as it applies in products liability actions. *Champs Convenience Stores, Inc. v. United Chemical Co.*, 329 N.C. 446, 452, 406 S.E.2d 856, 860 (1991). "In addition to codifying the general doctrine of contributory negligence, § 99B-4 sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action." *Id.* at 453, 406 S.E.2d at 860.

At common law, "[a] plaintiff is contributorily negligent when he fails to exercise such care as an ordinarily prudent person would exercise *under the circumstances* in order to avoid injury." *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 564, 467 S.E.2d

58, 65 (1996) (emphasis added). N.C.G.S. § 99B-4(3) does not create a different rule for products liability actions; it clarifies the common law contributory negligence standard with respect to these actions. The statute clearly provides that one who is negligent "under the circumstances in the use of the product" will be barred from recovery. *See Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 721-22 (4th Cir. 1995) (holding that the focus of N.C.G.S. § 99B-4(3) is not on a plaintiff's "use of the product" *per se*; rather, the focus is on whether a plaintiff "failed to exercise reasonable care under the circumstances in the use of the product"); *cf. Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 338-39 (4th Cir.) (common law defense of contributory negligence not defense to claim brought under Kentucky's products liability statute), *cert. denied*, 502 U.S. 820, 116 L. Ed. 2d 52 (1991).[1] Thus, all of the circumstances during the plaintiff's use of the product must be considered, not just plaintiff's conduct with respect to the product itself.

"In a product liability action founded on negligence, '[t]here is no doubt that . . . [plaintiff's] contributory negligence will bar his recovery to the same extent as in any other negligence case.' " *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 672, 268 S.E.2d 504, 506 (1980) (quoting William L. Prosser, *Handbook of The Law of Torts* § 102, at 670 (4th ed. 1971)) (alterations in original). In addition, contributory negligence also bars a products liability claim against a manufacturer or seller based on breach of implied warranty. N.C.G.S. § 99B-4 ("No manufacturer or seller shall be held liable in *any* product liability action if [plaintiff is contributorily negligent.]") (emphasis added); *Gillespie v. American Motors Corp.*, 69 N.C. App. 531, 317 S.E.2d 32 (1984); *see also Steelcase, Inc. v. Lilly Co.*, 93 N.C. App. 697, 701, 379 S.E.2d 40, 43 (noting that the plaintiff's contributory negligence defeated its entitlement to damages under a claim for breach of implied warranty), *disc. rev. denied*, 325 N.C. 276, 384 S.E.2d 530 (1989). Thus, contributory negligence in the context of a products liability action operates as a bar to recovery in the same manner as in an ordinary negligence action.

Having determined the scope of contributory negligence and its application in a products liability action, we turn to whether the trial court erred in concluding that plaintiff was contributorily negligent as a matter of law. Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, admissions on

1. Plaintiff's reliance on *Sexton* is misplaced because, unlike North Carolina's statute, Kentucky's products liability statute is based on strict liability.

file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990). The party moving for summary judgment has the burden of showing that there is no triable issue of material fact. *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). On a motion for summary judgment, "the forecast of evidence and all reasonable inferences must be taken in the light most favorable to the non-moving party." *Woodson v. Rowland*, 329 N.C. 330, 344, 407 S.E.2d 222, 231 (1991).

Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment. *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 418, 395 S.E.2d 112, 116 (1990). Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468-69, 279 S.E.2d 559, 563 (1981).

In the instant case, defendants' and plaintiff's pleadings and affidavits contest whether plaintiff's conduct was reasonable under the circumstances. Among the statements in defendants' affidavits, James Samuel McKnight, an electrical engineer, asserted that "plaintiff's failure to comply with the safety standards was the cause of the accident." On the other hand, among the statements in plaintiff's affidavits is a statement by Arthur R. McDonald, an electrical engineer and vice-president of Harrison Wright, that "[t]he procedures followed by [plaintiff] were consistent with the types of procedures other linemen similarly trained would follow under similar circumstances." Therefore, an issue of fact exists as to the reasonableness of plaintiff's conduct under the circumstances. Thus, the grant of summary judgment on the issue of plaintiff's contributory negligence was improper. Accordingly, we affirm the Court of Appeals' decision reversing the trial court's entry of summary judgment in favor of defendants as to the issue of contributory negligence, but for the reasons stated herein rather than those stated by the Court of Appeals.

MODIFIED AND AFFIRMED.

MARGARET ANN LEAHY, R.N., PETITIONER v. NORTH CAROLINA BOARD OF NURSING, RESPONDENT

No. 360PA96

(Filed 24 July 1997)

1. Physicians, Surgeons, and Other Health Care Professionals § 14 (NCI4th)— revocation of nurse's license—findings supported by evidence

Substantial evidence supported findings of the Board of Nursing as to instances of negligence or incompetence by a registered nurse upon which the Board based its order revoking the nurse's license.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 96, 99, 101.

Revocation of nurse's license to practice profession. 55 ALR3d 1141.

2. Physicians, Surgeons, and Other Health Care Professionals § 14 (NCI4th)— revocation of nurse's license—standard of care—expert testimony not required

The Board of Nursing could properly revoke the license of a registered nurse even though there was no expert testimony defining the standard of care for registered nurses in the practice of their profession since the Board must know the standard of care in order to perform its duties under the Nursing Practice Act. The decision of *Dailey v. N.C. State Bd. Of Dental Examiners*, 309 N.C. 710, 309 S.E.2d 219 (1983) is overruled to the extent that it is inconsistent with this opinion.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 112, 113.

Revocation of nurse's license to practice profession. 55 ALR3d 1141.

Necessity of expert evidence in proceeding for revocation or suspension of license of physician, surgeon, or dentist. 74 ALR4th 969.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous unpublished decision of the Court of Appeals, 123 N.C. App.

354, 473 S.E.2d 694 (1996), reversing an order entered by Bowen, J., on 31 March 1995 in Superior Court, Wake County. Heard in the Supreme Court 15 April 1997.

This case involves the suspension of the license of a registered nurse. The petitioner was notified by letter from the North Carolina Board of Nursing that it had come to the Board's attention that she may have been negligent or incompetent in her actions as a nurse. The petitioner asked for a settlement conference. When the parties could not resolve the issues between them at the settlement conference, a hearing was held before the full Board.

Four witnesses who were either registered nurses (RNs) or licensed practical nurses (LPNs) testified as to instances of alleged negligence or incompetence of the petitioner. Gail Cone testified that she was an LPN who was on duty at the Community General Hospital in Thomasville on the night of 14-15 August 1991. A Ms. Clodfelter was a patient on the third floor of the hospital. Ms. Cone was assigned to Ms. Clodfelter, with the petitioner as her supervisor. Ms. Cone checked on the patient, whose respiration rate had dropped from twenty to eight. Ms. Cone went to the petitioner and told her of this drop. The petitioner did not go immediately to the patient, so Ms. Cone went back to the patient. When the respiration rate stayed at eight, Ms. Cone returned to the petitioner and said, "Peg, you really need to come check on the patient." The petitioner went to Ms. Clodfelter's room and after observing her, said the patient's respirations were deep and that she should be all right.

Approximately fifteen minutes later, at 5:00 a.m., Ms. Cone went to Lavern McCracken, an RN, and asked permission to leave the hospital. In response to a question from Ms. McCracken, Ms. Cone said her patients were all right except for Ms. Clodfelter, whose respiration rate had dropped to eight. Ms. McCracken asked if a doctor had been called, and when Ms. Cone said "no," Ms. McCracken and Ms. Cone went immediately to Ms. Clodfelter's room. A doctor was called, and he prescribed Narcan, which was administered.

Ms. McCracken testified that when she went with Ms. Cone to Ms. Clodfelter's room, Ms. Clodfelter did not respond to any verbal or tactile stimuli. She was barely breathing. Ms. Clodfelter responded to the Narcan and was moved to the intensive care unit. Lynn Boggs, an RN, also testified.

Sylvia Collins testified that she was a registered nurse and supervising nurse at Community General Hospital. On the night of 7-8

October 1991, a Mr. Clodfelter, who was not related to Ms. Clodfelter, was a patient on the third floor of the hospital. The petitioner was the charge nurse for Mr. Clodfelter. An LPN reported to Ms. Collins his concern about Mr. Clodfelter's urine color. Ms. Collins then assessed the urine and believed it was too bloody. She instructed the LPN to call the urologist and inform him of the situation. The petitioner countermanded Ms. Collins' order by telling the LPN not to call the urologist. Later that night, Ms. Collins again assessed Mr. Clodfelter. Upon finding that his urine had not changed color, she asked the LPN whether he had called the urologist, and he told her he had not. The petitioner joined them, and when Ms. Collins asked why the urologist was not called, the petitioner said there was no need to call him because the patient's vital signs were stable. Ms. Collins again told the LPN to call the urologist, and the petitioner countermanded this instruction before the call could be made. When Ms. Collins asked the petitioner why she had stopped the LPN from calling, the petitioner said she saw no reason to do so after assessing the patient.

Ms. Collins testified further that at 6:00 a.m., she went to Mr. Clodfelter's room to assess him. He was evidently suffering from congestive heart failure. The LPN called the doctor, and Mr. Clodfelter was given medication and moved to the intensive care unit. The petitioner told Ms. Collins that she had been to the patient's room at 5:40 a.m. to hang a 6:00 a.m. medication. The patient was breathing deeply, and she thought he needed to be turned and deep breathed. She left the room, completed her 6:00 a.m. "meds," and checked on other patients. Ms. Collins was concerned that the petitioner did not come to Mr. Clodfelter's room while Ms. Collins was treating him. The petitioner told her that she had a patient who was in severe pain and that she had to medicate him and give him an enema. When Ms. Collins asked which of the two cases was more important, the petitioner said Ms. Collins and the LPN were in the room, and she knew they could take care of the patient.

The petitioner testified on her own behalf. She also had the testimony of Elaine Troschrodt, an RN who testified as an expert on nursing care. Ms. Troschrodt testified that in her opinion the petitioner did not violate the standard of nursing care in her treatment of the two patients. The petitioner introduced into evidence an affidavit by Dr. Marvin W. Phillips, who was Ms. Clodfelter's attending physician, in which Dr. Phillips said the nursing notes indicated that this patient was appropriately monitored, that he was called in a timely manner, and that his orders were carried out appropriately. The petitioner

also introduced into evidence an affidavit by Dr. Oscar Blackwell, Mr. Clodfelter's attending physician, in which Dr. Blackwell said that in his opinion the patient was appropriately monitored and that he was advised in a timely manner of the patient's respiratory difficulties. The petitioner also introduced into evidence an affidavit of Dr. Paul Coughlin, a urologist who had performed a procedure on Mr. Clodfelter, in which he said that in his opinion the patient was appropriately monitored.

The Board found facts which were consistent with the nurses' testimony. It concluded that the petitioner violated N.C.G.S. § 90-171.37(4) to (8) by (a) failing to document the care rendered to Mr. Clodfelter, (b) failing to recognize the danger to Mr. Clodfelter of the symptoms of congestive heart failure and excessive bleeding, (c) failing to set her priorities appropriately in determining which patients presented the greatest danger and most needed her care on 8 October 1991, (d) failing to provide adequate follow-up to Ms. Clodfelter, (e) failing to recognize the importance of the prompt initiation of oxygen for Ms. Clodfelter, (f) failing to supervise appropriately the care given both patients by the LPNs, and (g) failing to make patient information available to another health-care professional, as evidenced by her failure to notify or to allow an LPN under her supervision to notify a doctor of the change in condition of patients.

The Board revoked the petitioner's license for one year. The superior court affirmed. The Court of Appeals reversed the superior court, and we allowed the Board's petition for discretionary review.

Silverstein & Hodgdon, P.A., by Thaddeus B. Hodgdon, for petitioner-appellee.

Howard Kramer and Jordon, Price, Wall, Gray & Jones, L.L.P., by R. Frank Gray and Laura J. Wetsch, for respondent-appellant.

Allen and Pinnix, P.A., by Noel L. Allen, on behalf of the North Carolina State Board of Certified Public Accountant Examiners and the North Carolina Board of Architecture, amici curiae.

Bailey & Dixon, by Carson Carmichael, III, on behalf of The North Carolina Board of Pharmacy, amicus curiae.

Johnson, Mercer, Hearn & Vinegar, P.L.L.C., by George G. Hearn, on behalf of the North Carolina Veterinary Medical Board, amicus curiae.

WEBB, Justice.

[1] The petitioner first argues that under the "whole record" test, which must be applied in this case, there is not substantial evidence to support the findings of fact by the Board upon which it based its order revoking her license. *See Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977). The first finding of fact about which the petitioner complains is the finding that she did not adequately document the treatment of Mr. Clodfelter. Lynn Boggs testified, "Throughout the entire evening there was no documentation by Ms. Leahy although she was the RN on the case." This testimony supports the finding of fact.

The petitioner next attacks the Board's finding that she was negligent in failing to recognize the symptoms of congestive heart failure in Mr. Clodfelter. Ms. Collins testified that at 5:40 a.m., the petitioner was in Mr. Clodfelter's room and noticed he was breathing deeply. Nevertheless, she left the room to check on other patients. Twenty minutes later, at 6:00 a.m., Ms. Collins went to Mr. Clodfelter's room and discovered he was suffering from congestive heart failure. Ms. Boggs testified that the LPN documented Mr. Clodfelter's symptoms; the signs and symptoms indicated the patient was going into acute heart failure, but there was no indication the petitioner intervened. This testimony supports the finding of fact.

The petitioner next says the finding of fact that she did not make patient information available to another health-care professional by not notifying a doctor of the patient's change in condition cannot stand. She relies on the testimony of Ms. Troschrodt and the affidavits of Dr. Coughlin and Dr. Blackwell. Each of them said there was no need to call a doctor until 6:00 a.m. There was positive testimony from Ms. Collins and Ms. Boggs that the doctor should have been called earlier. The Board could accept this testimony rather than the evidence adduced by the petitioner.

The petitioner next attacks the Board's finding that the petitioner failed to set her priorities appropriately. This conclusion was based on the testimony of Ms. Collins and Ms. Boggs, each of whom testified that the petitioner should have been in Mr. Clodfelter's room when he was suffering from congestive heart failure rather than in the room of another patient. The petitioner introduced evidence to the contrary, but again the Board was the judge of the credibility of this testimony.

The petitioner says the Board's finding that she did not go immediately to Ms. Clodfelter's room when Ms. Cone told her Ms. Clodfelter's respirations had decreased to twelve per minute was not supported by the evidence. Ms. Cone testified that the respirations had decreased to eight per minute. This error in the finding of fact did not prejudice the petitioner.

The petitioner next says there is no evidence to support the finding of fact that when the emergency service to Mr. Clodfelter was being performed, she did not come to Mr. Clodfelter's room although she knew of the emergency. If the petitioner was unaware of the emergency, this would not change the outcome of the case. There are other findings of fact supported by the evidence which support the Board's conclusion.

Finally, the petitioner says there was not sufficient evidence to support the Board's conclusion that the petitioner "failed to recognize the importance of the prompt initiation of oxygen for Ms. Clodfelter on August 15, 1991." Ms. Boggs testified that one of the things that concerned her was that although the patient had described continuous chest pains for thirty minutes, no oxygen was administered for thirty-three minutes. This testimony supports the finding.

Considering the whole record, there was substantial evidence to support the findings of fact and conclusions of the Board.

[2] The petitioner argues and the Court of Appeals held that the Board's order cannot stand because there was no expert testimony defining the standard of care for registered nurses in the practice of their profession. The Court of Appeals relied on *Dailey v. N.C. State Bd. of Dental Examiners*, 309 N.C. 710, 309 S.E.2d 219 (1983), for this holding. We do not believe *Dailey* governs this case. The concern in *Dailey* was that the board would use its own expertise to decide the case without any evidence to support it. That is not the case here. There is evidence in the record which the Board could use its expertise to interpret, including its expertise as to whether the petitioner had violated the standard of care for registered nurses. From the record, we are able to determine the validity of the Board's action.

Article 3A of the Administrative Procedure Act, chapter 150B of the North Carolina General Statutes, governs disciplinary hearings by professional licensing boards. N.C.G.S. § 150B-41(d) provides in part, "An agency may use its experience, technical competence, and spe-

cialized knowledge in the evaluation of evidence presented to it." N.C.G.S. § 150B-41(d) (1995). The knowledge of the Board includes knowledge of the standard of care for nurses. The Board currently consists of nine registered nurses, four licensed practical nurses, one retired doctor, and one lay person. The Board is authorized to develop rules and regulations to govern medical acts by registered nurses. N.C.G.S. § 90-171.23(b)(14) (1993). It is empowered to administer, interpret, and enforce the Nursing Practice Act. N.C.G.S. § 90-171.23(b)(1), (2), (3), (7). The Board is required to adopt standards regarding qualifications of applicants for licensure and to establish criteria which must be met by an applicant in order to receive a license. N.C.G.S. § 90-171.30 (1993). To meet these requirements, the Board must know the standard of care for registered nurses in this state. There is no reason it should not be allowed to apply this standard if no evidence of it is introduced.

We can understand why the Court of Appeals applied *Dailey* as it did, but we believe our interpretation is better. So far as *Dailey* is inconsistent with this case, it is overruled.

For the reasons stated in this opinion, the Court of Appeals is reversed.

REVERSED.

PHILIP B. CATES AND DURHAM COUNTY, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S OFFICE, AND NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, RESPONDENTS

No. 111PA96

(Filed 24 July 1997)

Attorney General § 11 (NCI4th); Sanitation and Sanitary Districts § 5 (NCI4th)— local sanitarian—preliminary soil evaluation—alleged negligence—no duty by Attorney General to defend

The Attorney General was not required by N.C.G.S. § 143-300.8 to defend a county health department sanitarian in a developer's action arising out of the sanitarian's alleged negligence in conducting a preliminary soil evaluation on a tract of

land to determine its suitability for septic systems since the evaluation was not required or governed by the rules of the Commission for Health Services, and a local sanitarian who conducts a preliminary soil evaluation is providing a local service and is not enforcing the rules of the Commission.

Am Jur 2d, Attorney General §§ 22-26; Waterworks and Water Companies § 31.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) and N.C. R. App. P. 21(a)(2) of a decision of the Court of Appeals, 121 N.C. App. 243, 465 S.E.2d 64 (1996), affirming an order by Hight, J., entered 29 September 1994 in Superior Court, Wake County. Heard in the Supreme Court 11 February 1997.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Johnny M. Loper, for petitioner-appellants.

Michael F. Easley, Attorney General, by Mabel Y. Bullock, Special Deputy Attorney General, for respondent-appellees.

PARKER, Justice.

The issue presented in this case is whether N.C.G.S. § 143-300.8 required the Attorney General to defend a local sanitarian in an action arising out of the sanitarian's alleged negligence in conducting a preliminary soil evaluation. For the reason stated herein, we conclude that the Attorney General was not required to defend petitioner Philip B. Cates. Accordingly, we modify and affirm the decision of the Court of Appeals.

Cates, a registered sanitarian, was employed by the Environmental Health Division of the Durham County Health Department. On 17, 18, and 21 July 1986, at the request of H&W Developers, Cates conducted a preliminary soil evaluation on a tract of land in Durham County. Cates determined that all but one of fifty proposed lots were suitable for on-site septic systems, and H&W Developers purchased the tract of land in reliance on Cates' evaluation. After several prospective lot purchasers contacted the Durham County Health Department to obtain improvements permits, the Health Department discovered that twenty of the forty-nine lots deemed suitable by Cates were not suitable for on-site septic systems. In July 1989 H&W Developers filed a civil action against Cates and Durham County alleging that Cates was negligent in conducting the preliminary soils analysis and in issuing the preliminary soils

analysis report. The negligence action against Cates and Durham County proceeded to trial in 1990. Cates was covered by an insurance policy providing one million dollars in professional liability coverage issued to Durham County, and pursuant to this policy Cates was represented by private counsel. After eleven days of trial, the action was settled for the sum of $495,000.

In the meantime, on 17 October 1989 Cates, through counsel, notified the Secretary of Human Resources that N.C.G.S. § 143-300.8 required the Attorney General to defend Cates and formally requested that the Attorney General defend Cates or authorize private counsel. By letter, dated 9 February 1990, Assistant Attorney General Gayl M. Manthei informed Cates' counsel that the action was "not one where representation by the Attorney General's Office is appropriate." Manthei explained that N.C.G.S. § 143-300.8 was enacted after Cates performed the preliminary soil evaluation and that a local health department sanitarian is not enforcing the rules of the Commission for Health Services ("Commission") when conducting such evaluations. In March 1990 Cates, through counsel, asked the Attorney General to conduct a review of Manthei's decision. Chief Deputy Attorney General Andrew A. Vanore, Jr. responded by letter on 10 April 1990 and informed counsel that the decision rendered by Manthei was correct for the reasons stated in Manthei's 9 February 1990 letter.

On 30 March 1990 Cates filed a petition for administrative review contesting the Attorney General's decision not to defend Cates. Both the Department of Justice ("DOJ") and Cates filed motions for summary judgment. On 30 August 1993 Administrative Law Judge Michael Rivers Morgan entered a recommended decision granting Cates' motion. Morgan recommended that the DOJ provide legal representation to Cates in the negligence action or reimburse Cates for any costs of legal representation incurred by Cates as a direct result of the Attorney General's decision to deny Cates' request for legal representation.

On 7 February 1994 the DOJ entered a final agency decision rejecting Morgan's recommended decision. In the decision Attorney General Michael F. Easley listed several reasons for declining to adopt the recommended decision. The reasons for rejecting the recommended decision included the following: (i) N.C.G.S. § 143-300.8 was not in effect at the time of the acts which prompted the legal action; (ii) preliminary site evaluations are local services which are not provided for by the rules of the Commission and are, therefore,

not within the scope of N.C.G.S. § 143-300.8; (iii) the underlying action was settled within the limits of Durham County's commercial liability policy, rendering Cates' petition for administrative review moot; and (iv) even if an administrative law judge has the power to order the Attorney General to pay damages, the State is protected from such orders by sovereign immunity.

On 7 March 1994 Cates and Durham County filed a petition for judicial review in the Superior Court, Wake County; and the cause was heard by Superior Court Judge Henry W. Hight, Jr. By order dated 29 September 1994, the court ruled *inter alia* that the question of State responsibility was moot and dismissed the petition for judicial review.

A divided panel of the Court of Appeals affirmed. *Cates v. N.C. Dep't of Justice*, 121 N.C. App. 243, 465 S.E.2d 64 (1996). The Court of Appeals determined that N.C.G.S. § 143-300.8 required the Attorney General to defend Cates. *Id.* at 248, 465 S.E.2d at 68. However, the Court of Appeals concluded that any claim by Cates and Durham County for reimbursement of legal fees incurred in defending the negligence action was barred by the doctrine of sovereign immunity. *Id.*

The dispositive issue is whether N.C.G.S. § 143-300.8 required the Attorney General to defend Cates in an action arising out of his alleged negligence in conducting a preliminary soil evaluation. N.C.G.S. § 143-300.8 provides, in pertinent part:

> Any local health department sanitarian enforcing rules of the Commission for Health Services under the supervision of the Department of Environment, Health and Natural Resources pursuant to G.S. 130A-4(b) shall be defended by the Attorney General, subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of this Article in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Health Services. The Department of Environment, Health, and Natural Resources shall pay any judgment against the sanitarian, or any settlement made on his behalf, subject to the provisions of G.S. 143-300.6.

N.C.G.S. § 143-300.8 (1996).

Pursuant to N.C.G.S. § 130-335(e), the Commission has promulgated rules governing the treatment and disposal of domestic type sewage from septic tank systems. *See* 15A NCAC 18A .1934 (June 1995) (rules .1901 to .1968 of subchapter 18A of title 15A of the North Carolina Administrative Code were transferred and recodified from rules .1901 to .1968 of subchapter 10A of title 10 of the North Carolina Administrative Code, effective 4 April 1990). At the time Cates conducted the soil evaluation, the rules required an improvements permit prior to construction or installation of a sewage treatment and disposal system. 10 NCAC 10A .1937(a) (1986). The rules stated that "[t]he local health department shall issue an Improvements Permit only after it has determined that the [sewage] system is designed and can be installed so as to meet the provisions of these Rules." 10 NCAC 10A .1937(b). The rules further provided that "[t]he local health department shall investigate each proposed site" and that "[s]ite evaluations shall be made in accordance with Rules .1940 through .1948 of this Section." 10 NCAC 10A .1939.

The Court of Appeals concluded that Cates was enforcing rules of the Commission because the preliminary soil evaluation was conducted consistent with the criteria established by the Commission and because the rules of the Commission did not prohibit the procedure used by Durham County. *Cates*, 121 N.C. App. at 247-48, 465 S.E.2d at 67. Petitioners argue that Cates was enforcing the Commission's rules because (i) Durham County does not have any rules requiring or governing preliminary soil evaluations and (ii) Cates followed the criteria set forth in the rules when he conducted the preliminary soil evaluation. Petitioners argue that the preliminary soil evaluation was conducted as part of the overall septic tank approval process required by the State. We disagree.

In its complaint against Cates and Durham County, H&W Developers alleged that Cates performed a preliminary soil evaluation on a fifty-six-acre tract of land. The complaint alleged, *inter alia*, that

> 5. Among the duties of the Durham County Health Department is the evaluation of improvement permit applications pursuant to Article 11 of G.S. Chapter 130A and rules promulgated thereunder by the State of North Carolina, Department of Human Resources, Division of Health Services, Environmental Health Section (10 N.C.A.C. 10A. 1900 *et seq.*).

6. In addition to the duties set forth in Paragraph 5, the Durham County Health Department offers a preliminary soils analysis service to prospective developers. The soils analysis provided through this service is intended to assist prospective developers in designing subdivision plans.

. . . .

8. The preliminary soils analysis referred to in Paragraph 6 is not a State or County regulatory requirement and is not a prerequisite to either City of Durham or Durham County subdivision approval.

. . . .

12. . . . Mr. McDowell contacted the Durham County Health Department on behalf of Plaintiff H&W to arrange for a preliminary soils analysis to determine suitability of the proposed lots for septic tank systems.

H&W Developers did not apply for an improvements permit prior to Cates conducting the preliminary soil evaluation. The document submitted by H&W Developers was on a form presumably supplied by the local health department. The portion of the form for an application for an Improvements Permit was not completed and, consequently, did not comply with the Commission Rules for an Improvements Permit application. The rules required that the application contain at a minimum the following information: "name of owner, mailing address, location of property, plat of property . . . , type of facility, estimated sewage flow based on number of bedrooms or number of persons served, type of water supply, and signature of owner or authorized agent." 10 NCAC 10A .1937(c).

The rules of the Commission do not require or make any provision for preliminary soil evaluations. The rules provide for the issuance or denial of an improvements permit but not for the assurance of future permitability. For this reason a local sanitarian who conducts a preliminary soil evaluation is providing a local service and is not enforcing the rules of the Commission. Even if the preliminary soil evaluation is conducted in accordance with the criteria set forth in rules .1940 through .1948 of subchapter 18A of title 15A (formerly subchapter 10A of title 10) of the North Carolina Administrative Code, the evaluation itself is not required or governed by the rules of the Commission. Even where, as in this case, the county has no rules requiring a preliminary soil evaluation and considers such an evalua-

tion to be part of the overall septic tank approval process, a county sanitarian conducting a preliminary soil evaluation is providing a local service.

While a preliminary soil evaluation or analysis is a valuable service to a potential purchaser of land in assessing the reasonableness of the purchase price and the future marketability of the parcel, a local health department sanitarian is not "enforcing rules of the Commission for Health Services" as required by N.C.G.S. § 143-300.8 when he conducts such an evaluation. The preliminary soil evaluation conducted by Cates was neither a prerequisite to obtaining an improvements permit nor otherwise required by the rules of the Commission. Accordingly, we conclude that N.C.G.S. § 143-300.8 did not require the Attorney General to defend Cates in the action arising out of his alleged negligence.

For the reason stated in this opinion, the decision of the Court of Appeals as modified herein is affirmed.

AFFIRMED.

TOWN OF SPRUCE PINE, A MUNICIPAL CORPORATION, AND BRYANT ELECTRIC COMPANY, INC., PLAINTIFFS, V. AVERY COUNTY AND AVERY COUNTY BOARD OF COMMISSIONERS, CONSISTING OF SUSAN B. PITTMAN, PHYLLIS FORBES, BILL BEUTTELL, ARLENE ELLER, TOMMY BURLESON, INDIVIDUALLY, DEFENDANTS V. THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, THE DIVISION OF ENVIRONMENTAL MANAGEMENT OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES; AND THE DIVISION OF ENVIRONMENTAL HEALTH OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, ADDITIONAL DEFENDANTS

No. 431A96

(Filed 24 July 1997)

1. Constitutional Law § 49 (NCI4th)— constitutionality of statute—standing of county

A county had standing to challenge the constitutionality of the Water Supply Watershed Protection Act where the county was not accepting benefits under the statute.

Am Jur 2d, Constitutional Law §§ 190, 192-194, 461, 462, 535, 686, 744.

2. Environmental Protection, Regulation, and Conservation § 67 (NCI4th)— Water Supply Watershed Protection Act— not unconstitutional delegation of legislative power

The legislative standards applicable to the decision to be made by the Environmental Management Commission are adequate to save the Water Supply Watershed Protection Act from being an unconstitutional delegation of legislative power where N.C.G.S. § 143-211 sets forth the goal which the General Assembly wants to reach in its water program, and N.C.G.S. § 143-214.5 provides for the management of the watersheds by controlling development density, performance-based alternatives, or a combination of both.

Am Jur 2d, Zoning and Planning § 109.

3. Environmental Protection, Regulation, and Conservation § 67 (NCI4th)— Water Supply Watershed Protection Act— expungement of unconstitutional amendment

Failure of the 1993 amendment which in effect exempted one watershed from the coverage of the Water Supply Watershed Protection Act to pass constitutional muster under the equal protection clauses of the federal and state constitutions did not render the entire Act unconstitutional; rather, the 1993 amendment may be expunged so that the Act is left intact.

Am Jur 2d, Zoning and Planning § 109.

Appeal by additional defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 704, 475 S.E.2d 233 (1996), reversing an order for summary judgment by Thornburg, J., entered on 23 June 1994 in Superior Court, Avery County. On 10 October 1996, this Court allowed discretionary review of an additional issue. Heard in the Supreme Court 17 March 1997.

This case brings to the Court the question of whether the Water Supply Watershed Protection Act (WSWPA), codified as N.C.G.S. §§ 143-214.5 and -214.6, is unconstitutional under the Constitution of North Carolina. The Court of Appeals held that the WSWPA violated Article I, Section 6 and Article II, Section 1 of our state Constitution because it unlawfully delegated legislative power to the North Carolina Environmental Management Commission (EMC).

This case was commenced with the filing of a complaint by the Town of Spruce Pine and Bryant Electric Company, Inc. The plaintiffs alleged that Spruce Pine is a municipal corporation located in Mitchell County which had appealed to the commissioners of Avery County from the denial by the building inspector of Avery County of a building permit to plaintiffs to construct a raw water intake pump station on the Toe River in Avery County. The plaintiffs alleged that almost two months had elapsed since the hearing of their appeal, and no decision had been made. The plaintiffs prayed that a writ of mandamus be issued ordering the commissioners to make a decision.

The defendants filed an answer and counterclaim in which they alleged that the action of Spruce Pine in selecting the site in Avery County for the construction of an intake station was arbitrary and capricious. They also alleged that the WSWPA, which provides for zoning of watersheds, is an unconstitutional delegation of power by the General Assembly. The defendants moved that the State agencies listed in the heading of this opinion be made additional parties defendants. This motion was allowed.

On 23 June 1994, Judge Thornburg granted a motion for summary judgment by the additional defendants on defendants' claim that the WSWPA was unconstitutional. The defendants' claim that the action of Spruce Pine was arbitrary and capricious was tried by a jury. The jury could not reach a verdict, and after declaring a mistrial, Judge Morgan granted the plaintiffs' motion for a directed verdict. The defendants appealed from Judge Thornburg's order, but they did not appeal from Judge Morgan's order.

The Court of Appeals, in a divided opinion, reversed the superior court on the defendants' constitutional claim and held that the WSWPA is unconstitutional because it delegates legislative power to the EMC without adequate guiding standards. The additional defendants appealed to this Court.

Ronald W. Howell, P.A., by Ronald W. Howell, for defendant-appellees.

Michael F. Easley, Attorney General, by Daniel F. McLawhorn and Kathryn Jones Cooper, Special Deputy Attorneys General, and Sarah Y. Meacham, Assistant Attorney General, for additional defendant-appellants.

Durham County Attorney's Office, by Lowell L. Siler, Deputy County Attorney, amicus curiae.

Conservation Council of North Carolina, by John D. Runkle, Attorney, and Nathaniel Mund, General Counsel, amicus curiae.

WEBB, Justice.

[1] Before reaching the merits of the case, we deal with the question of Avery County's standing to challenge the constitutionality of the WSWPA. We held in *In re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974), that a county may not challenge on constitutional grounds an exemption to the imposition of a personal property tax. We said a county may not tax property under a statute granting it authority to do so and at the same time attack another part of the statute as being unconstitutional.

In *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 328 N.C. 557, 402 S.E.2d 623 (1991), and *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987), we held that municipalities had standing to test the constitutionality of acts of the General Assembly. We did not mention *Martin* in those two cases, but apparently the distinction from *Martin* was that in *New Bern* and *Emerald Isle*, the municipalities were not accepting benefits under the statutes they challenged. Avery County is not accepting benefits under the statute challenged in this case. Pursuant to *New Bern* and *Emerald Isle*, we hold that Avery County has standing to challenge the constitutionality of the statute involved in this case.

In 1951, the General Assembly provided in legislation, codified as chapter 143, article 21 of the North Carolina General Statutes, for the creation of the EMC and empowered it to make regulations for the conservation of air and water resources. The EMC was not empowered to regulate land use in the areas around rivers and streams. In 1989, the WSWPA was enacted as a part of article 21, which enabled the EMC to adopt rules for the regulation of land use which affects the water supply in watersheds throughout the state. The construction of a water intake by the Town of Spruce Pine on the Toe River in Avery County will make the Toe River watershed subject to certain regulations of the EMC.

[2] The defendants contend and the Court of Appeals held that the WSWPA constitutes an unconstitutional delegation of the power to legislate. If the General Assembly has delegated to the EMC the power to make rules and regulations without an adequate standard to guide the EMC in executing the will of the General Assembly, the

WSWPA is an invalid delegation of legislative power. In determining whether legislation violates the rule that the General Assembly cannot delegate its power to legislate, we are guided by *Adams v. N.C. Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978), in which we upheld the constitutionality of the Coastal Area Management Act. In that case we said:

> In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only "as specific as the circumstances permit." *Turnpike Authority v. Pine Island*, [*Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 323 (1965)]. *See also*, *Jernigan v. State*, [279 N.C. 556, 184 S.E.2d 259 (1971)]. When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.
>
> Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to "insure that the decision-making by the agency is not arbitrary and unreasoned." Glenn, [*The Coastal Management Act in the Courts: A Preliminary Analysis*, 53 N.C. L. Rev. 303, 315 (1974)]. Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. We thus join the growing trend of authority which recognizes that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. *See* K. Davis, 1 *Administrative Law Treaties*, § 3.15 at p. 210 (2d ed. 1978).

Adams, 295 N.C. at 698, 249 S.E.2d at 411. Applying the principles articulated in *Adams*, we hold that the legislative standards applicable to the decisions to be made by the EMC are adequate to save the WSWPA from being an unconstitutional delegation of legislative power.

We begin our analysis of the application of the rule regarding the delegation of legislative power by noting that there is a strong presumption that enactments of the General Assembly are constitutional. *Wayne County Citizens Ass'n v. Wayne County Bd. of Comm'rs*, 328 N.C. 24, 399 S.E.2d 311 (1991). We also note that the classification of watersheds is a complex subject. It is not something the General Assembly can micro-manage.

We said in *Adams* that the primary sources of guiding standards are declarations by the General Assembly of the legislative goals and policies that an agency is to apply when exercising its delegated powers. In N.C.G.S. § 143-211 it is said that water and air quality standards are to be set so as to

> protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

N.C.G.S. § 143-211 (1996). This sets the goal which the General Assembly wants to reach in the administration of its water program.

The General Assembly enacted a more specific standard in N.C.G.S. § 143-214.5 when it said:

> The Commission shall adopt rules for the classification of water supply watersheds and that establish minimum statewide water supply watershed protection requirements applicable to each classification to protect surface water supplies by (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, or (iii) a combination of both (i) and (ii).

N.C.G.S. § 143-214.5(b) (1996). This subsection provides for the management of watersheds by controlling development density, performance-based alternatives, or a combination of both. This is a direction about as specific as could be. It is certainly as specific as circumstances permit. *Turnpike Authority v. Pine Island, Inc.*, 265 N.C. at 115, 143 S.E.2d at 323.

In *Adams*, we said that procedural safeguards were to be considered in determining whether there was an abdication of legislative power. The procedural safeguards in this case were, to say the least, adequate. The rule-making power of the EMC is subject to chapter 150B of the General Statutes. N.C.G.S. § 143-214.1(e) (1996). The General Assembly created the Watershed Protection Advisory Council consisting of representatives of state and local government as well as special interest groups which met with the EMC seven times before rules were adopted. The WSWPA requires the EMC to submit reports quarterly on the implementation of the Act to the Environmental Review Commission, a legislative commission. In preparation for the adoption of rules, forty informational meetings and eight public hearings were held across the state. We believe these procedural safeguards show that the State retained as much control as was feasible over its legislative power.

[3] In 1993, the General Assembly adopted an act to exempt certain watersheds from the coverage of the WSWPA. Act of July 24, 1993, ch. 520, sec. 1, 1993 N.C. Sess. Laws 2122. The parties agree that the act was drawn so that it applied to one watershed only. The parties agree that there is no rational basis for so classifying the watershed. *See White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983). The defendant-appellees say that this makes the WSWPA violate the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina because it is not applied equally throughout the state.

The additional defendant-appellants argue and we agree that the failure of the 1993 legislation to pass constitutional muster does not condemn the WSWPA. We said in *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980):

> "[']A statute may be valid in part and invalid in part. If the parts are independent, or separable, *but not otherwise*, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement.[']" *Constantian v. Anson County*, 244 N.C. 221, 228, 93 S.E.2d 163, 168 (1956), *quoting* 82 C.J.S. *Statutes* § 92 (1953). (Emphasis supplied.)

Flippin, 301 N.C. at 118, 270 S.E.2d at 489 (citation omitted). The 1993 amendment may be expunged for being unconstitutional, which leaves the WSWPA intact.

For the reasons stated in this opinion, we reverse the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA v. KENNETH E. SMITH

No. 309PA96

(Filed 24 July 1997)

1. Searches and Seizures § 68 (NCI4th)— consent to search— previous information about drugs—previous conversation about consent

The fact that an officer had previously obtained information concerning the location of drugs in a home and had previously spoken with one of the residents concerning her consent to search does not invalidate a lawful consent to search.

Am Jur 2d, Searches and Seizures § 92.

Authority to consent for another to search or seizure. 31 ALR2d 1078.

Admissibility of evidence discovered in search of defendant's property or premises authorized by one, other than relative, who is cotenant or common resident with defendant—state cases. 4 ALR4th 1050.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative. 49 ALR Fed. 511.

2. Searches and Seizures § 68 (NCI4th)— consent to search— knock and talk procedure

A "knock and talk" procedure whereby officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband when they lack the probable cause necessary to obtain a search warrant does not taint the consent or render the procedure *per se* violative of the Fourth Amendment.

Am Jur 2d, Searches and Seizures § 92.

Authority to consent for another to search or seizure. 31 ALR2d 1078.

Admissibility of evidence discovered in search of defendant's property or premises authorized by one, other than relative, who is cotenant or common resident with defendant—state cases. 4 ALR4th 1050.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative. 49 ALR Fed. 511.

3. Searches and Seizures § 60 (NCI4th)— consent to search—voluntariness—remand for findings

Defendant's motion to suppress is remanded for reconsideration and further findings where the trial court failed to make a specific finding as to whether a resident of a house voluntarily consented to the search of a room she shared with defendant, and the appellate court is thus unable to determine as a matter of law whether defendant's Fourth Amendment rights were violated by a warrantless search of the room and the seizure of drugs found therein.

Am Jur 2d, Searches and Seizures § 83.

Validity, under Federal Constitution's Fourth Amendment, of search conducted pursuant to consent—Supreme Court cases. 111 L. Ed. 2d 850.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of a constitutional question pursuant to N.C.G.S. § 7A-30 of a unanimous, unpublished decision of the Court of Appeals, 123 N.C. App. 162, 472 S.E.2d 610 (1996), affirming the order granting defendant's motion to suppress entered by Rousseau, J., on 20 July 1995 in Superior Court, Forsyth County. Heard in the Supreme Court 15 May 1997.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State-appellant.

Daniel S. Johnson for defendant-appellee.

Winston-Salem Police Department, by Mary Claire McNaught, on behalf of North Carolina Association of Police Attorneys, North Carolina Association of Chiefs of Police, and North Carolina Police Executives Association, amici curiae.

PARKER, Justice.

On 24 April 1995 defendant was indicted for possession of marijuana with intent to sell and deliver. Defendant filed a motion to suppress evidence seized during a warrantless search of defendant's residence on 20 January 1995. At the hearing on defendant's motion, the trial court concluded that defendant's constitutional rights were violated by the warrantless search and granted defendant's motion to suppress.

The order allowing defendant's motion to suppress contains the following findings of fact. Prior to 20 January 1995 Detective E.M. Ruiz of the Winston-Salem Police Department received information that defendant possessed drugs at his residence. Detective Ruiz obtained this information from defendant's girlfriend, Janet Abrams. On 20 January 1995 Abrams called Ruiz and informed Ruiz that the drugs were located in a black suitcase and a black trunk in the room Abrams shared with defendant. Detective Ruiz relayed this information to Detective J.D. Cooke, also with the Winston-Salem Police Department. The detectives concluded they did not have sufficient information to obtain a search warrant for defendant's residence and decided to use a procedure known as "knock and talk."

The trial court made the following findings concerning the "knock and talk" procedure.

> The "knock and talk" procedure is a tactic used by law enforcement in Winston-Salem when they get information that a certain person has drugs in a residence but the officers don't have probable cause for a search warrant. The officers then proceed to the residence, knock on the door, and ask to be admitted inside. Thereafter gaining entry, the officers inform the person that they're investigating information that drugs are in the house. The officers then ask for permission to search and apparently are successful in many cases in getting the occupant's "apparent consent".

The trial court found that in the instant case Abrams told Ruiz in advance that she would give consent to search the bedroom she shared with defendant. Detective Cooke and Detective Ruiz arrived at

defendant's residence with three additional officers and a K-9 dog. The trial court also made the following findings:

> That Detective Ruiz and Detective Cook approached the door, knocked on the door. That a James Walters came to the door. The two officers were in plainclothes with a badge and guns in holsters and that the other three officers and the dog remained in the van in front of the house. That the officers asked Mr. Walters if they could come in rather than stand outside. That they then went inside. That Officer Ruiz advised Mr. Walters they were investigating drugs and had information that Kenneth Smith had the drugs there in that residence. That Officer Ruiz asked Mr. Walters if they could search and he gave permission to search the common areas and said he had the bedroom in the basement where he slept on a couch.

Additional findings were that the other three officers and the K-9 dog then entered the house and conducted a search in these areas. No controlled substances were found. Detective Ruiz asked Abrams if the officers could search the bedroom she occupied with defendant, "to which she had already stated that she would give consent." The K-9 dog entered the room and indicated that drugs were in a suitcase and a black trunk located in the bedroom closet. A bag of marijuana was also found in the closet.

Based on these findings the trial court concluded that defendant's constitutional rights had been violated and granted defendant's motion to suppress. The State appealed to the Court of Appeals, which affirmed the order granting defendant's motion to suppress. On 16 July 1996 the State filed a petition for discretionary review pursuant to N.C.G.S. § 7A-31 and a notice of appeal of a constitutional question pursuant to N.C.G.S. § 7A-30. On 5 September 1996 this Court granted defendant's petition for discretionary review.

In reviewing the trial court's order following a motion to suppress, we are bound by the trial court's findings of fact if such findings are supported by competent evidence in the record; but the conclusions of law are fully reviewable on appeal. *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995).

With the exception of a few immaterial discrepancies, the State does not take issue with the findings of fact set out by the trial court. The State does, however, contest the trial court's conclusions of law which were as follows:

> BASED ON THE FOREGOING, the Court concludes that the defendant's constitutional rights were violated in that the officers entered inside the house without a search warrant in an effort to circumvent the Fourth Amendment by searching the house without a search warrant. The Court further concludes that under the facts of this case the consent given by Mr. Walters was also to get around the Fourth Amendment and that initial entry into the house was a violation of the Fourth Amendment and that the later consent could not validate the search. Even if the officers had probable cause, it does not excuse their failure to obtain a search warrant.

We agree with the State that the trial court erred in its conclusions of law.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). Similarly, the Constitution of the State of North Carolina provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20.

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639, 651 (1980). Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973). For the warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary. *Id.* at 222, 36 L. Ed. 2d at 860. Whether the consent is voluntary is to be determined from the totality of the circumstances. *Id.* at 227, 36 L. Ed. 2d at 863.

Similarly, N.C.G.S. § 15A-221(a) provides for warrantless searches and seizures "if consent to the search is given." Under

N.C.G.S. § 15A-221(b) " 'consent' means a statement to the officer, made voluntarily . . . , giving the officer permission to make a search." *See also State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991).

[1] From the findings made by the trial court, we find no support for the conclusion that defendant's constitutional rights were violated "in that the officers entered inside the house without a search warrant in an effort to circumvent the Fourth Amendment by searching the house without a search warrant." The fact that Detective Ruiz had previously obtained information concerning the location of drugs in the home and had previously spoken with one of the residents concerning her consent to search does not invalidate a lawful consent to search. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854, the United States Supreme Court expressly recognized the situation presented by the evidence in this case. In determining the test for voluntariness of consent searches, the Court addressed the competing concerns raised by the need for consent searches and the necessity for such searches to be free from coercion. The Court stated:

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

Id. at 227-28, 36 L. Ed. 2d at 863. The Court further stated:

> Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning.

Id. at 231-32, 36 L. Ed. 2d at 865.

[2] "Knock and talk" is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant. That officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband does not taint the consent or render the procedure *per se* violative of the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806, ——, 135 L. Ed. 2d 89, 97-98 (1996) (" '[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional' " (*quoting Scott v. United States*, 436 U.S. 128, 138, 56 L. Ed. 2d 168, 177 (1978)). Therefore, the subjective state of mind of Detectives Cooke and Ruiz in this case does not invalidate the officers' otherwise lawful conduct.

The issue then is whether the officers' actions in conducting this search were in fact lawful. The two questions determinative of this issue are (i) whether Walters voluntarily gave consent for the detectives to enter the house, and (ii) whether Abrams voluntarily consented to the search of the room she shared with defendant. Defendant argues that the trial court correctly found that the officers gained their initial entry into the house in an unlawful, nonconsensual manner. The trial court found that after knocking on the door, "the officers asked Mr. Walters if they could come in rather than stand outside. That they then went inside." Defendant argues that the lack of a specific finding of fact as to Walters' consent for the detectives to enter the premises renders the initial entry into the residence illegal and that the illegal entry invalidated Walters' and Abrams' subsequent consents to search.

When a trial court conducts a hearing on a motion to suppress, the court "should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court." *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996). In the instant case the evidence that Walters granted the officers permission to enter was uncontradicted, and no evidence suggested coercion or intimidation by the detectives.[1] The conclusion by the trial court that "the consent given by Mr. Walters was also to get around the Fourth Amendment and that initial entry into the house was a violation of the Fourth Amendment" implies that consent to enter the house was given by Mr. Walters. After reviewing the entire record in this case, we conclude

1 Although present in the courtroom, Walters was not called to testify by either the State or defendant.

that the trial court based its conclusion that defendant's constitutional rights were violated on the erroneous belief that the "knock and talk" procedure is unconstitutional rather than on any lack of permission for the detectives to enter the premises initially.

[3] The trial court did not make a specific finding as to whether Abrams voluntarily consented to the search of the room which she and defendant occupied, and the evidence on this point is conflicting. For this reason we cannot determine as a matter of law whether the warrantless search of the room where the drugs were seized violated defendant's Fourth Amendment rights. Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Forsyth County, for reconsideration of, and further findings on, defendant's motion to suppress in light of this opinion.

REVERSED AND REMANDED.

APPENDIXES

ORDER ADOPTING AMENDMENTS TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

ORDER ADOPTING AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

CLIENT SECURITY FUND

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

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 deletion of the current subsection (b) to Rule 5 and the adoption of a new subsection (b) to Rule 5 to read as follows:

5. Form of Pleadings

(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 not reject the filing of any paper that does not include the required cover sheet. Instead, the clerk shall file the paper, notify the filing party of the omission and grant the filing party a reasonable time not to exceed five (5) days within which to file the required cover sheet. Until such time as the party files the required cover sheet, the court shall take no further action other than dismissal in the case.

Adopted by the Court in Conference this 25th day of June, 1997. The amendment shall be effective 1 August 1997 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 Delaying Implementation of the Order Adopting Amendment to General Rules of Practice for the Superior and District Courts

The Court, having met in Conference, hereby delays the implementation of the above "Order Adopting Amendment to General Rules of Practice for the Superior and District Courts" until 1 October 1997.

Adopted by the Court in Conference this 24th day of July, 1997. This order 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
AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

The Code of Judicial Conduct first published in 283 N.C. at 779-80, as amended from time to time thereafter, is hereby amended by the addition of a preamble thereto which shall read as follows:

PREAMBLE

A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

Canon 2B of the said Code of Judicial Conduct is hereby amended so that, as amended, it reads as follows:

B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. He should not testify voluntarily as a character witness.

Canon 2 of the said Code of Judicial Conduct is hereby amended by adding a section C to read as follows:

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

Canon 3A(6) of the said Code of Judicial Conduct is hereby amended so that, as amended, it reads as follows:

(6) A judge should abstain from public comment about a pending or impending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina Law and should encourage similar abstention on the part of court personnel subject to his direction and con-

trol. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the proceedings of the Court.

Canon 7 of the said Code of Judicial Conduct is hereby amended so that, as amended, it reads as follows:

CANON 7

A Judge Should Refrain from

Political Activity Inappropriate

to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political party or any subdivision thereof. For example, he may not attend a political convention on any level as a delegate, nor may he preside or serve as an officer. He may attend any political party meeting, provided he does not violate any other canon, particularly 7A(1)(b) or (c).

(b) make speeches in support of a political party or candidate for public office or publicly endorse a candidate for public office.

(c) solicit funds for a political organization or candidate other than as permitted under canon 7B(2).

(d) make financial contributions to any candidate for public office, including a candidate for a judgeship, unless the candidate is a member of the judge's or judicial candidate's family.

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a nonjudicial office, except that he may continue to hold his judicial office while being a candidate for election to

or serving as a delegate in a state constitutional convention if he is otherwise permitted by law to do so.

(4) The foregoing provisions of canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates:

(a) should maintain the dignity appropriate to the judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; nor misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not solicit campaign funds but may establish committees of responsible persons to secure and manage the expenditure of such funds. Such committees are not prohibited from soliciting campaign contributions from anyone not otherwise prohibited by law from making such contributions or from soliciting public support from anyone. A candidate is not prohibited from soliciting public support from anyone. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Adopted by the Supreme Court in conference this 25th day of May, 1997, to become effective on 1 September 1997.

Orr, J.
For the Court

IN RE CLIENT SECURITY FUND OF) ORDER
THE NORTH CAROLINA STATE BAR)
****

This matter coming on to be considered before the North Carolina Supreme Court in conference duly assembled on November 6, 1997, upon the request of the North Carolina State Bar, and it appearing from information submitted by the Council of the North Carolina State Bar that no assessment of the active members of the North Carolina State Bar will be needed in 1998 in order to support and maintain properly the Client Security Fund;

Now, therefore, it is hereby ordered that there be no assessment of the active members of the North Carolina State Bar to support the Client Security Fund in 1998.

This the 6th day of November, 1997.

Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 18, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0105 (a) and .0114, be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter B

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The Chairperson of the Grievance Committee will have the power and duty . . .

. . .

(20) to dismiss a grievance where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel and ~~the chairperson of the Preliminary Screening Committee assigned to the grievance~~ **a member of the Grievance Committee designated by the Committee** consent to the dismissal.

.0114 Formal Hearing

. . .

(I)At the discretion of the chairperson of the hearing committee, **and upon five days' notice to the parties**, a conference may be ordered before the date set for commencement of the hearing ~~and upon five days' notice to the parties~~ for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson, **who shall have the power to issue such orders as may be appropriate.** At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered in addition to any offers

of settlement or proposals of adjustment, ~~the possibility of~~ the following:

(1) the simplification of the issues;

(2) the exchange of exhibits proposed to be offered in evidence;

(3) the stipulation of facts not remaining in dispute or the authenticity of documents;

(4) the limitation of the number of witnesses:

(5) the discovery or production of data;

(6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

The chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 18, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 1997.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of October, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 2nd day of October, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meetings on April 4, 1997, and July 18, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0125 (a) and (b), be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter B

.0125 Reinstatement

(a) After disbarment

. . .

(3) the petitioner will have the burden of proving by clear, cogent, and convincing evidence that . . .

(N) The petitioner paid all dues, Client Security Fund assessments, and late fees owed to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of disbarment.

. . .

(b) After suspension . . .

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement, and will set forth facts demonstrating the following in the petition:

(H) satisfaction of the minimum continuing legal education requirements, as set forth in Rule .1517 of Subchapter 1D of these rules, for the two calendar years immediately preceding the year in which the petitioner was suspended, provided that the petitioner may attend CLE programs after the effective date of the suspension to make up any unsatisfied requirement. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(I) [effective for petitioners suspended on or after January 1, 1997] if two or more years have elapsed between the effective date of the suspension order and the date on which the reinstatement petition is filed with the secretary, the petitioner must, within one year prior to filing the petition, complete 15 hours of CLE approved by the Board of Continuing Legal Education pursuant to Subchapter 1D, Rule .1519 of these rules. Twelve of the 15 hours must be earned by attending practical skills courses and three hours must be earned by attending a three-hour block course of instruction devoted exclusively to professional responsibility. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(J) payment of all dues, Client Security Fund assessments and late fees due and owing to the North Carolina State Bar as well as all attendee

fees and late penalties due and owing to the Board of Continuing Legal Education at the time of suspension.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at regularly called meetings on April 4, 1997, and July 18, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 1997.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of October, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 2nd day of October, 1997.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 4, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0118, be amended by adding a new subsection (g) as follows (new language is in bold type):

Title 27, Chapter 1

Subchapter B

Rule .0118 Disability Hearings

. . .

(g) A member of the North Carolina State Bar may be transferred to disability inactive status with the consent of the member, the counsel and the Chairperson of the Grievance Committee.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 4, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of May, 1997.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of March, 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of March, 1998.

s/ Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 16, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning procedures for ruling on questions of legal ethics of the ethics committee, as particularly set forth in 27 NCAC 1D, Section .0100 be amended as follows (additions in bold type, deletions interlined):

Procedures for Ruling on Questions of Legal Ethics
27 NCAC 1D, Section .0100

Rule .0101 Definitions

(1) "Assistant executive director" shall mean the assistant executive director of the Bar.

(2) "Attorney" shall mean any active member of the Bar.

(3) "Bar" shall mean the North Carolina State Bar.

(1) "Chairperson" shall mean the chairperson or, in his or her absence, the vice-chairperson of the Ethics Committee of the Bar.

~~(5) "Citizen" shall mean any person, firm, or corporation residing in North Carolina who is not an attorney as above defined.~~

(5)~~(6)~~ "Committee" shall mean the Ethics Committee of the Bar.

(6)~~(7)~~ "Council" shall mean the council of the Bar.

(7)~~(8)~~ "Ethics advisory" shall mean a~~n informal~~ legal ethics ~~ruling~~ **opinion** issued **in writing** by the executive director,~~ or~~ the assistant executive director, **or a designated member of the Bar's staff counsel. All ethics advisories shall be subsequently reviewed and approved, withdrawn or modified by** ~~under the supervision of~~ the committee. ~~The~~ **Ethics** advisories shall be designated by the letters "EA", numbered **by year and order of issuance**, and kept on file at the Bar~~'s headquarters~~.

(8)~~(9)~~ "Ethics decision" shall mean a **written** ~~ruling~~ **ethics opinion issued** by the council in response to a request for a**n** ~~legal~~ ethics opinion which, because of its special facts or for other reasons, does not warrant issuance of a ~~published opinion~~ **formal ethics opinion.** ~~The~~ **Ethics** decisions shall be designated by the letters "ED", numbered **by year and order of issuance**, and kept on file at the Bar~~'s headquarters~~.

(9)~~(10)~~ "Executive director" shall mean the executive director of the Bar.

~~(11) "Grievance Committee" shall mean the Grievance Committee of the Bar.~~

(10)~~(12)~~ "**Formal** ~~Legal~~ ethics opinion" shall mean a~~n~~ published opinion issued by the council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. **A formal ethics opinion adopted under the Revised Rules of Professional Conduct (effective July 24, 1997) shall be designated as a "Formal Ethics Opinion" and numbered by year and order of issuance.** ~~Such opinions are published and~~ **Formal ethics opinions adopted under the repealed Rules of Professional Conduct (effective October 7, 1985 to July 23, 1997) are** designated by the letters "RPC" and numbered **serially** ~~with a number to identify them as interpretations of the Rules of Professional Conduct~~. **Formal ethics opinions adopted under the repealed Code of Professional Conduct (effective January 1, 1974 to October 6, 1985) are designated by the let-**

ters "CPR" and numbered serially. Formal ethics opinions adopted under the repealed Rules of Professional Conduct and the repealed Code of Professional Conduct are binding unless overruled by a provision of the Bar's current code of ethics, a revision of the rule of ethics upon which the opinion is based, or a subsequent formal ethics opinion on point.

(11) "Grievance Committee" shall mean the Grievance Committee of the Bar.

(12) "Informal ethics advisory" shall mean an informal ethics opinion communicated orally or via electronic mail by the executive director, the assistant executive director, or a designated member of the Bar's legal staff counsel. A written record documenting the name of the inquiring attorney, the date of the informal ethics advisory, and the substance of the advice given shall be kept on file at the Bar. An informal ethics advisory is not binding upon the Bar in a subsequent disciplinary proceeding.

(13) "President" shall mean the president of the Bar or, in his or her absence, the presiding officer of the council.

(14) "Published" shall mean published **for comment** in the North Carolina State Bar *Newsletter* **(prior to fall 1996), the North Carolina State Bar *Journal* (fall 1996 and thereafter) or other appropriate publication of the North Carolina State Bar.**

(15) "Revised Rules of Professional Conduct" shall mean the code of ethics of the Bar effective July 24, 1997.

Rule .0102 ~~Requests for Legal Ethics Opinions and Ethics Advisories (~~General Provisions~~)~~

(a) An~~y~~ attorney ~~or citizen~~ may ~~request~~ **ask** the Bar to rule on actual or contemplated professional conduct of an attorney ~~in the form and manner~~ as provided ~~hereinafter~~ **in Section .0100 of this subchapter. In special circumstances, a ruling on the contemplated professional conduct of an attorney may be provided in response to the request of a person who is not a member of the Bar.** The grant or denial of ~~the~~ **a** request rests with**in** the discretion of the executive director, assistant executive director, **designated staff counsel, the chairperson, the** committee, or the council, **as appropriate**.

(b) **An** ~~A~~attorney~~s~~ may ~~initiate a~~ request ~~for~~ an **informal** ethics advisory **by** ~~either in writing~~ **letter, electronic mail,** ~~by~~ telephone, or ~~in~~-person**al meeting with an appropriate member of the Bar staff. The executive director, assistant executive director, or designated staff counsel may provide an informal ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry** ~~regarding conduct which they contemplate and in good faith believe is either a~~ is routine, **the responsive advice is readily ascertained from the Revised Rules of Professional Conduct and formal ethics opinions,** ~~matter~~ or **the inquiry** requires urgent action ~~in order~~ to protect some legal right, privilege, or interest. ~~If the request is initiated verbally, the requesting attorney must promptly confirm the request in writing.~~

(c) An attorney may request an ethics advisory or formal ethics opinion by sending a written inquiry to the Bar. The executive director, assistant executive director, or designated staff counsel may issue an ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry is routine, the responsive advice is readily ascertained from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest. An inquiry requesting an opinion about the professional conduct of another attorney, past conduct, or that presents a matter of first impression or of general interest to the Bar shall be referred to the committee for response by ethics decision or formal ethics opinion.

(d)~~(c)~~ ~~A request for an ethics advisory, ethics decision, or legal ethics opinion~~ **All ethics inquiries, whether written or oral,** shall present in detail ~~to the executive director or assistant executive director~~ all operative facts upon which the request is based. **Inquiries should not disclose client confidences or other sensitive information not necessary to the resolution of the ethical question presented.** ~~All requests for either a legal ethics opinion or an ethics decision shall be made in writing~~.

~~(d) Any citizen may request either a legal ethics opinion or an ethics decision through any councilor of the judicial district of his or her residence or principal place of business except when the request is regarding the propriety of said councilor's conduct, in which case the citizen may make the request through another~~

~~councilor in the district or a councilor in an adjoining judicial district.~~

(e) Any attorney~~, including a councilor acting pursuant to paragraph(d) hereinabove,~~ who requests ~~either a legal~~ **an** ethics opinion ~~or an ethics decision concerning~~ **on the** acts or contemplated professional conduct of another attorney, shall state, **in the written inquiry,** the name of ~~that~~ **the** attorney and identify all persons whom the requesting attorney has reason to believe ~~would~~ **may** be substantially affected by ~~the question or questions advanced~~ **a response to the inquiry. The inquiry shall also provide evidence that the attorney whose conduct is at issue and all other identified interested persons have received copies of the inquiry from the requesting attorney.** ~~The councilor shall exercise good faith in preparing the request on behalf of the citizen.~~

~~(f) If an attorney willfully fails to identify an attorney who the requesting attorney has reason to believe would be substantially affected by the requested ethics advisory, legal ethics opinion, or ethics decision, his or her willful failure may be treated as misconduct. The requesting attorney shall receive no right, benefit, or immunity under any opinion which has been issued under such circumstances, and the opinion shall be reexamined *de novo* under the procedures delineated in Rule .0104 of this subchapter.~~

(f) When a written ethics inquiry discloses conduct which may be actionable as a violation of the Revised Rules of Professional Conduct, the executive director, the assistant executive director, chairperson or the committee may refer the matter to the Grievance Committee for investigation.

(g) In general, no response shall be provided to an ethics inquiry that seeks an opinion on an issue of law.

(h) A decision not to issue a response to an ethics inquiry, whether by the executive director, assistant executive director, designated staff counsel, chairperson or the committee, shall not be appealable.

(i) Except as provided in Rule .0103(b) of this subchapter, the information contained in a request for an ethics opinion shall not be confidential.

Rule .0103 **Informal Ethics Advisories and** Ethics Advisories

~~(a) An ethics advisory answers an inquiry by an attorney regarding his or her own contemplated conduct when the attorney needs an expeditious ethics ruling on either a routine matter or under exigent circumstances and has complied with Rule .0102 of this subchapter.~~

(a) The executive director, assistant executive director, or designated staff counsel may honor or deny a request for an informal ethics advisory. Except as provided in Rule .0102(b), an attorney requesting an opinion concerning another attorney's professional conduct, past conduct, or matters of first impression shall be asked to submit a written inquiry for referral to the committee. An attorney requesting an opinion involving matters of widespread interest to the Bar or particularly complex factual circumstances may also be asked to submit a written inquiry for referral to the committee.

(b) The Bar's program for providing informal ethics advisories to inquiring attorneys is a designated lawyers' assistance program approved by the Bar and information received by the executive director, assistant executive director, or designated staff counsel from an attorney seeking an informal ethics advisory shall be confidential information as defined in Rule 1.6(a) and (b) of the Revised Rules of Professional Conduct; provided, however, such confidential information may be disclosed as allowed by Rule 1.6(d) and as necessary to respond to a false or misleading statement made about an informal ethics advisory. Further, if an attorney's response to a grievance proceeding relies in whole or in part upon the receipt of an informal ethics advisory, confidential information may be disclosed to Bar counsel, the Grievance Committee or other appropriate disciplinary authority.

~~(b) Upon receipt of either a written or verbal request from an attorney for an ethics advisory, the executive director or the assistant executive director, acting under the supervision and direction of the committee, may either honor the request, or deny it. If the executive director or assistant executive director honors the request, he or she shall communicate the ruling to the inquirer. The action on the request shall be either written or verbal with prompt confirmation in writing. Action on the request shall be~~

~~taken within a reasonable time. Neither the denial nor issuance of an advisory nor the ruling itself shall be appealable.~~

(c) An ethics advisory issued by the executive director, ~~or~~ assistant executive director, **or designated staff counsel** shall be promulgated under the authority of the committee and in accordance with such guidelines as the committee may establish and prescribe from time to time.

(d) An ethics advisory shall sanction or disapprove only the matter in issue, **shall** not otherwise serve as precedent and **shall** not be published.

(e) Ethics advisories shall be reviewed periodically by the committee. If, upon review, a majority of the committee present and voting decides that an ethics advisory should be withdrawn **or modified**, the requesting attorney shall be notified in writing of the committee's decision by the executive director or assistant executive director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he or she acts pursuant to the ethics advisory which is later withdrawn **or modified**.

~~(f) An attorney requesting a legal ethics opinion or ethics decision, subsequent to requesting an ethics advisory on the same question, shall state that an advisory was sought, specify the nature of the advisory provided, and attach copies of all relevant correspondence between the attorney and the Bar.~~

~~(g) If the executive director or the assistant executive director declines to issue an ethics advisory, or the requesting attorney disagrees with the issued advisory, or the advisory is withdrawn by the committee, an attorney has the right to proceed *de novo* under the procedures delineated in Rule .0104 of this subchapter.~~

(f) If an inquiring attorney disagrees with the ethics advisory issued to him or her, the attorney may request reconsideration of the ethics advisory by writing to the committee prior to the next regularly scheduled meeting of the committee.

Rule .0104 ~~Legal~~ **Formal** Ethics Opinions and **Ethics** Decisions

(a) Requests for ~~legal~~ **formal** ethics opinions or ethics decisions shall be made in writing and submitted to the executive director or assistant executive director who, after determining that ~~the~~ **a**

request is in compliance with Rule .0102 of this subchapter, shall transmit the requests to the chairperson of the committee.

(b) If a ~~legal~~ **formal** ethics opinion or ethics decision is requested concerning contemplated or actual conduct of another attorney, ~~the chairperson shall notify that attorney and provide him or her~~ **that attorney shall be given** ~~with the~~ an opportunity to be heard **by the committee**, along with the person who requested the opinion, under such guidelines as may be established by the committee. ~~The chairperson shall notify~~ **At the discretion of the chairperson and the committee,** ~~any~~ additional persons or groups ~~he or she deems appropriate~~ shall be notified **by the method deemed most appropriate by the chairperson** and provided ~~them~~ an opportunity to be heard **by the committee.**

(c) The committee shall prepare a written proposed ~~legal~~ **formal** ethics opinion or ethics decision which shall state its conclusion in respect to the question asked and the reasons therefor.

(d) The committee shall determine whether to issue an ethics decision or a formal ethics opinion in response to an inquiry.

(e)~~(d)~~ ~~The~~ **A** proposed ~~legal~~ **formal** ethics opinion or ethics decision shall be provided to ~~the~~ interested persons **by the method deemed most appropriate by the chairperson** and shall **also** be transmitted to the president for consideration by the council. **All proposed formal ethics opinions shall be published.**

(f)~~(e)~~ ~~At least 30 days~~ **Prior** to the next regularly scheduled meeting of the ~~council~~ **committee**, any interested person or group may submit a written request to ~~be heard on~~ **reconsider** ~~the~~ **a** proposed **or final formal ethics** opinion or **ethics** decision **and may ask to be heard by the committee**. The ~~council~~ **committee**, under such guidelines as it may adopt, may~~, in its discretion,~~ allow or deny such request. **If a proposed or final ethics decision is withdrawn or revised, interested persons shall be notified by the method deemed most appropriate by the chairperson. If a proposed or final formal ethics opinion is withdrawn or revised, notice of the action and any proposed revised formal ethics opinion shall be published.**

(g) If the committee declines to revise a proposed formal ethics opinion or ethics decision in response to a written

request, any interested person or group may request to be heard by the council prior to a vote on the adoption of the proposed formal ethics opinion or ethics decision. ~~Any attorney,~~ **W**hether permitted to appear before the council or not, **the person or group** has the right to file a written brief with the council under such rules as may be ~~fixed~~ **established** by the council. ~~The president may, in his or her discretion, permit any additional person or group to file a written brief.~~

(h)~~(f)~~ The council's action on the proposed **formal ethics** opinion **or ethics decision** shall be determined by vote of the majority of the council present and voting. Notice of such action shall be provided to ~~the~~ interested persons **by the method deemed most appropriate by the chairperson**.

~~(g) The committee may on its own motion submit a proposed legal ethics opinion to the council for its consideration. Prior to action by the council, the proposed opinion shall be published and an opportunity shall be provided for interested persons to request to be heard before the council when the opinion is considered, subject to the provisions of Rule .0104(e) above.~~

(i)~~(h)~~ A ~~legal~~ **formal** ethics opinion or ethics decision may be reconsidered or withdrawn by the council pursuant to rules which it may establish from time to time. ~~Those persons who participated in the original proceedings shall be given an opportunity to request to be heard in connection with the reconsideration in accordance with Rule .0104(e) above~~.

~~(i) When an ethics inquiry may amount to the statement of a grievance, the executive director, the assistant executive director, the chairperson, or the president may either consider the request as seeking an ethics ruling or refer the matter to the Grievance Committee.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning ruling on questions of legal ethics were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 16, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of February, 1998.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning ruling on questions of legal ethics as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of March, 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning ruling on questions of legal ethics be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of March, 1998.

s/ Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

The following amendments to the Rules and Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 16, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning regulations for organizations practicing law, as particularly set forth in 27 NCAC 1E, Section .0200 be amended as follows (additions in bold type and deletions interlined):

27 NCAC 1E, Section .0200

Registration of Interstate **and International** Law Firms

.0201 Registration Requirement

No law firm or professional organization which maintains ~~an~~ offices in North Carolina **and one or more other jurisdictions may do business in North Carolina without first obtaining a certificate of registration from the North Carolina State Bar provided, however, that no law firm or professional organization shall be required to obtain a certificate of registration if all attorneys associated with the law firm or professional organization, or any law firm or professional organization that is in partnership with said law firm or professional organization, are licensed to practice law in North Carolina.** ~~and has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina or has as its partner, shareholder, or member a law firm or professional organization which has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina may do business in North Carolina without first having obtained a certificate of registration.~~

.0202 Conditions of Registration

The secretary of the North Carolina State Bar shall issue such a certificate **of registration** upon satisfaction of the following conditions ~~precedent~~:

(1) There shall be filed with the secretary of the North Carolina State Bar a registration statement disclosing:

a. all names used to identify the filing law firm or professional organization;

b. addresses of all offices maintained by the filing law firm or professional organization;

c. the name and address of any law firm or professional organization with which the filing law firm or professional organization is in partnership and the name and address of such partnership;

d. the name and address of each attorney who is a partner, shareholder, member or employee of the filing law firm or professional organization or who is a partner, shareholder,

member or employee of a law firm or professional organization with which the filing law firm or professional organization is in partnership;

e. the relationship of each attorney identified in Rule .0202(1)(d) above to the filing law firm or professional organization;

f. the ~~states~~ **jurisdictions** to which each attorney identified in Rule .0202(1)(d) above is admitted to practice law.

(2) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization **executed** by a ~~member~~ **responsible attorney associated with the filing law firm or professional organization** who is licensed in North Carolina certifying that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of ~~each state~~ **the** bar **of each jurisdiction** to which the attorney has been admitted.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization **executed by a responsible attorney associated with the filing law firm or professional organization who is licensed in North Carolina** affirming that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina will govern his or her ~~personal and~~ professional conduct with respect to legal matters arising from North Carolina in accordance with **the Revised** Rules of Professional Conduct of the North Carolina State Bar.

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning the registration of interstate and international law firms were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 16, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of February, 1998.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning the registration of interstate and international law firms as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of March, 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning the registration of interstate and international law firms be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of March, 1998.

s/ Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 16, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 NCAC 1D, Section .1600, be amended as follows (additions in bold type, deletions interlined):

Regulations Governing the Administration of the Continuing Legal Education Program

27 NCAC 1D, Section .1600

Rule .1602, General Course Approval

. . . .

(a) Nonlegal Educational Activities—**A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519 (2)-(7) and Rule .1602(e), (h)-(j) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment.** Except **as noted in the preceding sentence or** in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

. . . .

(4) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients). ~~A course or segment may be granted credit by the board when a bar organization's course trains volunteer attorneys in service to the profession if all segments of the course are devoted to CLE or professional responsibility, as such terms are defined in Rule .1501(b) of this subchapter, if such course or segment meets the standards of Section .1500 and Section .1600 of this subchapter, and if the sponsor represents that such course or segment meets these standards. No more than three hours of professional responsibility will be credited per training course.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning continuing legal education were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 16, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of February, 1998.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning continuing legal education as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of March, 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning continuing legal education be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of March, 1998.

s/ Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules and Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 16, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership procedures, as particularly set forth in 27 NCAC 1D, Section .0900 and Section .1000 be amended as follows (additions in bold type and deletions interlined):

Procedures for the Membership and Fees Committee
27 NCAC 1D, Section .0900

Rule .0902 Reinstatement from Inactive Status

. . .

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

. . .

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that during the period of inactive status, the member has completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter; **and,** of the required 15 CLE hours, 12 hours must be earned attending practical skills courses and 3 hours must be earned by attending a 3-hour block course of instruction devoted exclusively to the area of professional responsibility; and

(5) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee and Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;

(D)~~(C)~~ all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of Rule .0902(b)(2) and (4) above;

(E)~~(D)~~ ~~all past due~~ **any** costs **previously** assessed against the member by **the chairperson of the Grievance Committee,** the Disciplinary Hearing Commission, **and/or the secretary or council of the North Carolina State Bar** ; and

(F)~~(E)~~ all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

The reinstatement fee, ~~and~~ costs, **and any past due district bar annual membership fees** shall be retained ~~by the North~~

~~Carolina State Bar~~ but the **State Bar and district bar** membership fees **assessed for the year in which the application is filed** shall be refunded if the petition is denied.

. . .

Rule .0903 Suspension for Nonpayment of Membership Fees, Late Fee, ~~or~~ Client Security Fund Assessment, **or Assessed Costs**

(a) Notice of Overdue Fees **or Costs**

Whenever it appears that a member has failed to comply, **in a timely fashion,** with the rules regarding payment of the annual membership fee, late fee, ~~and/or~~ the Client Security Fund assessment, **and/or any district bar annual membership fee,** ~~in a timely~~ ~~fashion,~~ **or that the member has failed to pay, in a timely fashion, the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the North Carolina State Bar as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, or a notice of the secretary or the council of the North Carolina State Bar,** the secretary shall prepare a written notice

(1) directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law, and

(2) demanding payment of a $30 late fee **for the failure to pay the annual membership fee to the North Carolina State Bar and/or Client Security Fund assessment in a timely fashion.**

(b) Service of the Notice

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the

member, and it appears that the member has failed to comply with the rules regarding payment of the annual membership fee, any late fees imposed pursuant to Rule .0203(b) of Subchapter A, ~~and/or~~ the Client Security Fund assessment, **and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar,** the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by Membership and Fees Committee

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Membership and Fees Committee shall consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual membership fee, late fee, ~~and/or~~ Client Security Fund assessment, **and/or any district bar annual membership fee, and/or the apparent failure to pay costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar.**

(2) Recommendation of Membership and Fees Committee

The Membership and Fees Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall make a written recommendation to the council that the member be suspended.

(3) Order of Suspension

Upon the recommendation of the Membership and Fees Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(e) Late Tender of Membership Fees **or Assessed Costs**

If a member tenders **to the North Carolina State Bar** the annual membership fee, **the $30 late fee,** ~~required~~ Client Security Fund assessment, **any district bar annual membership fee,** ~~and the $30 late fee to the North Carolina State Bar on or after July 1 of a given year~~, **and/or any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar** ~~but~~ before a suspension order is entered by the council, no order of suspension will be entered.

Rule .0904 Reinstatement After Suspension for Failure to Pay Fees **or Assessed Costs**

(a) Reinstatement Within 30 Days of Service of Suspension Order

A member who has been suspended for nonpayment of the annual membership fee, ~~any~~ late fee, ~~and/or~~ Client Security Fund assessment, **district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council**

of the North Carolina State Bar, may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member of payment of the membership fee, **late fee,** Client Security Fund assessment, ~~any late fee~~**, district bar annual membership fee, assessed costs,** and **the** costs **of the suspension and reinstatement procedure, including the costs of service.** Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, **late fee,** Client Security Fund assessment, ~~and/or any late fee,~~ **district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar,** may petition the council for an order of reinstatement.

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

. . .

(4) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) all past and current membership fees and late fees;

(C) all annual Client Security Fund assessments;

(D) all past and current district bar annual membership fees;

(E)~~(D)~~ all attendee fees, fines and penalties owed the Board of Continuing Legal Education, including attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;

(F)~~(E) all past due~~ **any** costs assessed against the member by **the chairperson of the Grievance Committee,** the Disciplinary Hearing Commission, **and/or the secretary or council of the North Carolina State Bar**; and

(G)~~(F)~~ all costs incurred by the North Carolina State Bar **in suspending the member, including the costs of service, and** in investigating and processing the application for reinstatement.

(d) Procedure for Review of Reinstatement Petition

The procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

Rule .1001 Reinstatement Hearings Before Panel of Membership and Fees Committee

. . .

(c) Burden of Proof

. . .

(2) Reinstatement from Suspension for Nonpayment of Membership Fees, Late Fee, ~~or~~ Client Security Fund Assessment, **District Bar Membership Fees, or Assessed Costs**

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter.

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning membership procedures were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 16, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of February, 1998.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning membership procedures as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of March, 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar concerning membership procedures be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of March, 1998.

s/ Orr, J.
For the Court

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APPEAL AND ERROR

§ 147 (NCI4th). Preserving question for appeal; necessity of request, objection, or *motion*

A first-degree murder defendant's argument that the trial court erred by not giving a limiting instruction as to a prior assault was not properly before the Supreme Court where defendant did not raise the issue at trial. **State v. Allen,** 731.

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the trial court's instruction on flight was erroneous but defendant failed to object to the wording of the instruction. **State v. Beck,** 750.

The failure of a defendant in a capital murder prosecution to object to the trial court's peremptory instructions on nonstatutory mitigating circumstances precluded assignment of error to the peremptory instructions pursuant to Appellate Rule 10(b)(2). Defendant's request for a peremptory instruction at the charge conference did not preserve the issue for review. **State v. Neal,** 608.

§ 150 (NCI4th). Preserving constitutional issues

Defendant failed to preserve for appellate review the issue as to whether he was placed in double jeopardy when he was sentenced for two murders and his convictions for kidnapping the same victims were elevated to first-degree based on his failure to release the victims in a safe place. **State v. Fernandez,** 1.

§ 155 (NCI4th). Effect of failure to make motion, objection, or request; criminal actions

A first-degree murder defendant's assignment of error concerning whether the trial court had impermissibly restricted stand-by counsel was overruled where the pro se defendant did not raise the issue at trial and did not specifically and distinctly assign plain error in the record on appeal. **State v. LeGrande,** 718.

§ 175 (NCI4th). Mootness of particular questions

A challenge to the constitutionality of a rezoning was dismissed as moot where there were two plaintiffs and the heirs of one had sold the property to a third party while the complaint of the other did not allege an interest sufficient to allow him to maintain an independent constitutional challenge. **Messer v. Town of Chapel Hill,** 259.

§ 341 (NCI4th). Failure to properly assign error

A first-degree murder defendant's argument that the trial court erred by not giving a limiting instruction as to a prior assault was not properly before the Supreme Court where defendant did not specifically and distinctly assign plain error in the record. **State v. Allen,** 731.

§ 504 (NCI4th). Invited error

Any error in a capital prosecution for first-degree murder, robbery, and conspiracy in the court's instruction on the impaired capacity mitigating circumstance was invited and not subject to review where the instruction was requested and agreed to by defense counsel at the charge conference. ***State v. Cagle,*** 497.

§ 506 (NCI4th). Error as harmless or prejudicial; criminal cases

There was no prejudicial error where the trial court denied defendant's motion to dismiss charges of first-degree felony murder and first-degree murder by lying in wait and the jury found defendant guilty on the basis of premeditation and deliberation. **State v. Barnard,** 95.

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Article I, Section 15 and Article IX, Section 2 of the N.C. Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. **Ibid.**

The "equal opportunities" clause of Article IX, Section 2(1) of the N.C. Constitution does not require substantially equal funding or educational advantages in all school districts so that provisions of the current state system for funding schools which require or allow counties to help finance their school systems and result in unequal funding among the school districts of the state do not violate constitutional principles. **Ibid.**

Because Article IX, Section 2(2) of the N.C. Constitution expressly states that units of local governments with responsibility for public education may provide additional funding to supplement the educational programs provided by the State, there can be nothing unconstitutional about their doing so. **Ibid.**

Disparities in school funding resulting from local supplements in the wealthier school districts do not deprive those in the poorer school districts of equal protection of the laws in violation of Article I, Section 19 of the N.C. Constitution because such disparities are expressly authorized by Article IX, Section 2(2). **Ibid.**

The General Assembly has the power to create a supplemental state funding program to provide additional state funds to poor districts so that they can provide their students access to a sound basic education, but a funding system that distributes state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives would not be a valid exercise of that constitutional authority. **Ibid.**

Plaintiff-intervenors have made sufficient allegations to entitle them to proceed to attempt to prove that the state supplemental funding system is unrelated to legitimate educational objectives and is, therefore, arbitrary and capricious where they alleged that their relatively wealthy urban districts have been denied equal protection because they have greater numbers of students requiring special education programs and the funding system does not take into account the amount of money required to educate particular students with special needs. **Ibid.**

The courts must grant every reasonable deference to the legislative and executive branches of government when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. **Ibid.**

If the trial court finds from competent evidence that defendants, the State and the State Board of Education, are denying children a sound basic education, a denial of a fundamental right will have been established, and it will then be incumbent upon defendants to establish that their actions denying this fundamental right are necessary to promote a compelling governmental interest. **Ibid.**

§ 161 (NCI4th). Rights of persons accused of crime generally

The trial judge did not violate defendant's due process rights by his failure to comply with his statement that defendant would have an opportunity to be heard prior to any final ruling on disclosure of his prison records to the prosecution. **State v. Rich,** 50.

§ 202 (NCI4th). Former jeopardy; kidnapping and murder

Defendant did not receive multiple punishments for the same offense in violation of the prohibition against double jeopardy when he was convicted and sentenced for two murders and his convictions for kidnapping the same victims were elevated to

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first-degree based on his failure to release the victims in a safe place. **State v. Fernandez,** 1.

§ 226 (NCI4th). Former jeopardy; mistrial based on prosecutorial misconduct

The trial court did not err in a capital resentencing by denying defendant's motion for a life sentence where the proceeding was defendant's third, which resulted from the prosecutor's persistent misconduct in the prior proceeding. **State v. Sanderson,** 669.

§ 230 (NCI4th). Former jeopardy; new trial after appeal or post-conviction attack; capital crimes

The trial court did not err in a capital resentencing by denying defendant's motion in limine to exclude references to an alleged rape which was not submitted as an aggravating circumstance in two prior sentencing hearings and by submitting the aggravating circumstance that the murder was committed during the commission of a rape. Even though defendant contended that submitting rape as an aggravating circumstance would violate double jeopardy principles because of the prior sentencing hearings, jeopardy attaches in a capital sentencing proceeding only after there has been a finding that no aggravating circumstances are present and, in this case, neither the first nor second juries found that no aggravating circumstance existed. **State v. Sanderson,** 669.

The trial court did not err in a capital resentencing by submitting as an aggravating circumstance that defendant had committed murder while engaged in the commission of a rape where the evidence submitted at the sentencing hearing (defendant's third) supported the circumstance. Double jeopardy considerations do not come into play because neither jury in two prior capital sentencing proceedings found that no aggravating circumstance existed. **Ibid.**

§ 244 (NCI4th). Preparation of defense; discovery generally

The trial court's failure to compel the State to disclose to a defendant charged with first-degree murder the name of an individual to whom defendant had stated that the gun had gone off accidentally did not violate defendant's due process rights under *Brady v. Maryland,* 373 U.S. 83. **State v. Strickland,** 443.

§ 264 (NCI4th). Right to counsel; attachment of right

A superior court judge's announcement in open court of his ruling on the State's request for release of defendant's prison records was not a hearing, and the absence of defendant and his counsel when the announcement was made did not violate defendant's Sixth Amendment right to counsel. **State v. Rich,** 50.

§ 266 (NCI4th). Particular acts or circumstances as infringing on right to counsel

The trial court did not err in a capital prosecution for first-degree murder by not suppressing defendant's confessions because they were obtained after a law enforcement officer chilled defendant's exercise of his right to counsel by statements that defendant might have to pay the State for his lawyer. **State v. Cummings,** 291.

§ 280 (NCI4th). Right to appear pro se generally

The trial court erred by allowing the motion of standby counsel, filed over the pro se defendant's objection, to appoint standby counsel to represent defendant for the

limited purpose of litigating his capacity to knowingly and intelligently waive his right to counsel and proceed pro se. **State v. Thomas,** 135.

The trial court adequately advised a first-degree murder defendant who waived his right to counsel of the nature of the capital sentencing proceeding. **State v. LeGrande,** 718.

§ 281 (NCI4th). Sufficiency of demand to appear pro se

The trial court did not err in a capital first-degree murder prosecution by initially granting defendant's request to represent himself and later by not revoking his right of self-representation where the trial court's inquiry was sufficient to determine that defendant's decision to proceed pro se was knowing and voluntary. **State v. LeGrande,** 718.

§ 282 (NCI4th). Effect of quality of pro se defense

The trial court did not err in a capital sentencing proceeding by not revoking defendant's right to represent himself and not requiring stand-by counsel to assume conduct of the defense where defendant insulted and challenged the jurors. Defendant was allowed to represent himself as he wanted. **State v. LeGrande,** 718.

§ 309 (NCI4th). Effectiveness of assistance of counsel; counsel's abandonment of client's interest

A defendant on trial for first-degree murder was not denied the effective assistance of counsel by his attorney's admission during closing argument that defendant was guilty of second-degree murder where defendant stipulated in writing that he stabbed the victim and proximately caused her death. **State v. McNeill,** 233.

Defense counsel's statements during jury selection in a first-degree murder case that defendant was holding the gun that killed the victim at the time the victim was shot did not amount to a concession of guilt to which defendant had not agreed in violation of defendant's right to the effective assistance of counsel. **State v. Strickland,** 443.

§ 310 (NCI4th). Effectiveness of assistance; misstatements to jury

Defense counsel's opening statement in a first-degree murder prosecution did not violate defendant's Sixth Amendment right to effective assistance of counsel because it allegedly included assertions for which there was no supporting evidence and an admission that defendant had a criminal record. **State v. Strickland,** 443.

§ 312 (NCI4th). What constitutes denial of effective assistance of counsel; failure to object to instructions

A defendant in a capital resentencing was not denied his Sixth Amendment right to counsel by his trial counsel's failure to object to the Issue Three instruction given by the court. **State v. Sanderson,** 669.

§ 321 (NCI4th). Speedy trial generally

The constitutional right to a speedy trial was not violated in a first-degree murder retrial by the extended prosecution and appeal processes in the case. **State v. Pickens,** 628.

§ 342 (NCI4th). Presence of defendant at proceedings generally

The trial court did not err in a capital prosecution for first degree murder by conducting unrecorded bench conferences with defense counsel and counsel for the State

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where defendant was present in the courtroom but made no request to be present at the bench and made no objection to his absence. **State v. Tyler,** 187.

There was no error in a capital first-degree murder prosecution where potential jurors were excused or deferred during bench conferences, all but one of which were recorded. It does not appear that defendant's presence would have had a relation, reasonably substantial, to the fullness of his opportunity to defend, such that his absence thwarted the fairness and justness of his trial. **State v. Neal,** 608.

The trial court did not err in a first-degree murder prosecution by conducting recorded bench conferences with defendant seated at counsel table where defense counsel represented defendant's interest at the conferences and had both the obligation and the opportunity to discuss matters with defendant, raise for the record any matter to which defendant objected and ask questions warranted by defendant's statements to him. **State v. Robinson,** 586.

§ 343 (NCI4th). Presence of defendant at proceedings; pretrial proceedings

A defendant charged with a capital murder did not have a right under Art. I, § 23 of the N.C. Constitution to be present when a superior court judge announced in open court his ruling on the State's request for release of defendant's prison records. **State v. Rich,** 50.

§ 344.1 (NCI4th). Presence of defendant at proceedings; conduct of trial

The right of a defendant to be present at his capital prosecution for first-degree murder was not violated where, following the guilt-innocence conference, the court asked the attorneys to step to the bench to be handed a sheet of paper, no comments were made at the bench, the contents of the paper provided the counsel were not revealed, defendant was actually present in the courtroom and was able to inquire of his counsel regarding the substance of the paper, defendant had constructive knowledge of the substance of the paper, and defendant was not excluded from any private conversations between the court, the prosecutor, and defendant's counsel. **State v. Jones,** 704.

There was no prejudicial error in a capital prosecution for first-degree murder where, during defendant's cross-examination of a prosecution witness, the trial court interrupted defense counsel to have the bailiff deliver a note to an alternate juror, made comments, and told the alternate that he could talk to his fellow jurors about the note. The trial court negated the defendant's presence in the courtroom by passing the note to the alternate juror but the transcript reflects the benign substance of the communication. **Ibid.**

§ 349 (NCI4th). Right of confrontation; cross-examination of witnesses

The trial court denied defendant the right of effective cross-examination in a prosecution for first-degree murder and kidnapping by refusing to permit defendant to cross-examine the State's principal witness as to whether he had been promised or expected anything with regard to forgery and uttering charges pending against him, which had been continued by the district attorney for eighteen months at the time of this trial, in exchange for his testimony in this case. **State v. Prevatte,** 162.

§ 352 (NCI4th). Self-incrimination generally

The trial court did not abuse its discretion by not requiring a proposed witness to assert his Fifth Amendment privilege against self-incrimination in the presence of the jury in a noncapital first-degree murder retrial where the proposed witness was a

codefendant who had pleaded guilty to second-degree murder and been released after the remand and before this trial. **State v. Pickens,** 628.

§ 355 (NCI4th). Self-incrimination; invocation of privilege by accomplice or codefendant

The trial court did not err in a noncapital first-degree murder retrial by accepting an assertion of the Fifth Amendment privilege against self-incrimination from a codefendant whom defendant wished to present as a witness. **State v. Pickens,** 628.

There was no waiver of the Fifth Amendment privilege against self-incrimination in a noncapital first-degree murder prosecution where a codefendant whom defendant wished to call as a witness and who had pled guilty to second-degree murder after the first convictions were remanded and been released by the time of this trial asserted his Fifth Amendment privilege based on fear of future prosecution for perjury or federal crimes. **Ibid.**

An argument by a first-degree murder defendant that due process required that the State provide a codefendant with immunity from future prosecution so that he could testify for defendant because there are statutory mechanisms for the State to compel testimony was not preserved for appellate review. **Ibid.**

§ 370 (NCI4th). Death penalty generally

There was no state or federal constitutional violation in sentencing to death a mentally retarded defendant with organic brain damage. **State v. Holden,** 404.

§ 371 (NCI4th). Death penalty; first-degree murder

The death penalty is not inherently cruel and unusual and the North Carolina capital sentencing scheme is not unconstitutionally vague and overbroad. **State v. Tyler,** 187.

§ 374 (NCI4th). Life imprisonment generally

Life imprisonment without parole falls within the meaning of the constitutional term "imprisonment" and is authorized by the North Carolina Constitution. **State v. Allen,** 731.

The sentencing scheme employed by the trial court when sentencing a first-degree murder defendant to life imprisonment does not violate the Due Process Clause or the Law of the Land Clause in the United States or North Carolina Constitutions. **Ibid.**

A sentence of life imprisonment without the possibility of parole does not violate North Carolina's constitutional prohibition against cruel and unusual punishment. **Ibid.**

CORPORATIONS

§ 143 (NCI4th). Rights, duties, and liabilities of corporate shareholders and members; actions and proceedings generally

The trial court properly granted summary judgment for defendant-accountants on claims for the lost value of plaintiffs' stock where defendants had been employed to provide services to The Furniture House, plaintiffs were the sole shareholders and directors, and the company was liquidated in bankruptcy. A shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, only if the shareholder can show that the wrongdoer owed him a special duty or that

pretrial motion to preclude the district attorney and any witness from mentioning that defendant had previously been sentenced to death, the trial court expressed its opinion that juries should not be permitted to sentence capital defendants. **State v. Holden,** 404.

§ 378 (NCI4th Rev.). Expression of opinion on evidence during trial; comments when ruling on objections

There was no error in a first-degree murder prosecution where defendant requested specific instructions on burden of proof and reasonable doubt, the trial judge stated outside the presence of the jury that he would allow defense counsel to give this definition but cautioned that he would instruct the jury that it should take the law from the court if an objection was made, defense counsel referred to "moral certainty," the prosecutor objected, and the court instructed the jury to listen to counsel but to take the definition of the law from the court. **State v. Barnard,** 95.

§ 402 (NCI4th Rev.). Expression of opinion on evidence during trial; opening remarks

There was no error in a capital sentencing proceeding where the court, in comments after swearing in venire members, stated that jurors did not know much about the court system, that jurors did not know much about the trial court specifically or their elected officials generally, that the Oklahoma bombing was a terrible thing, that something is wrong and it's us, and gave a lengthy discourse expressing disdain for the term "African-American." **State v. Holden,** 404.

§ 420 (NCI4th Rev.). Order of argument; right to conclude argument

An officer's reading to the jury of his notes of an interview of defendant during cross-examination by defense counsel constituted the introduction of evidence by defendant which deprived defendant of the right to make the final argument to the jury. **State v. Macon,** 109.

§ 429 (NCI4th Rev.). Argument of counsel; failure to offer any evidence

The trial court did not err in a prosecution for armed robbery, kidnapping, and first-degree murder by overruling objections to comments made by the prosecutor during closing arguments where defendant claims that the prosecutor impliedly commented on his failure to testify. **State v. Skeels,** 147.

§ 431 (NCI4th Rev.). Argument of counsel; comment on defendant's failure to call other particular witnesses or offer particular evidence

Any impropriety in the prosecutor's argument to the jury in a murder case suggesting that defendant's mother did not take the stand in order to avoid committing perjury was not so grossly improper as to require the trial court to intervene ex mero motu. **State v. Bishop,** 365.

§ 436 (NCI4th Rev.). Argument of counsel; comment on defendant's character and credibility generally

The prosecutor's closing argument in a first-degree murder case that he didn't ask defendant about the number of car keys because her answer would be, "May I explain? There were two car keys" did not misstate defendant's testimony or mislead the jury concerning what was in evidence. **State v. Bishop,** 365.

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§ 438 (NCI4th Rev.). Argument of counsel; appeals to prejudice, passion and the like

There was no error requiring intervention ex mero motu in a capital prosecution for first-degree murder where defendant contended that the prosecutor's argument sought to use public sentiment against domestic abuse to enlist jurors' help in a general effort to deter abusive spouses and boyfriends from escalating the level of abuse to murder. **State v. Tyler,** 187.

§ 440 (NCI4th Rev.). Argument of counsel; defendant's prior convictions or criminal conduct

There was no gross error requiring the trial court to intervene ex mero motu in a capital resentencing where defendant contended that the prosecutor made improper use of his prior unadjudicated sexual assaults. **State v. Holden,** 404.

§ 442 (NCI4th Rev.). Argument of counsel; defendant's callousness, lack of remorse, or potential for further crime

There was no error requiring ex mero motu intervention by the trial judge in the prosecutor's closing argument where the prosecutor indicated that defendant might rob or murder the jury if released. **State v. Barnard,** 95.

§ 444 (NCI4th Rev.). Argument of counsel; miscellaneous comments on defendant's general character and truthfulness

The trial court did not err by failing to intervene ex mero motu during the penalty phase closing argument in a first-degree murder prosecution where the prosecutor's argument, standing alone, did not equate to the type of specific, objectionable language referring to defendant as a liar that would require defendant to be granted a new sentencing proceeding. **State v. Tyler,** 187.

§ 448 (NCI4th Rev.). Argument of counsel; comment on jury's duty

The prosecutor's closing argument in a first-degree murder case did not improperly urge the jury to "lend its ear" to anticrime sentiment in the community and to convict defendant in order to "do something" about crime. **State v. Bishop,** 365.

§ 451 (NCI4th Rev.). Argument of counsel; interjection of counsel's personal beliefs; other

The prosecutor's closing argument in a first-degree murder trial that defendant's boyfriend would be found guilty of second-degree murder and that his criminal record would "cost him" was supported by the evidence and properly made in response to defense counsel's argument that the boyfriend had not been punished for his role in the crime. **State v. Bishop,** 365.

§ 454 (NCI4th Rev.). Argument of counsel; victim's age, circumstances, or characteristics

An argument by a prosecutor in a capital prosecution for first-degree murder that described what the victim may have seen and felt and asked the jury to speculate about what the victim may have been thinking was not so grossly improper as to require the trial court to intervene ex mero motu. **State v. Jones,** 704.

§ 460 (NCI4th Rev.). Argument of counsel; capital cases, generally

Statements by the prosecutor in his closing argument in a capital sentencing proceeding were similar to statements previously reviewed by the Supreme Court and found to be proper. **State v. Strickland,** 443.

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The trial court did not err in a capital resentencing hearing by overruling defendant's objection to an argument which defendant contended improperly told jurors that circumstances not sufficient to excuse the killing or to reduce it to a lesser-included offense did not have mitigating value. **State v. Holden,** 404.

There was no gross error requiring intervention ex mero motu in a capital resentencing where the prosecutor related the facts of four prior unadjudicated sexual assaults after telling the jury, "We have to prove his intent at the time he killed [the victim] was to commit rape . . . ." **Ibid.**

The trial court was not required to intervene ex mero motu in a capital resentencing where the prosecutor argued that defendant being good to the elderly did not allow him to do what he had done to "all these" women. **Ibid.**

The trial court did not abuse its discretion by not intervening ex mero motu in a capital resentencing where the prosecutor argued that the Biblical injunction prohibited murder and quoted the New Testament in what defendant contends was an argument that Jesus would have hung a millstone around defendant's neck and drowned him for harming this victim. **Ibid.**

§ 461 (NCI4th Rev.). Argument of counsel; deterrent effect of death penalty

The trial court did not err in a capital resentencing by allowing the prosecutor to comment on the quality of life defendant would have in prison. **State v. Holden,** 404.

§ 466 (NCI4th Rev.). Argument of counsel; possibility of parole generally

The trial court did not err during a capital first-degree murder prosecution by granting the State's motion to prohibit defense counsel from discussing parole eligibility for a life sentence during penalty phase closing arguments. **State v. Tyler,** 187.

§ 467 (NCI4th Rev.). Argument of counsel; permissible inferences

Statements in the prosecutor's closing argument in a kidnapping and murder trial that defendant had sex with the female victim the night she was kidnapped, that the male victim suffered lacerations to his face as he reacted to this assault, that the victims suffered extreme indignities, and that the victims would not be bearing any children for their parents were supported by the evidence or were reasonable inferences drawn from the evidence. **State v. Fernandez,** 1.

The prosecutor's arguments that it was not likely that defendant's automobile just happened to run out of gas in a wooded area near the place where he would soon kill his estranged wife and that self-defense was not a defense in this case came within the wide latitude allowed counsel in stating contentions and drawing inferences from the evidence. **State v. Macon,** 109.

§ 468 (NCI4th Rev.). Argument of counsel; comment on matters not in evidence

The trial court properly sustained an objection to defense counsel's closing argument in a capital sentencing proceeding that the victim in defendant's prior conviction of voluntary manslaughter had fired a gun during the incident because the argument was not supported by the evidence. **State v. Strickland,** 443.

A prosecutor's argument in a first-degree murder prosecution was not so grossly improper as to require intervention ex mero motu where defendant contended that the prosecutor impermissibly referred to matters outside the record, but the argument was a reasonable inference from the evidence. **State v. Robinson,** 586.

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today" was not designed to simply badger the witness but its purpose was to challenge defendant's testimony that she was hysterical and crying at the scene of the crime. **State v. Bishop,** 365.

§ 481 (NCI4th Rev.). Reading of indictment to jury prohibited

The trial court did not impermissibly limit defense counsel's closing argument in a murder and kidnapping prosecution by cautioning counsel that he was very close to using the exact language in the indictment and that he should not read the indictment to the jury. **State v. Richardson,** 520.

§ 503 (NCI4th Rev.). Deliberations; review of testimony

The trial court in a prosecution for first-degree statutory rape and taking indecent liberties with a child improperly failed to exercise its discretion, as required by G.S. 15A-1233(a), in denying the jury's request to review the testimony of the victim and her aunt. **State v. Johnson,** 119.

§ 535 (NCI4th Rev.). Circumstances in which mistrial may be ordered; exposure to evidence not formerly introduced

There was no abuse of discretion in a prosecution for murder by torture, felonious child abuse, and felony murder in not declaring a mistrial where copies of defendant's pretrial statement containing a detective's collateral notation were provided to the jury. **State v. Pierce,** 471.

§ 574 (NCI4th Rev.). Circumstances in which mistrial may be ordered; consideration of improper evidence

The trial court did not abuse its discretion in a prosecution for robbery and murder by denying defendant Scott's motion for a mistrial after the court admitted evidence concerning a codefendant killing a cat. **State v. Cagle,** 497.

§ 660 (NCI4th Rev.). Postponement of ruling on dismissal motion

The trial court did not abuse its discretion in refusing to dismiss a charge of attempted armed robbery before trial where the court heard defendant's rendition of the facts as well as the State's and declined to rule on the motion before the evidence was presented at trial. **State v. Skeels,** 147.

§ 690 (NCI4th Rev.). Peremptory instructions involving particular mitigating circumstances in capital cases generally

The trial court did not err in a capital resentencing by refusing to grant defendant's motions for a directed verdict on three statutory mitigating circumstances. **State v. Holden,** 404.

There was no error in a capital sentencing proceeding in the court's peremptory instructions on nonstatutory mitigating circumstances where the court instructed the jurors that they could refuse to find the circumstances if they did not deem them to have mitigating value. **State v. Cagle,** 497.

The trial court's peremptory instructions on nonstatutory mitigating circumstances in a capital sentencing hearing were reviewed only for plain error where defendant had failed to object at trial and the instructions did not amount to plain error. **State v. Neal,** 608.

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permitted the jury to convict defendants without determining that each possessed the requisite mens rea to commit premeditated and deliberate murder. **State v. Evans,** 221.

The trial court did not err by instructing the jury that it could find defendant guilty of second-degree arson under the theory of acting in concert with her boyfriend. **State v. Bishop,** 365.

The trial court did not err by giving acting in concert instructions with respect to first-degree murder by torture, felony murder, and felonious child abuse where the evidence was more than ample to show that defendant and his girlfriend acted together with the joint purpose to commit acts constituting felonious child abuse and torture and that the victim's death was a natural and probable consequence of their actions. **State v. Pierce,** 471.

§ 806 (NCI4th Rev.). Acting in concert instructions as shifting burden of proof

There was no plain error in a prosecution for murder by torture, felonious child abuse, and felony murder in the trial court's acting in concert instruction or reinstruction. Although defendant argued that the instruction permitted the jury to convict him without determining that he possessed specific intent, none of these crimes requires specific intent and the argument was without merit under *State v. Barnes.* **State v. Pierce,** 471.

§ 826 (NCI4th Rev.). Instructions on character evidence; requirement of showing prejudice

There was no prejudicial error in a noncapital first-degree murder prosecution where the trial court denied a defendant's proper instruction on his character for peacefulness. **State v. Evans,** 221.

§ 878 (NCI4th Rev.). Additional instructions after retirement of jury generally

When the jury advised the court after continued deliberation that it had not reached unanimity on a charge of first-degree murder based upon premeditation and deliberation, the trial court did not then coerce a verdict in favor of the prosecution by its instructions on the duties of the jurors during deliberations, although the court did not give all of the instructions listed in G.S. 15A-1235(b) verbatim, where the instructions contained the substance of the statutory instructions. **State v. Fernandez,** 1.

No clear violation of G.S. 15A-1235(b) will be found as long as the trial court gives the substance of the four instructions found in that statute. **Ibid.**

§ 889 (NCI4th Rev.). Instructions to jury having difficulty reaching decision or in deadlock; miscellaneous instructions not erroneous or prejudicial

There was no error in a noncapital first-degree murder prosecution in the court's instructions to the jury on failure to reach a verdict where, read as a whole, the court twice admonished jurors not to compromise their convictions or do violence to their consciences, the substance of the instructions was to ask the jury to continue its deliberations, and the instructions were not coercive. **State v. Evans,** 221.

§ 1340 (NCI4th Rev.). Capital punishment; submission and competence of evidence; aggravating and mitigating circumstances

The trial court erred in a first-degree murder resentencing hearing by refusing to allow defendant's expert to testify that defendant would not be a danger in prison to himself or other inmates. **State v. Bunning,** 253.

The trial court in a capital sentencing hearing did not err in excluding an officer's hearsay testimony that defendant's victim in a prior voluntary manslaughter conviction had left a bar before defendant where the testimony was offered in response to the State's evidence of the (e)(3) aggravator, and this evidence had no direct mitigating value and was not relevant to whether defendant had been convicted of a prior felony. **State v. Strickland,** 443.

Evidence in a capital sentencing proceeding that defendant put plastic bags on his feet so that dogs could not pick up his scent and that he wore a stocking cap so that no hair would fall out was relevant to the pecuniary gain aggravating circumstance. **State v. LeGrande,** 718.

§ 1342 (NCI4th Rev.). Capital punishment; submission and competence of evidence; prior criminal record or other crimes

The trial court did not err in a capital sentencing proceeding by admitting evidence concerning the details of a prior killing where defendant argued that the probative value of the evidence was outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. **State v. Cummings,** 291.

The trial court did not abuse its discretion during a capital resentencing by admitting testimony relating to four prior unadjudicated sexual assaults. **State v. Holden,** 404.

§ 1345 (NCI4th Rev.). Capital punishment; instructions; function of jury

There was no error in a capital resentencing hearing where the trial court instructed the jury that it must not have any preconceived ideas as to whether defendant should receive life or death and that a juror's mind must not be closed on either of those propositions. **State v. Holden,** 404.

§ 1346 (NCI4th Rev.). Capital punishment; instructions; consideration of evidence

The trial court did not commit plain error by failing to instruct the jury in a capital sentencing proceeding that it could not consider the same evidence to find the aggravating circumstances that the murder was committed by a person lawfully incarcerated and that defendant had been previously convicted of a felony involving the use or threat of violence to the person. **State v. Rich,** 50.

§ 1351 (NCI4th Rev.). Capital punishment; instructions; unanimous decision as to mitigating circumstances

The trial court did not err in a capital sentencing proceeding by refusing to instruct the jury that it did not need to be unanimous in order to answer no to Issues Three and Four. **State v. Cummings,** 291.

Under a plain error review, the trial court's instructions in a capital resentencing did not preclude consideration of mitigating circumstances which had not been unanimously found by the jurors where the court instructed the jury on Issue Three that each juror may consider any mitigating circumstance that the jurors determine to exist. **State v. Sanderson,** 669.

CRIMINAL LAW—Continued

§ 1370 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; particularly heinous, atrocious, or cruel offense; instructions

The trial court in a first-degree murder prosecution did not allow the jury to find the especially heinous, atrocious, or cruel aggravating circumstance based on an unconstitutionally vague instruction. **State v. Tyler,** 187.

§ 1374 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; murder as course of conduct

The trial court did not err in a capital sentencing proceeding arising from the robbery and murder of a store owner by admitting evidence that defendant had broken into the home of another victim and killed her during the course of a robbery to support the aggravating circumstance that the murder of the store owner was part of a course of conduct which included the commission of other violent crimes. **State v. Cummings,** 291.

There was no plain error in a capital sentencing proceeding where the court failed to give special instructions as to what conduct could be used in determining whether the course of conduct aggravating circumstance existed. **Ibid.**

§ 1375 (NCI4th Rev.). Capital punishment; consideration of mitigating circumstances; definition; instructions

The trial court did not commit plain error that violated the Eighth and Fourteenth Amendments in a capital prosecution for first-degree murder by allowing jurors not to give effect to mitigating evidence if they deemed the evidence not to have mitigating value. **State v. Tyler,** 187.

The trial court did not err in a capital sentencing hearing in its definition of mitigating circumstance. **State v. Cagle,** 497.

The trial court did not err in a capital sentencing proceeding by denying defendant's request for an instruction that the jury may base its sentencing recommendation upon sympathy or mercy. **Ibid.**

§ 1378 (NCI4th Rev.). Capital punishment; consideration of mitigating circumstances; burden of proof

There was no error in a capital resentencing where defendant contended that the trial court's peremptory instructions on the mitigating circumstances of emotional disturbance and impaired capacity heightened his burden of proof by requiring the jury to find the uncontradicted evidence to be credible and convincing. **State v. Holden,** 404.

§ 1379 (NCI4th Rev.). Capital punishment; consideration of mitigating circumstances; unanimous decision

The trial court did not err in a capital prosecution for first-degree murder in its instruction during jury selection on Issue Three, which involves weighing aggravating and mitigating circumstances. **State v. Cummings,** 291.

§ 1382 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; lack of prior criminal activity

The trial court erred in a capital sentencing proceeding by not submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. Defendant's criminal history was submitted in a nonstatutory cir-

CRIMINAL LAW—Continued

§ 1402 (NCI4th Rev.). Death penalty held not excessive or disproportionate

A sentence of death imposed upon defendant for first-degree murder of a fellow prison inmate was not excessive or disproportionate. **State v. Rich,** 50.

A sentence of death was not disproportionate. **State v. Tyler,** 187.

A sentence of death imposed upon defendant for first-degree murder by stabbing the victim to death in her home in front of her children was not disproportionate. **State v. McNeill,** 233.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant abducted the victim as she closed a food store, transported her to a secluded area, and ran over the victim repeatedly with her own car. **State v. Richardson,** 520.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where the case has aspects of lying-in-wait because defendant, unaware to the victim, stood behind the victim and shot him at close range with a shotgun. **State v. Strickland,** 443.

A sentence of death was not disproportionate. This defendant shot the victim several times, left the victim lying helplessly on the floor, did not seek medical aid for the victim, stole money from the victim in order to buy drugs, and immediately fled the scene. **State v. Cummings,** 291.

A sentence of death was proportionate where the evidence strongly tended to show that defendant coldly and callously planned to rape and kill the victim and then killed her to prevent her from testifying against him. **State v. Holden,** 404.

A sentence of death was not disproportionate. **State v. Cagle,** 497.

A sentence of death was not disproportionate where there was clear evidentiary support for the aggravating circumstances considered and found by the jury, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the case was distinguishable from cases in which the death penalty was found disproportionate, and this case was similar to cases in which the death penalty was found proportionate. None of the cases found disproportionate involved first-degree murder of a police officer from a distance with a high-powered rifle while the officer was engaged in the performance of his duties. **State v. Page,** 689.

A sentence of death for first-degree murder was not disproportionate where the record fully supports the aggravating circumstance found by the jury, there was no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration, this case is distinguishable from those cases in which the death penalty has been found disproportionate, and this case is similar to those cases in which the death penalty was found proportionate. Defendant murdered the victim after lying in wait and watching her for hours from the woods surrounding her home; he was willing to kill a person he had never met for money; he made elaborate plans to accomplish the murder and do it without getting caught; and he never showed any remorse for what he did and bragged to his friend. **State v. LeGrande,** 718.

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 was imposed under the influence of passion, prejudice or any other arbitrary factor, and this case is more similar to cases where the death sentence was found proportionate than to those in which it was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. **State v. Neal,** 608.

CRIMINAL LAW—Continued

A sentence of death was not disproportionate where the record fully supports the aggravating circumstance found by the jury, there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration, none of the seven cases in which the death penalty has been found disproportionate was factually similar to this case. The terror the victim here must have experienced is staggering and clearly distinguishes this case from those in which the death penalty has been found disproportionate; moreover, defendant killed the victim in order to eliminate her as a potential witness, which revealed a particularly callous and depraved heart. **State v. Sanderson,** 669.

§ 1604 (NCI4th Rev.). Eligibility for parole under life sentence

The clemency power of the Governor is not infringed upon by G.S. 15A-1380.5, which allows defendants sentenced to life imprisonment without parole the right to have their cases reviewed by a superior court judge after twenty-five years imprisonment and every two years thereafter. This statute allows defendants not already benefitted by the Governor to have their case reviewed but does not affect the Governor's clemency power in any way. **State v. Allen,** 731.

ENERGY

§ 7 (NCI4th). *Competition* between suppliers; territory annexed by a municipality

In resolving the rights of competing electric suppliers to provide customer service within a municipality where the competing interests have been created by multiple annexations, the "determination date" is the annexation date on which there first existed a primary and secondary supplier competing for the right to service premises initially requiring electric service. **City of Concord v. Duke Power Co.,** 211.

Where a customer's lot was annexed into plaintiff city, an electric supplier, in 1986, an area with a power company's electric conductor line was annexed into the city in 1992, and the customer constructed on the lot an industrial building requiring electric service after the 1992 annexation, the determination date for applying the Electric Act of 1965 was the date of the 1992 annexation of the power company's line. **Ibid.**

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 67 (NCI4th). Water pollution generally; water quality standards and classifications

The legislative standards applicable to the decision to be made by the Environmental Management Commission are adequate to save the Water Supply Watershed Protection Act from being an unconstitutional delegation of legislative power. **Town of Spruce Pine v. Avery County,** 787.

Failure of the 1993 amendment which in effect exempted one watershed from the coverage of the Water Supply Watershed Protection Act to pass constitutional muster under the equal protection clauses of the federal and state constitutions did not render the entire Act unconstitutional; rather, the 1993 amendment may be expunged so that the Act is left intact. **Ibid.**

EVIDENCE AND WITNESSES

§ 86 (NCI4th). Exclusion of irrelevant evidence

The trial court did not err in a noncapital first-degree murder retrial where a codefendant whom defendant wished to call as a witness was allowed to assert his Fifth Amendment privilege against self-incrimination and the trial court excluded evidence detailing repeated threats and physical assaults by the codefendant against his girlfriend and her children, including the victim, on the day of the murder. **State v. Pickens,** 628.

§ 119 (NCI4th). Evidence incriminating persons other than accused; evidence of similar crimes

The trial court did not err in a first-degree murder prosecution by excluding evidence of an accomplice's prior violent conduct. **State v. Dickens,** 26.

§ 125 (NCI4th). Evidence of specific instances of sexual behavior of rape victim

In a capital resentencing where defendant had also been convicted of rape, the trial court did not err by excluding evidence that the victim had engaged in sexual intercourse with a third party on the night of the killing. The evidence did not relate to any aspect of defendant's character, his record, or any other circumstance which a jury could deem to have mitigating value. **State v. Holden,** 404.

§ 167 (NCI4th). Threats made by others generally

Evidence that the murder victim, her family members, and a friend had threatened defendant's life and that, for that reason, he carried a gun with him when he went to see the victim the night the victim was shot was relevant to rebut the State's contention that the fact defendant carried a gun with him was evidence of premeditation and deliberation, but the trial court properly excluded this evidence where it concluded that it would prejudice the State and would serve only to delay the proceedings, inflame the jury, or confuse the issues. **State v. Macon,** 109.

§ 179 (NCI4th). Facts indicating state of mind; motive; in murder and like cases

Evidence of a murder victim's cash advances to defendant and the victim's real estate dealings with defendant was relevant to show that defendant had a motive to kill the victim. **State v. Bishop,** 365.

Evidence that defendant sold a murder victim two life insurance policies and that both policies were amended to make defendant the primary beneficiary was relevant to show a motive for the killing. **Ibid.**

§ 190 (NCI4th). Physical or mental condition or appearance of victim

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by admitting testimony from the son of the victim that the victim had very little strength in his right hand following testimony that the victim was right-handed and kept a pistol by the cash register in the store where he was shot. **State v. Cummings,** 291.

§ 222 (NCI4th). Flight

The trial court did not err in a first-degree murder prosecution by instructing the jury on the issue of flight. Jury instructions relating to flight are proper as long as there is some evidence reasonably supporting the theory that defendant fled after commission of the crime charged. **State v. Allen,** 731.

EVIDENCE AND WITNESSES—Continued

The trial court did not err in a noncapital first-degree murder prosecution by giving an instruction on flight where the evidence permitted an inference that defendant not only left the scene of the crime, but took steps to avoid apprehension. **State v. Beck,** 750.

§ 264 (NCI4th). Character or reputation of persons other than witness; victim

Assuming that testimony by a murder victim's mother that the victim was "beautiful," "loving," "very gentle," and "her best friend" was improper character evidence, the admission of this testimony was not plain error. **State v. Bishop,** 365.

§ 284 (NCI4th). Specific acts of victim; to prove self-defense

Testimony that defendant knew a murder victim had assaulted his wife a few months prior to the murder was not admissible under Rule 404(b) to show that defendant was fearful of the victim at the time of the killing where there was no allegation or evidence that defendant shot the victim in self-defense. **State v. Strickland,** 443.

The trial court in a first-degree murder trial did not err by excluding testimony by defendant's girlfriend about defendant's past violent conduct against his wife or about the victim's threats to beat defendant on the night of the murder where defendant did not claim self-defense. **Ibid.**

§ 292 (NCI4th). Admissibility of crimes, wrongs, or acts not resulting in conviction

There was no abuse of discretion in a first-degree murder prosecution where the trial court admitted testimony that defendant beat his girlfriend in a jealous rage prior to murdering the victim. **State v. Robinson,** 586.

There was no error, much less plain error, in a first-degree murder prosecution where four witnesses were allowed to testify that the defendant beat his girlfriend before killing the victim because he thought she was running around with another man. **Ibid.**

§ 337 (NCI4th). Other crimes, wrongs, or acts; to show intent; homicide offenses generally

The trial court did not err in a prosecution for murder by torture, felonious child abuse, and felony murder by admitting testimony concerning defendant's alleged mistreatment of one of his girlfriend's children. **State v. Pierce,** 471.

§ 339 (NCI4th). Other crimes, wrongs, or acts; admissibility to show malice, premeditation or deliberation

Evidence of a prior assault on the murder victim by defendant, her husband, was admissible in a first-degree murder prosecution to prove malice and intent to kill. **State v. Allen,** 731.

§ 351 (NCI4th). Other crimes, wrongs, or acts; to show motive, reason, or purpose; homicide offenses generally

The trial court did not err in a prosecution for murder by torture, felonious child abuse, and felony murder by admitting testimony concerning defendant's alleged mistreatment of one of his girlfriend's children. **State v. Pierce,** 471.

§ 607 (NCI4th). Rebuttal generally

Testimony by defendant's former boyfriend that defendant changed the beneficiary on his life insurance policy without his knowledge and that defendant took the

EVIDENCE AND WITNESSES—Continued

accrued value of his insurance policy without his consent, even though ordinarily inadmissible as specific instances of bad character, was properly admitted to rebut and discredit defendant's testimony that her actions were taken with the boyfriend's consent. **State v. Bishop,** 365.

§ 657 (NCI4th). Challenging probable cause for search or search warrant

In a hearing on a motion to suppress evidence seized pursuant to a search warrant on the ground that the affidavit contained known falsehoods, the trial court properly refused to admit the deposition of a witness to illustrate contradictions between the affidavit and his deposition testimony. **State v. Fernandez,** 1.

§ 876 (NCI4th). Hearsay evidence; statements offered to show state of mind of victim

Even if statements by a murder victim that she thought defendant had made some "hang-up" calls and she was afraid were improperly admitted under the state-of-mind exception to the hearsay rule because neither the victim's state of mind nor the relationship of the victim and defendant was relevant to the shooting in this case, the admission of this evidence was not prejudicial error. **State v. Macon,** 109.

Statements by a murder victim to a banker and to her brother expressing her concern about defendant's handling of her real estate transactions and her intent to document defendant's debt to her, to seek repayment, and to confront defendant about her concern that defendant had stolen from her were properly admitted pursuant to the state of mind exception to the hearsay rule. **State v. Bishop,** 365.

Assuming that a murder victim's statement to her brother indicating that she had not been paid for horses that defendant had sold for her and her statement to her mother indicating that she had sent money to defendant to lift restrictions on property defendant was selling for her were improperly admitted under the state of mind exception to the hearsay rule, defendant was not prejudiced by the admission of this testimony in light of other evidence that defendant's motive for the murder was the victim's insistence that defendant pay money defendant owned her. **Ibid.**

§ 881 (NCI4th). Hearsay evidence; statements not offered to prove truth of matter asserted; to show motive

A promissory note signed by defendant and made payable to a murder victim was not admitted solely to show the truth of the matter asserted but was relevant to establish a motive for the killing. **State v. Bishop,** 365.

A murder victim's check register books showing checks and wire transfers to defendant, a list made by the victim documenting checks, money orders, and wire transfers to defendant, and handwritten calculations corresponding to amounts the victim believed defendant owed her for land and horses sold by defendant were admissible for the non-hearsay purpose of showing that the victim had followed through on her stated intention to document defendant's debt to her and to establish a motive for the killing. **Ibid.**

§ 887 (NCI4th). Hearsay evidence; uses of evidence other than to prove truth of matter asserted; application in particular cases

The trial court did not err in a first-degree murder prosecution by admitting a tape recording and transcript of a 911 call in which defendant asked a hypothetical question. **State v. Dickens,** 26.

EVIDENCE AND WITNESSES—Continued

where the officers had probable cause to believe defendant had participated in the murder and burglary. **State v. Dickens,** 26.

§ 1224 (NCI4th). Confessions and other inculpatory statements; delay in arraignment

The trial court did not err by not suppressing a first-degree murder defendant's statement where the delay in taking him before a magistrate was four hours and defendant failed to show that he would not have made an inculpatory statement absent the delay. **State v. Dickens,** 26.

§ 1250 (NCI4th). Confessions and other inculpatory statements; invocation of right to counsel generally

Defendant did not invoke his right to an attorney during custodial interrogation, and his inculpatory statement indicating the location of a shotgun used in two murders was the product of a voluntary, intelligent, and knowing waiver of defendant's Miranda rights. **State v. Fernandez,** 1.

§ 1255 (NCI4th). Confessions and other inculpatory statements; invocation of right to counsel; post-invocation communication initiated by defendant

Once an accused has invoked his right to counsel during custodial interrogation, a valid waiver of that right cannot be established by showing merely that he responded willingly to further police-initiated interrogation. **State v. Fernandez,** 1.

§ 1259 (NCI4th). Confessions and other inculpatory statements; right to remain silent; what constitutes invocation of right; extent of invocation

Assuming that an SBI agent's testimony that he did not interview defendant again because he was advised by her boyfriend that she had an attorney and that he should not attempt to interview her again constituted improper evidence of defendant's exercise of her right to remain silent, the admission of this testimony was not plain error. **State v. Bishop,** 365.

§ 1268 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; necessity that second waiver be obtained

The trial court did not err in a murder prosecution by denying defendant's motion to suppress his statement to an SBI agent where defendant had twice been advised of his rights and the agent did not readvise him. **State v. Pierce,** 471.

§ 1679 (NCI4th). Allegedly grotesque and unflattering photographs

There was no error in a prosecution for murder by torture, felonious child abuse, and felony murder in the introduction of a photograph of defendant taken on the day of his arrest which showed tatoos and long hair. **State v. Pierce,** 471.

§ 1688 (NCI4th). Photographs of victims prior to crime

A photograph of a murder victim while she was alive was admissible to illustrate her mother's testimony. **State v. Bishop,** 365.

§ 1694 (NCI4th). Photographs of crime victim; location and appearance of victim's body

The trial court did not abuse its discretion in a capital resentencing hearing by admitting into evidence three photographs of the victim's body where the photographs

were admitted to illustrate testimony describing the appearance of the body when it was found. **State v. Holden,** 404.

There was no abuse of discretion in a prosecution for murder by torture, felonious child abuse, and felony murder in the admission of 26 photographs of the victim. **State v. Pierce,** 471.

§ 1700 (NCI4th). Photographs of crime victim; to illustrate pathologist's testimony

The trial court did not abuse its discretion in a first-degree murder prosecution by permitting the State to introduce five autopsy photographs where the photographs were used to illustrate the testimony of the medical examiner and demonstrated with clarity the nature and placement of the wounds and supported the State's theory that the death was caused by repeated blows to the head with a blunt weapon. **State v. Dickens,** 26.

§ 1704 (NCI4th). Photographs of crime victims at crime scene

The trial court did not abuse its discretion in a first-degree murder prosecution by permitting the State to introduce six photographs of the body as found at the crime scene where the photographs were introduced to illustrate the testimony of officers with respect to the crime scene and the position of the body. **State v. Dickens,** 26.

§ 1776 (NCI4th). In court demonstration; manner in which death occurred

The trial court did not err in a capital prosecution for first-degree murder by overruling defendant's objection to a demonstration by the prosecutor during guilt-innocence closing arguments where an expert witness had testified that the victim would have lost consciousness between two and five minutes after receiving fatal knife wounds and the prosecutor silently timed five minutes. **State v. Jones,** 704.

§ 2047 (NCI4th). Opinion testimony by lay persons generally

The trial court did not err in a first-degree murder prosecution by allowing a detective to testify about the demeanor of a State's witness, who was also defendant's girlfriend, during interviews with law enforcement officers. **State v. Dickens,** 26.

Where testimony by a witness refuted defendant's statements implicating the witness in a murder, testimony by officers that they had checked out the witness's story and that it appeared that the witness's story was true did not constitute inadmissible character evidence but was admissible to explain the officers' investigation following defendant's implication of the witness and why the witness had been eliminated as a suspect. **State v. Richardson,** 520.

§ 2159 (NCI4th). Qualification of witness as expert generally; challenge or objection to qualification

The trial court did not err in a capital prosecution for first-degree murder by permitting a nurse to give an opinion about the cause of the victim's death and about the effects of a sedative medication administered to the victim where defendant made only general objections to the nurse rendering her opinions and failed to made a specific objection about her expertise in diagnosing the victim's cause of death. **State v. Tyler,** 187.

§ 2242 (NCI4th). Particular subjects of expert testimony; conclusion based on medical records

The trial court did not err in a capital prosecution for first-degree murder by allowing a nurse who treated the victim before she died and who testified as to the vic-

FRAUD, DECEIT, AND MISREPRESENTATIONS

§ 5 (NCI4th). Constructive or legal fraud

Plaintiffs' claim for constructive fraud was properly dismissed by the trial court in an action against defendant-accountants by the shareholders of a liquidated corporation where plaintiffs alleged only that they were harmed by specific misrepresentations made negligently by defendants but failed to allege that defendants took advantage of the parties' relationship to the hurt of plaintiffs. **Barger v. McCoy Hillard & Parks,** 650.

HOMICIDE

§ 226 (NCI4th). Sufficiency of evidence; evidence of identity linking defendant to crime sufficient

The State's evidence in a first-degree murder prosecution was sufficient for the jury to find that defendant alone abducted the victim from a food store, drove her to a secluded area, and killed her by running over her with her own car, although defendant told officers that he was with another person when the other person abducted and killed the victim. **State v. Richardson,** 520.

There was sufficient evidence to support a first-degree murder conviction where the evidence presented clearly supports a reasonable inference that defendant was the perpetrator of the murder. **State v. Robinson,** 586.

§ 244 (NCI4th). Sufficiency of evidence; first degree murder; malice, premeditation, and deliberation; intent to kill generally

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution. **State v. Beck,** 750.

§ 255 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; where defendant continued to inflict injuries after victim felled

The State's evidence was sufficient to support defendant's conviction of first-degree murder based on premeditation and deliberation where it tended to show that defendant abducted the victim from a food store, drove her to a secluded area, ran her down with her own car, and ran over her again as the victim tried to crawl away. **State v. Richardson,** 520.

§ 260 (NCI4th). Sufficiency of evidence; murder by ambush or lying in wait

The State's evidence was sufficient to be submitted to the jury on a charge of first-degree murder of a food store employee by lying in wait. **State v. Richardson,** 520.

§ 261.1 (NCI4th). Sufficiency of evidence; murder by torture

The State's evidence was sufficient to show that defendant's actions of torture of the victim were part of a course of conduct that resulted in the victim's death so as to support defendant's conviction of first-degree murder by torture even though defendant was not present when the victim died. **State v. Anderson,** 158.

The evidence was sufficient to support the submission of first-degree murder by torture to the jury where it permitted the jury to conclude that defendant engaged in a course of conduct in which he intentionally inflicted grievous pain and suffering upon the two and a half-year old victim, that he did this to punish her, and that the torture was a proximate cause of her death. **State v. Pierce,** 471.

HOMICIDE—Continued

§ 263 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; proof of underlying felony

The trial court did not err by denying defendant's motion to dismiss a charge of felony murder based on felonious child abuse where the evidence that defendant caused a small child's death by shaking her with his hands was sufficient for the jury to conclude that defendant committed felonious child abuse and that he used his hands as deadly weapons. **State v. Pierce,** 471.

§ 283 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; kidnapping

The evidence supported submission to the jury of the charge of felony murder with kidnapping as the underlying felony. **State v. Richardson,** 520.

§ 374 (NCI4th). Sufficiency of evidence; acting in concert; first-degree murder

The trial court did not err by instructing the jury in a first-degree murder prosecution that it could convict defendant on the basis of malice, premeditation, and deliberation under the theory of acting in concert where the evidence sufficiently indicated that two men were acting together pursuant to a common plan. **State v. Dickens,** 26.

The trial court did not err by instructing the jury that it could find defendant guilty of first-degree murder under the theory of acting in concert with her boyfriend. **State v. Bishop,** 365.

The trial court did not err in a noncapital first-degree murder prosecution by submitting the case against one defendant to the jury even though defendant contended that there was no evidence beyond mere presence to support a conviction. **State v. Evans,** 221.

§ 476 (NCI4th). Instructions; first-degree murder; intent

The trial court did not err in a capital murder prosecution by not giving defendant's requested instruction on specific intent to kill where the pattern jury instruction given by the court was in substantial conformity with the requested instruction. **State v. Cummings,** 291.

§ 478 (NCI4th). Instructions; transferred intent

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the trial court's instructions on transferred intent were erroneous but, viewed as a whole, they did not detract from the instructions on the elements of the crime. **State v. Evans,** 221.

§ 482 (NCI4th). Instructions; first-degree murder; premeditation and deliberation generally

The trial court's supplemental instruction on deliberation in a first-degree murder case, given in response to the jury's request for a clearer definition of deliberation, was a correct statement of the law and substantially conformed with defendant's requested instruction. **State v. Lewis,** 141.

§ 482.1 (NCI4th). Instructions; inference of premeditation and deliberation

The trial court did not err by giving the jury an instruction containing a list of suggestions which the jury may consider in determining whether the murder was committed with premeditation and deliberation. **State v. McNeill,** 233.

HOMICIDE—Continued

§ 493 (NCI4th). Instructions; matters considered in proving premeditation and deliberation; lack of just cause, excuse, or justification

The trial court did not err in a capital prosecution for first-degree murder by instructing the jury that it could consider the lack of provocation by the victim in determining whether defendant acted with premeditation and deliberation. **State v. Jones,** 704.

§ 523 (NCI4th). Instructions; second-degree murder; malice

The trial court did not err in a murder prosecution by not instructing the jury that diminished capacity could negate the element of malice required for a second-degree murder. **State v. Page,** 689.

§ 506 (NCI4th). Instructions; underlying felony; where more than one felony allegedly committed in same transaction

Although kidnapping and armed robbery were submitted to the jury as predicate offenses of felony murder, and the evidence was insufficient to support a charge of armed robbery, defendant's conviction of felony murder was not affected thereby where the jury found defendant guilty of first-degree kidnapping and not guilty of armed robbery, and the jury thus necessarily convicted defendant of felony murder based on kidnapping as the underlying felony. **State v. Richardson,** 520.

§ 583 (NCI4th). Instructions; acting in concert

The trial court's instructions on acting in concert in a first-degree murder trial were not erroneous because they included the phrase "either acting by herself or together with another" in the instruction on each of the elements relating to specific intent. **State v. Bishop,** 365.

§ 669 (NCI4th). Instructions; intoxication; where there was lack of evidence that capacity to think and plan was affected by drunkenness

There was no error in a prosecution for first-degree murder, robbery, and conspiracy in the trial court's failure to give defendant Cagle's requested instruction on voluntary intoxication where the evidence showed that defendant Cagle was able to have a predetermined plan, communicate the plan to another, execute the plan, flee the murder scene, and use the alibi. **State v. Cagle,** 497.

§ 705 (NCI4th). Cure of error in instructions by conviction; effect of alternate theory to support conviction of first-degree murder

Assuming the jury erroneously found defendant guilty of felony murder based on a charge of armed robbery not supported by the evidence, defendant was not prejudiced since he was also found guilty of first-degree murder based on theories of lying in wait and premeditation and deliberation. **State v. Richardson,** 520.

§ 727 (NCI4th). Propriety of additional punishment for underlying felony as independent criminal offense on conviction for felony murder; merger

There was no error in a prosecution for armed robbery, kidnapping, and first-degree murder where defendant contended that the judgment should have been arrested on the armed robbery conviction because the jury found him guilty of murder by premeditation and deliberation but not by felony murder. **State v. Skeels,** 147.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 50 (NCI4th). Variance between averment and proof generally

There was no fatal variance between the indictment and evidence where the indictment charged that defendant "did discharge a shotgun, a firearm," into a dwelling house while it was actually occupied and the evidence at trial established that the fatal shot came from a handgun. **State v. Pickens,** 628.

INDIGENT PERSONS

§ 19 (NCI4th). Expert witnesses; psychologists and psychiatrists

The trial court did not abuse its discretion in a capital prosecution by denying defendant's motions for funds for a psychiatrist. **State v. Pierce,** 471.

The trial court did not abuse its discretion in a capital first-degree murder prosecution by providing the State access to a forensic psychiatrist while denying defendant's request for the same type of expert. **State v. Page,** 689.

§ 21 (NCI4th). Expert witnesses; medical experts

There was no abuse of discretion in the denial of defendant's motion for funds to retain a pathologist where defendant's pretrial statements that the victim had been attacked by the family dog and assaulted by other children and that she bruised easily were overwhelmingly refuted by the evidence presented by the State. **State v. Pierce,** 471.

There was no abuse of discretion in a murder prosecution where the trial court denied defendant's request for funds for a medical expert in child abuse. All of the evidence suggested that the victim's injuries had been incurred as a result of abuse and defendant did not present anything other than speculation that an expert witness might testify that the victim had not been the victim of abuse. **Ibid.**

INFANTS OR MINORS

§ 20 (NCI4th). Felony child abuse; sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of felonious child abuse where the State's evidence tended to show that defendant was the victim's uncle, that he and his girlfriend had custody of the victim for three or four weeks prior to her death, that the victim was two and one-half years of age at the time of her death, and that defendant intentionally committed an assault upon the victim resulting in her death. **State v. Pierce,** 471.

INSURANCE

§ 895 (NCI4th). General liability insurance; what damages are covered

The term "unfair competition" was not ambiguous as used in insurance policies where plaintiffs purchased from a builder a residence situated in a drainage area subject to severe flooding, plaintiffs brought this action against the builder's insurers alleging bad faith and unfair trade practices, the trial court granted summary judgment for plaintiffs, determining that coverage existed under the advertising injury and advertising liability coverage of both policies. Neither policy defines "unfair competition" and the offenses surrounding the term in the policies referred to causes of action brought between business rivals; a competitor of the insured, but not its customer, can assert a claim which may be covered under the unfair competition category of the advertising injury coverage. **Henderson v. United States Fidelity & Guaranty Co.,** 741.

JURY

§ 26 (NCI4th). Summoning of jurors; failure to appear

The trial court did not err in a first-degree murder prosecution by denying defendant's challenge to the jury panel where defense counsel learned prior to trial that the sheriff possessed a list of jurors drawn for the session who had not been served with a summons or who had not made a proper return of summons, defendant filed a motion to continue, and the clerk's office and sheriff's department attempted to contact some of the prospective jurors who had not returned their notification of service to find out if they had received service. **State v. Barnard,** 95.

There was no error in a first-degree murder prosecution where two or three prospective jurors were contacted by the sheriff from a list he had received from the clerk's office and the district attorney's office, the sheriff asked the persons contacted if they had received their summons and if they intended to appear in court, and the sheriff and the chief deputy testified at trial. **Ibid.**

§ 35 (NCI4th). Supplemental jurors and special venires generally

The trial court did not err during jury selection in a first-degree murder prosecution where a supplemental list of jurors was prepared three days before trial; G.S. 9-11 specifically allows a trial court to summon a special venire of jurors at any time and the thirty-day notice provision in G.S. 9-5 therefore did not apply. **State v. Dickens,** 26.

§ 70 (NCI4th). Procedure for selecting trial jury generally

The trial court did not err in a capital first-degree murder prosecution by denying defendant's requested instructions during jury selection that the presumption of innocence remained in place even though they would be asked questions concerning the possible sentencing phase. **State v. Cummings,** 291.

§ 82 (NCI4th). Excusing jurors; hardship

There was no abuse of discretion in a capital murder prosecution where the trial court excused a prospective juror who had a medical history including coronary bypass surgery and an addiction to Valium and who stated that thinking about the case brought the problem back and that the stress of being a prospective juror awakened him at night. **State v. Neal,** 608.

§ 99 (NCI4th). Voir dire examination; reopening examination of juror previously accepted

The trial court did not err in a first-degree murder prosecution by failing to award defendant an additional peremptory challenge following the reexamination and excusal for cause of one of the supplemental jurors where the juror was initially passed by both sides before further examination revealed reasons supporting removal for cause. **State v. Dickens,** 26.

The trial court did not abuse its discretion in a capital resentencing hearing by reopening voir dire after the jury was impaneled and permitting the State to exercise a peremptory challenge where the prosecutor informed the court after the close of all the evidence that he had learned from "an officer of the court" that a juror had in the past few years expressed an argument against the death penalty. **State v. Holden,** 404.

§ 109 (NCI4th). Examination of veniremen individually or as a group; sequestration of venire; racial bias

In a capital prosecution of a black defendant for the first-degree murder of a white victim, the trial court did not abuse its discretion by denying defendant's motion

resolve to be fair and impartial and the second clearly stated that she could impose life imprisonment as punishment for first-degree murder. **State v. Dickens,** 26.

§ 206 (NCI4th). Challenges for cause; acquaintance or friendship with persons in law enforcement

The trial court did not abuse its discretion in a first-degree murder prosecution by failing to excuse a juror whose son was a state trooper and whose husband was a retired state trooper. **State v. Dickens,** 26.

§ 215 (NCI4th). Challenges for cause; propriety of seating juror who expressed belief in capital punishment

The trial court did not abuse its discretion in a first-degree murder prosecution by failing to excuse for cause a juror who stated that she believed in the death penalty and favored it as punishment for first-degree murder. **State v. Dickens,** 26.

§ 219 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; necessity that juror be able to follow trial court's charge and state law

The trial court did not err during jury selection for a capital first-degree murder prosecution by excluding a prospective juror for cause when the prospective juror stated that he would follow the capital sentencing scheme but choose life imprisonment over death. **State v. Cummings,** 291.

§ 226 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; rehabilitation of jurors

The trial court did not err by excusing for cause in a capital trial six prospective jurors who stated unequivocally that they would be unable to vote to impose the death penalty but also stated that they could follow the law as to sentence recommendation without affording defendant the opportunity to attempt to rehabilitate the prospective jurors. **State v. Richardson,** 520.

The trial court did not err in a capital murder prosecution by refusing to allow defendant the opportunity to rehabilitate a prospective juror on capital sentencing. **State v. Cummings,** 291.

The trial court did not abuse its discretion in jury selection for a capital first-degree murder prosecution where defendant contended that he was not allowed to rehabilitate prospective jurors excused for cause based on opposition to the death penalty. **State v. Page,** 689.

§ 260 (NCI4th). Effect of racially neutral reasons for exercising peremptory challenges

The trial court did not err during jury selection for a capital first-degree murder prosecution by overruling defendant's objection to the peremptory challenge of a prospective juror where defendant had argued that the challenge was based upon race. **State v. Cummings,** 291.

The trial court did not err during jury selection for a capital first-degree murder prosecution which resulted in a life sentence by overruling defendant's objections to the State's use of its peremptory challenges in an allegedly discriminatory manner where the reasons given by the prosecutor are supported by the record. **State v. Robinson,** 586.

PARENT AND CHILD

§ 19 (NCI4th). Parent's right to custody and control of minor child, generally

The "best interest of the child" test must be applied in a custody dispute between two natural parents (biological or adoptive) or between two parties who are not natural parents. **Price v. Howard,** 68.

§ 21 (NCI4th). Presumptions of parent's right to custody and control

A natural parent may no longer enjoy a constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child if the parent's conduct is inconsistent with the parent's protected status, and in such case the best interest of the child standard may be applied in a custody dispute with a nonparent without offending the Due Process Clause. **Price v. Howard,** 68.

While unfitness, neglect, and abandonment clearly constitute conduct inconsistent with a natural parent's constitutionally protected paramount status, other types of conduct can also rise to this level. **Ibid.**

In order to preserve the constitutional protection of parental interest, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with protected parental interests. **Ibid.**

§ 25 (NCI4th). Custody to third persons; other relatives

A custody dispute between defendant natural mother and plaintiff nonparent, the child's de facto father, is remanded for a determination as to whether defendant's conduct was inconsistent with the constitutionally protected status of a natural parent so that the "best interest of the child" standard should be applied. **Price v. Howard,** 68.

§ 99 (NCI4th). Termination of parental rights; neglect, generally

A finding of neglect sufficient to terminate parental rights must be based on neglect at the time of the termination proceeding. **In re Young,** 244.

§ 100 (NCI4th). Termination of parental rights; neglect; evidence held insufficient

The trial court's termination of respondent mother's parental rights on the basis of neglect at the time of the termination proceeding was unsupported by clear, cogent, and convincing evidence. **In re Young,** 244.

Evidence that respondent mother had given her first child up for adoption was insufficient to show a probability of repetition of neglect of her second child sufficient to support termination of her parental rights in the second child. **Ibid.**

§ 102 (NCI4th). Termination of parental rights; abandonment

The trial court's findings did not support the termination of respondent mother's parental rights on the ground of abandonment. **In re Young,** 244.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 14 (NCI4th). Nursing generally

Substantial evidence supported findings of the Board of Nursing as to instances of negligence or incompetence by a registered nurse. **Leahy v. Bd. of Nursing,** 775.

The Board of Nursing could properly revoke the license of a registered nurse even though there was no expert testimony defining the standard of care for registered nurses in the practice of their profession. **Ibid.**

PRODUCTS LIABILITY

ROBBERY

SANITATION AND SANITARY DISTRICTS

SCHOOLS

SEARCHES AND SEIZURES

§ 100 (NCI4th). Application for search warrant; affidavits containing erroneous, inaccurate, or false information

Defendant failed to show that a search warrant was invalid and that evidence seized thereunder was inadmissible under *Franks v. Delaware*, 438 U.S. 154, and G.S. 15A-978 on the ground that facts necessary to establish probable cause were asserted in the affidavit either with knowledge of their falsity or with a reckless disregard for the truth. **State v. Fernandez**, 1.

§ 114 (NCI4th). Affidavits to support search warrant for vehicle

The trial court did not err in a first-degree murder prosecution by not suppressing tires seized from defendant's vehicle where defendant argued that the warrant application lacked sufficient information to support probable cause. **State v. Dickens**, 26.

§ 150 (NCI4th). Release of seized property to owner

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion to dismiss because the State failed to preserve potentially exculpatory evidence where the car in which the victim had been sitting when shot was released by the Sheriff's Department to a finance company. The findings that the officers acted in good faith and that no evidence was destroyed which rose to the level of constitutional materiality were supported by the evidence and are conclusive on appeal. **State v. Robinson**, 586.

UTILITIES

§ 27 (NCI4th). Natural gas facilities; compelling creation of expansion fund

The evidence supported the Utilities Commission's finding that Piedmont's proposal to provide natural gas service to a four-county area was contingent upon 30% or more of the capital being provided from an expansion fund. **State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.**, 558.

The evidence supported the Utilities Commission's finding that its failure to grant a final certificate to Frontier to provide natural gas service to a four-county area would likely result in no natural gas being available in these counties in the foreseeable future, notwithstanding Piedmont had also applied to serve this area, where Piedmont refused to provide service to this area without the use of expansion funds. **Ibid.**

Any proclaimed right a local distribution company has to the creation and use of an expansion fund is limited to those areas in which it possesses a certificate of public convenience and necessity and does not extend to unfranchised areas which are the subject of competing certificate applications. **Ibid.**

The Utilities Commission could properly determine that the method of financing of natural gas service for a four-county area takes precedence over the limited differential between the rates proposed by the two applicants. **Ibid.**

The Utilities Commission did not improperly fail to employ the net present value method of analysis to determine whether extension of natural gas service into a four-county area was economically feasible pursuant to G.S. 62-158(c). **Ibid.**

§ 48 (NCI4th). Certificates of public convenience and necessity generally

The Utilities Commission did not act arbitrarily and capriciously by giving the greatest weight to the proposed sources of funding in deciding between two appli-

cants for a certificate of public convenience and necessity to provide natural gas service to a four-county area, and there was substantial evidence in the record to support the Commission's award of the final certificate to a newly formed local distribution company (Frontier) rather than to a previously existing company (Piedmont) where Frontier proposed to use traditional financing and Piedmont was unwilling to provide the service without expansion fund financing. **State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.**, 558.

Substantial evidence supported a finding by the Utilities Commission that a new local distribution company was formed to develop a rural natural gas system to provide service to four counties although the new company first applied for a certificate to serve only three counties. **Ibid.**

Substantial evidence supported the Utilities Commission's finding that an applicant's proposed natural gas distribution system was in excess of 428 miles, despite a finding in an earlier order that the applicant's proposed project included 718 miles of distribution main. **Ibid.**

A finding by the Utilities Commission that a previously existing local distribution company proposed to construct only 215 miles of natural gas distribution main was supported by testimony of the company's own witness. **Ibid.**

The evidence supported the Utilities Commission's finding that a four-county area would have to compete for limited corporate resources if Piedmont is granted the certificate to provide natural gas service to this area. **Ibid.**

§ 233 (NCI4th). Conduct of hearing generally

The Utilities Commission's procedures for receiving evidence from both applicants for a certificate of public convenience and necessity to provide natural gas service to a four-county area and its rulings with regard to the admissibility of that evidence were proper. **State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.**, 558.

§ 254 (NCI4th). Competency and relevancy of evidence generally

While an independent market study required as a condition of a final certificate for providing natural gas service to a four-county area differed from Frontier's initial proposal with regard to the pace of construction and development of the distribution system, the study was in substantial compliance with Frontier's preliminary proposal, and the Utilities Commission properly denied Piedmont's motion to dismiss Frontier's filing of the study. **State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.**, 558.

§ 321 (NCI4th). Grounds for decision by reviewing court

It is not the function of the appellate court to determine whether there is evidence to support a position the Utilities Commission did not adopt. **State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.**, 558.

The credibility and weight of the testimony are for the Utilities Commission to decide, and the appellate court will presume that the Commission gave proper consideration to all competent evidence presented. **Ibid.**

WORKERS' COMPENSATION

§ 86 (NCI4th). Liens upon payments made by third party

An employer and its insurance carrier possessed a workers' compensation subrogation and lien interest in funds received by the injured employee through settlement with the third-party tortfeasor even though the employer had not filed a written

WORD AND PHRASE INDEX