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SUPREME COURT OF NORTH CAROLINA

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2. Appointed and sworn in 1 April 1998 to replace Thomas W. Seay, Jr. who retired 31 March 1998.
3. Retired 31 July 1998.
4. Appointed and sworn in 12 May 1998 to replace Julia V. Jones who retired 31 March 1998.
5. Deceased 30 July 1998.
6. Sworn in as Emergency Judge 1 April 1998.
7. Retired 1 February 1998.

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1. Appointed and sworn in 10 June 1998.
2. Appointed and sworn in 17 April 1998.
3. Appointed and sworn in 8 May 1998.
4. Resigned as Chief Judge 6 March 1998.
5. Appointed and sworn in 20 July 1998.
6. Appointed Chief Judge 12 May 1998 to replace James E. Lanning who became Superior Court Judge.
7. Appointed and sworn in 10 July 1998.
8. Deceased April 1998.

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Eric Solomon Frahm . . . . Fairfax, Virginia
Stephen David Joseph Fraser . . . . Raleigh
Stacy D. Fulcher . . . . Cary
Richard Harcourt Fulton . . . . Charlotte
Victor Curtis Garlock . . . . Asheville

KROME DOYLE GEORGE . . . . .Charlotte
SUSAN JEAN GIAMPORTONE . . . . .Cary
BRANDY COOLEY GILLENWATER . . . . .Kernersville
JAMES ROBINSON GILREATH . . . . .Greenville, South Carolina
ANGEL ROCHELLE GORDON . . . . .Charlotte
JOHN FELIX GREEN II . . . . .Wilmington
EDWIN SMITH GREEN III . . . . .Charlotte
CHRISTINE MICHELE GRIECO . . . . .Fayetteville
RYAN DAVID GUILDS . . . . .Chapel Hill
BENJAMIN ROBINSON HARDWICK . . . . .Winston-Salem
LASHON ANNETTE HARLEY . . . . .Raleigh
HELEN RUTH HARWELL . . . . .Greenville
DANIEL KIVETT HICKS . . . . .Greenville, South Carolina
ALISON A. M. HOLMES . . . . .Durham
MELANIE KIRK HOLTON . . . . .Bethania
HEATHER HARDING HOWARD . . . . .Nashville, Tennessee
YANCEY CANAAN HUIE . . . . .Raleigh
CHRISTOPHER MARK HUMPHREY . . . . .Raleigh
JAMES BRIAN INNES . . . . .Davie, Florida
CHIAKI ITO . . . . .Carolina Beach
LINA ELIZABETH JAMES . . . . .Winston-Salem
MARK RODMAN JOHNSON . . . . .Charlotte
DANA GENEEN JONES . . . . .Durham
WOODROW CLARKSTON JORDAN . . . . .Charlotte
ARRIS NICHELLE KING . . . . .Statesville
MAITRI KLINKOSUM . . . . .Purlear
ANDREW THOMAS KNOWLES . . . . .Raleigh
JAIME ARNOLD KOSOFSKY . . . . .Charlotte
CLAYTON BRENT KROHN . . . . .High Point
FREDERICK C. LAMAR . . . . .Durham
TERRI E. LEGRAND . . . . .Durham
JENNIFER M. LEAHY . . . . .Raleigh
MICHAEL VINCENT LEE . . . . .Raleigh
STUART MARTIN LEVINE . . . . .Apex
KATHERINE MARTIN LEWIS . . . . .Durham
ERIK PAUL LINDBERG . . . . .Charlotte
KELLY KATHLEEN MAGUIRE . . . . .Raleigh
CHRISTY LYNN MAILLET . . . . .Vernon Hill, Virginia
RICHARD JOHN MAITA . . . . .Waynesville
DENNIS MARCELLOUS MARTIN . . . . .Franklin
ERIK LOUIS MAZZONE . . . . .Chapel Hill
CHRISTINE M. MAZZONE . . . . .Chapel Hill
MICHELLE DEVONDRIA MCCLURE . . . . .Burlington
CHARLES WILLIAM MCHAN, JR. . . . . .Murphy
GERALD FRANCIS MEEK . . . . .Fayetteville
ROBERT J. MERMELSTEIN . . . . .Raleigh
MASAO MEROE . . . . .Greenville
JOSEPH FREDERICK MILLER . . . . .Hickory
NADINE MITCHELL . . . . .Raleigh
TRULA RENO MITCHELL . . . . .Matthews
MICHAEL MONTECALVO . . . . .Winston-Salem

Janet Moore . . . . Durham
Peter Francis Morgan . . . . Charlotte
Ashleigh Philayne Sims Morgan . . . . Charlotte
Corie Diane Morman . . . . Carrboro
Christopher Andrew Mullaly . . . . Chapel Hill
Joseph Charles Munch . . . . Swansboro
Kelly Booth Neal . . . . Kure Beach
David V. Otterson . . . . Raleigh
Carla Carrillo Otterson . . . . Raleigh
William E. Parker III . . . . Raleigh
James Wright Parris, Jr. . . . . Durham
Diane Fox Paul . . . . Winston-Salem
John Abb Payne . . . . Chapel Hill
Vernell Yvonne P. Peele . . . . Burtonsville, Maryland
Tasha Kae Pepper . . . . Sunrise, Florida
Michael Stuart Pitts . . . . Greenville, South Carolina
Daniel Scott Porper . . . . Cary
Matthew James Powers . . . . Raleigh
Anand Prakash Ramaswamy . . . . Burlington
Anthony Hoyt Randall . . . . Spartanburg, South Carolina
Babette Maria Reynolds . . . . Charlotte
Robert C. Richards . . . . Sanford
Leslie Shea Riggsbee . . . . New Bern
Yolanda Yvette Riley . . . . Charlotte
Caroline Horton Rockafellow . . . . Apex
Cynthia Diane Rogers . . . . Chapel Hill
Mary Joanne Hayes Romano . . . . Charlotte
Frauke Rona-Bowler . . . . Cary
Lori W. Rosbrugh . . . . Wilmington
James Andrew Saputo, Jr. . . . . Cary
April Savoy-Lewis . . . . Atlanta, Georgia
Kara Fitch Schrum . . . . Greensboro
Katrina Helene Schwarting . . . . Charlotte
Kimberly Woodell Sieredzki . . . . Clayton
Eric Michael Simpson . . . . Fenton, Michigan
Mary Nicole Slaughter . . . . Greensboro
Mary L. Sneeringer . . . . Cumming, Georgia
Cynthia Vuille Stewart . . . . Washington, DC
Jamal Montez Summey . . . . Winston-Salem
Kim Ellen Taylor . . . . Wilmington
Arles Allen Taylor, Jr. . . . . Chapel Hill
Steven Dominic Thomas . . . . Durham
John David Thompson . . . . Apex
Sean Abbott Timmons . . . . Raleigh
Anders Karl Torning . . . . Charlotte
Leah Burrows Trowbridge . . . . Cornelius
Brandon L. Truman . . . . Charlotte
Frederick Turner Varcoe Jr. . . . . Washington, DC
Christopher T. Vonderau . . . . Wilmington
Radoje Allyn Vujovic . . . . Aurora, Illinois
John Thomas Warlick, IV . . . . Winston-Salem

Eran Lee Weaver . . . . Charlotte
Lee Davis Weddle, Jr. . . . . Wilmington
Edward Hanson White . . . . Charlotte
Stephen J. Wilde . . . . Hendersonville
Roderick H. Willcox Jr. . . . . Morganton
Peter S. Wilson, Jr. . . . . Chapel Hill
Alan Kyle Windham . . . . Chapel Hill
Judith M. Zielinski . . . . Charlotte
Robert Edward Zulli . . . . Chapel Hill

Given over my hand and seal of the Board of Law Examiners this the 6th day of April, 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 duly passed the examinations of the Board of Law Examiners as of the 21st day of March, 1998 and said persons have been issued a license certificate.

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

Mandy De'Ann Powers-Norrell . . . . Lancaster, South Carolina

Arthur Campbell Stone, Jr. . . . . Raleigh

Given over my hand and seal of the Board of Law Examiners this the 15th day of April, 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 duly passed the examinations of the Board of Law Examiners as of the 10th day of April, 1998 and said persons have been issued a license certificate.

JULY 1997 NORTH CAROLINA BAR EXAMINATION

Thomas Joseph Mew, IV . . . . Mt. Berry, Georgia

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

Wendy J. Baker . . . . Greensboro
Sonya E. Cole . . . . Durham
Daniel A. Collins . . . . Greenville, South Carolina
Heather Lynn Cook . . . . Charlotte
John Cunningham . . . . Raleigh
Sarah Dalonzo-Baker . . . . Raleigh

PAULA CAPOZZI DAVIS .... Charlotte
ANN TERRELL DORSETT .... Charlotte
ELIZABETH COOPER DOYLE .... Greensboro
DAVID T. DUCKETT .... Raleigh
MARTIN FARRELL .... Cary
TERENCE DAVID FRIEDMAN .... Lake Charles, Louisiana
EDWARD R. GALLAGHER, JR. .... Greenville
GARTH ASHER GERSTEN .... Chapel Hill
KENNETH M. GONDEK .... Charlotte
DANIEL R. HANSEN .... Charlotte
R. DAVID HARDEN .... Charlotte
HEATHER ELIZABETH HARPER .... Independence, Missouri
JAMES S. HASSAN .... Charlotte
PETER JOSEPH HENN .... Boca Raton, Florida
ERIC J. HOWLAND .... Chapel Hill
ELIZABETH ANNE HYLAND .... Durham
MOLLIE THORN JAMES .... Charlotte
TANYA DE'PASSALLEE LOCKLAIR .... Durham
KRISTIN PERNOLL MANZANO .... Charlotte
STEPHEN JOHN MANZANO .... Charlotte
LYNN ELLEN WATSON NEUMANN .... Charlotte
NEIL GERALD O'ROURKE .... Winston-Salem
SCOTT WALTER PITTS .... Charlotte
DEBORAH LYNN POPE .... Matthews
DAVID HADLEY READ .... Winston-Salem
JOHN W. REIS .... Pembroke Pines, Florida
MARK LOUIS RICHARDSON .... Charlotte
STEPHANIE UNDERWOOD ROBERTS .... Greensboro
WAYNE DAVID RUTMAN .... Winston-Salem
PHILIP DAVID SONG .... Huntersville
JAN CHERYL THORSTAD .... Cary
JAMES RENÉ TOADVINE .... Matthews
KELLY MARLAINE TOMS .... Wrightsville Beach
DOUGLAS ROSS VREELAND .... Signal Mountain, Tennessee

Given over my hand and seal of the Board of Law Examiners this the 15th day of April, 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 17th day of April, 1998 and said persons have been issued a license certificate of this Board:

JAMES LONG CHAPMAN, IV .... Applied from the State of Virginia

ALEXANDER B. COOK . . . . Applied from the District of Columbia
STEPHEN HOLME DOUGLAS . . . . Applied from the States of Texas and New York
EUGENE MICHAEL KATZ . . . . Applied from the District of Columbia
WOOD WALTER LAY . . . . Applied from the State of Virginia
HEIDI B. OSHIN . . . . Applied from the State of New York
STEPHEN DAVID THOMPSON . . . . Applied from the State of Ohio
GARY J. RICKNER . . . . Applied from the State of Indiana
KELLY MICHEL COLQUETTE . . . . Applied from the State of Texas
WAYNE T. BAUCINO . . . . Applied from the State of Virginia
MARY ANN C. MILLS . . . . Applied from the State of New York
KATHLEEN ANNE RYAN . . . . Applied from the State of Illinois
RICHARD EDGAR WIDIN . . . . Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 22nd day of April, 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 duly passed the examinations of the Board of Law Examiners as of the 17th day of April, 1998 and said persons have been issued a license certificate.

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

ALAN JAEHOON KIM . . . . Carrboro

MARK ROBERT MANN . . . . Evansville, Indiana

PHYLLIS SUSAN MITCHELL . . . . Durham

Given over my hand and seal of the Board of Law Examiners this the 22nd day of April, 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 person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 8th day of May, 1998 and said person has been issued a license certificate of this Board:

JACK VICTOR COHEN . . . . Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 18th day of May, 1998.

LICENSED ATTORNEYS

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 22nd day of May, 1998 and said person has been issued a license certificate of this Board:

WILLIAM H. GIFFORD, JR. . . . . Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners this the 4th day of June, 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 person duly passed the examinations of the Board of Law Examiners as of the 22nd day of May, 1998 and said person has been issued a license certificate of this Board.

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

SEAN TIMOTHY PARTRICK . . . . Chapel Hill

Given over my hand and seal of the Board of Law Examiners this the 4th day of June, 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 person duly passed the examinations of the Board of Law Examiners as of the 19th day of June, 1998 and said person have been issued a license certificate.

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

CRAIG MICHAEL JANAK . . . . Cheektowaga, New York

Given over my hand and seal of the Board of Law Examiners this the 26th day of June, 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 persons duly passed the examinations of the Board of Law Examiners as of the 26th day of June, 1998 and said persons have been issued a license certificate.

JULY 1997 NORTH CAROLINA BAR EXAMINATION

June Ellen Showfety McElroy . . . . .Salisbury

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

David Lee Credle . . . . .South Mills

Given over my hand and seal of the Board of Law Examiners this the 26th day of June, 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 person duly passed the examinations of the Board of Law Examiners as of the 3rd day of July, 1998 and said person has been issued a license certificate.

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

Robert Bradley Van Laningham . . . . .Pinehurst

Given over my hand and seal of the Board of Law Examiners this the 15th day of July, 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 person duly passed the examinations of the Board of Law Examiners as of the 31st day of July, 1998 and said person has been issued a license certificate.

FEBRUARY 1998 NORTH CAROLINA BAR EXAMINATION

Jeffrey M. Sullivan . . . . .Cary

Given over my hand and seal of the Board of Law Examiners this the 10th day of August, 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 persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 31st day of July, 1998 and said persons have been issued certificates of this Board:

BARBARA T. ARDIZZONE .Applied from the State of Pennsylvania
JOHN R. BOWLER . . . . .Applied from the State of Ohio
JOHN JOSEPH BRODERICK . . . . .Applied from the State of New York
JACQUELINE EDWARDS CAMP . . . . .Applied from the State of Massachusetts
GREGORY N. CLEMENTS . . . . .Applied from the State of Ohio
WILLIAM R. COPPEL . . . . .Applied from the State of Michigan
JOHN N. COX . . . . .Applied from the State of Pennsylvania
FRANK L. EPPES . . . . .Applied from the State of New York
GREGORY M. GERTZ . . . . .Applied from the State of Minnesota
LESLIE E. HAGIE . . . . .Applied from the State of Virginia
ARTHUR LEWIS HASTINGS . . . . .Applied from the State of Nebraska
GEORGE ROBERT HAUSEN, JR. . . . . .Applied from the State of Illinois
PATRICK W. HERMAN . . . . .Applied from the State of Virginia
ANNE LANKFORD HIMES . . . . .Applied from the State of New York
CARL E. HOSTLER . . . . .Applied from the State of West Virginia
CHRISTOPHER DREW MAURIELLO . . . . .Applied from the State of New York
JENNIFER P. MAY-PARKER . . . . .Applied from the State of New York
KAREN MEYER PORTER . . . . .Applied from the State of Nebraska
DAVID VAN BRUNT PRICE . . . . .Applied from the State of Texas
PATRICIA M. REDMAN . . . . .Applied from the State of Connecticut
MATTHEW ROTHBEIND . . . . .Applied from the State of New York
JOHN KENNETH RUSSELL . . . . .Applied from the State of Ohio
SALLY A. SAGER . . . . .Applied from the State of Indiana
SUSAN EILEEN SCHNEIDER . . . . .Applied from the State of Kentucky
A. MARK SMILING . . . . .Applied from the State of Oklahoma
JOHN MATTHEW TIMPERIO . . . . .Applied from the State of Massachusetts

Given over my hand and seal of the Board of Law Examiners this the 10th day of August, 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. WENDELL FLOWERS

No. 553A94

(Filed 5 September 1997)

1. Constitutional Law § 287 (NCI4th)— first-degree murder—refusal to replace appointed counsel—no error

The trial court did not err in a capital first-degree murder prosecution by refusing to replace defendant's counsel where the trial court properly found that defendant's court-appointed counsel had provided effective representation. The record shows that defendant's counsel had the requisite experience and ability to try a capital case, had competently conducted pretrial preparation of defendant's case, had communicated to the district attorney defendant's desire to plea bargain, and the record shows no evidence of a communication problem between defendant and his attorneys. Defendant simply did not like his court-appointed counsel.

Am Jur 2d, Appellate Review § 727; Criminal Law §§ 736, 745, 935.

Indigent accused's right to choose particular counsel appointed to assist him. 66 ALR3d 996.

Relief available for violation of right to counsel at sentencing in state criminal trial. 65 ALR4th 183.

2. Constitutional Law § 284 (NCI4th)— first-degree murder—defendant allowed to appear pro se—no error

The trial court did not violate the constitution rights of the defendant in a capital first-degree murder prosecution by allowing him to proceed *pro se* where defendant stated in clear and unequivocal terms that he would represent himself when informed by the court that it would appoint substitute counsel; defendant reaffirmed his desire to represent himself after a recess; the trial court twice went through the matters required by N.C.G.S. § 15A-1242; defendant was advised of his right to the assistance of counsel and clearly stated that he understood the consequences of representing himself; defendant also stated that he understood the nature of the charges and proceedings and that he was facing a possible death sentence; defendant requested that counsel be appointed more than a year after electing to proceed *pro se*; and defendant's request was granted and he was represented at all phases of the trial. Moreover, this defendant was familiar with the criminal justice system and with capital proceedings.

Am Jur 2d, Criminal Law §§ 993-995.

Assertion of right to counsel. 80 ALR Fed. 622.

3. Criminal Law § 467 (NCI4th Rev.)— first-degree murder—roles of codefendants—State's argument—change of theory from earlier trial

The trial court did not err in a capital prosecution for first-degree murder by not preventing the state from changing the theory of guilt upon which it sought conviction where the State had argued during an earlier trial of codefendants that defendant was only a lookout and not an actual participant in the stabbing and argued in defendant's trial that defendant was both the lookout and one of the actual stabbers. The State's evidence (that all four defendants were equally culpable) was essentially the same in both trials and the prosecutor's argument was a fair and accurate interpretation of the evidence and the reasonable inferences to be drawn therefrom.

Am Jur 2d, Trial §§ 307 et seq.

4. Criminal Law § 491 (NCI4th Rev.)— first-degree murder—bailiff as witness—incidental contact—jurors not dismissed

The trial court did not err in a capital first-degree murder prosecution by failing to dismiss jurors after discovering that the courtroom bailiff was a State's witness where the bailiff's only contact with jurors occurred while letting them into and out of the courtroom and directing them to their seats; his contact with the jurors took place in the courtroom and occurred at various times over a period of less than a day and a half; he did not have specific contact or communication with any individual juror; and the trial court took steps to remedy the potential conflict by ordering the bailiff not to have any direct contact with the jurors as soon as the potential conflict was brought to its attention. There is no evidence to suggest that this bailiff at any time acted as a custodian or officer in charge of the jury, and his contact with the jury was brief, incidental, entirely within the courtroom, and was thus without legal significance.

Am Jur 2d, Trial § 981.

5. Criminal Law § 923 (NCI4th Rev.)— first-degree murder—juror agreement with verdict—jurors asked to raise hands—no request for individual polling—no individual polling by judge—no error

The trial court did not err in a capital first-degree murder prosecution by asking the jurors to raise their hands after the verdict was returned if that was their verdict. Although defendant contended that the court erred by failing to poll the jurors individually, he concedes that he made no request for an individual polling of the jurors, and there is nothing in the record suggesting that the trial court undertook on its own motion to poll the jurors individually. The procedure followed by the trial court merely served to insure that the record reflected the fact that the written verdicts were returned in open court and were unanimous.

Am Jur 2d, Trial §§ 1164, 1165.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case. 25 ALR3d 1149.

6. Homicide § 583 (NCI4th)— first-degree murder—acting in concert—instruction—specific intent to kill—no error

There was no plain error in a capital prosecution for first-degree murder in the trial court's instruction on acting in concert where defendant contended that the instruction permitted the jury to convict defendant without finding the requisite specific intent to kill. At the time this murder was committed, the law of acting in concert required that the State prove that each defendant possessed the requisite *mens rea*, but the court emphasized to the jury on more than one occasion that it must find that defendant specifically intended to kill the victim in order to find defendant guilty of premeditated and deliberated murder.

Am Jur 2d, Homicide §§ 568-574.

7. Constitutional Law § 277 (NCI4th)— defendant's pretrial statements—admitted in prior trial of codefendants—waiver of counsel

The trial court did not err in a capital first-degree murder prosecution by admitting into evidence pretrial statements made by the defendant and contained in the transcript of defendant's testimony at the prior trial of his codefendants. Defendant's Sixth Amendment rights were fully protected in the trial of his codefendants in that defendant clearly and unequivocally waived his right to counsel after being informed of his rights and before the codefendants' trial; his waiver was made knowingly, intelligently and voluntarily; he made no request for counsel before testifying, although he clearly knew how to ask for counsel when he wanted representation; the trial court nevertheless provided defendant standby counsel before and during his testimony; and defendant stated prior to his testimony in response to the trial court's inquiries that he had no questions, that his testimony was voluntary, and that he felt no compulsion to testify.

Am Jur 2d, Evidence § 793; Homicide §§ 332, 333, 338, 353.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions. 40 ALR4th 514.

What is accused's "statement" subject to state court criminal discovery. 57 ALR4th 827.

8. Appeal and Error § 147 (NCI4th)— first-degree murder—defendant's testimony in codefendant's trial—admitted without redaction—no objection or request to omit—appellate review waived

Defendant waived appellate review of whether portions of his testimony in a prior trial should have been redacted when the transcript was introduced because he made no objection or request through counsel to omit any portion of the testimony. The trial court told defendant to bring any specific objections regarding any portion of the transcript to the court's attention. N.C.G.S. § 15A-1025.

Am Jur 2d, Trial §§ 395, 401 et seq.

9. Evidence and Witnesses § 502 (NCI4th)— first-degree murder—defendant's letter to prosecutor—mention of possibility of plea bargain—not barred

The trial court did not err in a capital prosecution for first-degree murder by admitting a letter from defendant to the district attorney which contained statements concerning defendant's desire to plea bargain. The letter is essentially an admission of defendant's guilt, a statement of defendant's desire that the codefendants not be tried for the murder, a request to have counsel removed, and a mention of the possibility of a plea bargain. The letter does not state what plea defendant may have had in mind or any other specifics and the prosecutor did not respond to the letter, did not engage in plea discussions, and did not enter into a plea arrangement. Admission of the letter was not barred by N.C.G.S. § 15A-1025.

Am Jur 2d, Trial § 1067.

Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence. 5 ALR3d 1018.

Admissibility of admissions made in connection with offers or discussions of compromise. 15 ALR3d 13.

10. Evidence and Witnesses § 1260 (NCI4th)— first-degree murder—initial exercise of right to remain silent—subsequent letter to prosecutor—interview by SBI agent and statement—admissible

The trial court did not err in a capital prosecution for first-degree murder by not suppressing defendant's confession to an

SBI agent where defendant initially exercised his right to remain silent, wrote a letter to the district attorney admitting that he committed the murder and requesting removal of his attorneys, the agent met with defendant at the request of the district attorney, defendant was advised of and waived his rights, and defendant then confessed. There is no dispute that defendant voluntarily sent the letter, the letter stated that defendant was accepting responsibility for the murder and did not express a desire to begin plea discussions, the record indicates that defendant knowingly and voluntarily waived his rights and that he wanted to talk to the agent, and defendant in no way indicated that the discussion was limited to plea negotiations. The trial court properly found that defendant initiated the request for contact in his letter to the district attorney and that his confession was made voluntarily and after a knowing waiver of his constitutional rights to silence and counsel.

Am Jur 2d, Evidence §§ 555-557, 614; Criminal Law §§ 788 et seq.

Comment note: Constitutional aspects of procedure for determining voluntariness of pretrial confession. 1 ALR3d 1251.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 ALR4th 180.

11. Constitutional Law § 325 (NCI4th)— first-degree murder—constitutional speedy trial—no violation

A defendant in a capital first-degree murder prosecution was not denied his rights to a speedy trial under the state or federal constitutions pursuant to the factors set identified in *Barker v. Wingo*, 407 U.S. 514, which are the length of the delay, the reason for the delay, the defendant's assertion of the right, and whether defendant suffered prejudice as a result of the delay. The length of the delay from indictment to trial in this case was five years and eight days, clearly enough to trigger examination of the other factors; defendant made no contention that the prosecution willfully delayed his trial and the record does not reveal prosecutorial negligence but shows numerous nonnegligent causes of the delay; defendant first asserted his right to a speedy trial nearly four years after indictment, his counsel stated at the hearing on that motion that they were not prepared for trial, and he filed his

second motion the day the case was called for trial; his failure to assert the right sooner in the process does not foreclose the claim, but does weigh against him; and defendant failed to show prejudice in that he was serving a life sentence at the time of the murder and did not suffer oppressive incarceration as a result of any delay, made no showing of anxiety and concern because of the delay, and, while he contended that the delay prevented him from calling a witness who allegedly admitted killing the victim, he made no showing that he could present admissible evidence of third party guilt through the witness.

Am Jur 2d, Criminal Law §§ 652-665; Prohibition § 64.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters. 6 ALR4th 1208.

12. Homicide § 552 (NCI4th)— first-degree murder—no instruction on second-degree—no evidence of second-degree murder

The trial court did not err in the capital prosecution of a prison inmate for the first-degree murder of another inmate by not instructing the jury on second-degree murder as a possible verdict where evidence of the lesser included offense was totally lacking. The evidence permits no inference other than that defendant went to the victim's cell with the intent to kill him.

Am Jur 2d, Homicide § 53.

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

13. Criminal Law § 1364 (NCI4th Rev.)— capital sentencing—aggravating circumstance—prior violent felony used for felony murder—other prior violent felonies submitted—no prejudice

Any error was harmless in a capital sentencing proceeding where the court submitted defendant's 1982 conviction for armed robbery as one of the felonies supporting the aggravating circumstance that defendant had been convicted of a felony involving the use or threat of violence but the 1982 armed robbery conviction was the underlying felony for a felony murder conviction and judgment was arrested on the armed robbery conviction. Four other prior felony convictions were submitted, the jury

unanimously found the existence of each prior felony conviction, and each of the other four felonies was sufficient if submitted alone.

Am Jur 2d, Criminal Law § 533.

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

14. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—instructions—statutory and nonstatutory mitigating circumstances

The trial court did not err in a capital sentencing proceeding in its instructions on mitigating circumstances where defendant alleged that the instructions failed to make a meaningful or readily understandable distinction between statutory and nonstatutory mitigating circumstances, but the trial court instructed the jury in accordance with the pattern instructions, the instructions on the two statutory mitigating circumstances did not give the jury the option of finding no mitigating value, and the only instance in which the jury was instructed that it could consider circumstances which it deemed to have mitigating value was in regard to the catchall circumstance. That instruction mirrored the language of N.C.G.S. § 15A-2000(f)(9), was clearly separate from the instructions given for the two statutory mitigating circumstances, and was proper in all respects. There was no possibility that the trial court's instructions allowed the jury to determine for itself whether the statutory mitigating circumstance had mitigating value.

Am Jur 2d, Criminal Law §§ 609 et seq.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions. 49 ALR 3d 128.

15. Criminal Law §§ 1363, 1364 (NCI4th Rev.)— capital sentencing—aggravating circumstances—prior violent felony—prior capital felony—arising from same transaction—submission of both no error

The trial court did not err in a capital sentencing proceeding by submitting both the aggravating circumstance that defendant had previously been convicted of a capital felony and that defendant had previously been convicted of a felony involving

the use or threat of violence where the prior convictions all arose from the same transaction. To support the prior capital felony circumstance, the State introduced documents proving that defendant had been convicted of first-degree murder in 1982 and testimony from a witness that defendant had been tried capitally; this evidence was sufficient to support the prior capital felony aggravating circumstance but not any other circumstance submitted to the jury. To support the prior violent felony circumstance, the State introduced documents proving that defendant had been convicted of first-degree burglary, robbery with a dangerous weapon, second-degree kidnapping, breaking and entering and felonious larceny, and testimony that the victims were assaulted by defendant and forced at gunpoint to cooperate with their assailants. The jury logically could not have used evidence of one aggravating circumstance to support the other. N.C.G.S. § 15A-2000(e)(2); N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 533, 598 et seq.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-*Gregg* cases. 67 ALR4th 942.

16. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—aggravating circumstances—indictments for prior crimes—admissible

The trial court did not violate N.C.G.S. § 15A-1221(b) in a capital sentencing proceeding by admitting defendant's previous felony indictments into evidence to support the prior capital felony and prior violent felony aggravating circumstances. N.C.G.S. § 15A-1221(b) does not prohibit publication during the sentencing proceeding of indictments from cases not currently before the jury; its purpose is to insure that the jurors do not receive a distorted view of the case by an initial exposure through the stilted language of indictments and other pleadings. It was noted that the North Carolina Supreme Court has also

found no error in a case in which a prior indictment was read to the jury to prove the existence of a prior felony.

Am Jur 2d, Criminal Law §§ 598 et seq.

17. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's arguments—focus of especially heinous, atrocious and cruel aggravating circumstances

There was no gross impropriety requiring intervention *ex mero motu* in the prosecutor's closing arguments in a capital sentencing hearing where defendant argued that the prosecutor trivialized differences in the culpability of the defendant and codefendants, which denied him the individualized consideration required for imposition of the death penalty. However, read in context, the argument explained to the jury that the focus of the especially heinous, atrocious, or cruel circumstance is on the victim and not on defendant's role or how many blows the defendant struck. This argument is in accord with prior holdings of the North Carolina Supreme Court.

Am Jur 2d, Trial § 231.

18. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—appropriateness of death penalty

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing hearing where the prosecutor argued that any penalty other than death would be meaningless. The prosecutor's argument was grounded in the evidence and properly emphasized the appropriateness of the death penalty in light of the specific facts in this case.

Am Jur 2d, Trial §§ 260-264.

19. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—appropriateness of death penalty—prior arrested judgment

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing hearing where defendant contended that the prosecutor improperly urged the jury to consider a 1982 armed robbery conviction to support the aggravating circumstance that defendant had previously been convicted of a prior violent felony, but the portion of the argument cited by defendant asked the jury to consider defendant's previous crimes while evaluating the appropriateness of the death penalty during

the weighing process. Although judgment was arrested on the armed robbery verdict, the verdict itself remained intact and it was proper for the jury to consider it during the weighing of circumstances.

Am Jur 2d, Trial § 231.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-*Gregg* cases. 67 ALR4th 942.

20. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—psychological torture

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing hearing where defendant contended that the prosecutor improperly argued that psychological torture should be considered in support of the especially heinous, atrocious, or cruel circumstance. The prosecutor's argument falls well within the wide latitude accorded prosecutors in the scope of their argument.

Am Jur 2d, Homicide § 48.

What constitutes murder by torture. 83 ALR3d 1222.

21. Criminal Law § 1370 (NCI4th Rev.)— capital sentencing—aggravating circumstance—especially heinous, atrocious or cruel—not unconstitutionally vague and overbroad

The trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was not unconstitutionally vague and overbroad. The court's instruction was identical to the pattern jury instruction, the constitutionality of which has been consistently upheld. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 609 et seq.

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

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions. 49 ALR3d 128.

22. Criminal Law § 1114 (NCI4th Rev.)— Fair Sentencing Act—conspiracy to murder—findings

The trial court erred when sentencing defendant for conspiracy to commit murder under N.C.G.S. § 15A-1340.4(a) (applicable to crimes occurring before 1 October 1994) by imposing a sentence in excess of the presumptive without first making findings in aggravation.

Am Jur 2d, Criminal Law §§ 598, 599.

23. Jury § 145 (NCI4th)— capital murder—death qualifying jury—questions by court—no abuse of discretion

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by excusing for cause eight prospective jurors based upon leading questions which defendant contends were used to stake jurors to the position from which they were disqualified. The transcript indicates that the court questioned the prospective jurors only after each had been challenged for cause and their answers to the prosecutor's questions showed that they would have difficulty following the law.

Am Jur 2d, Jury §§ 291-293.

24. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A sentence of death for first-degree murder was not disproportionate where the record fully supports the aggravating circumstances found by the jury, there is no indication that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and the case is distinguished from those in which the death penalty was found disproportionate by the fact that this defendant was lawfully incarcerated at the time of the murder because of a prior murder conviction; defendant was convicted under the theory of premeditation and deliberation; the victim's beating and stabbing was found by the jury to be especially heinous, atrocious, or cruel; the victim suffered great physical and psychological pain before death; and the jury found the existence of more than one aggravating circumstance. It is also relevant that no juror found the existence of any mitigating circumstance. This case is more similar to certain cases in which the sentence of death was found proportionate than to those in which the sentence was found disproportionate or those in which juries have consistently returned recommendations of life impris-

onment. Finally, it was noted that similarity of cases is not the last word on proportionality; the issue in a particular case ultimately rests on the experienced judgment of the members of the Supreme Court.

Am Jur 2d, Criminal Law §§ 606 et seq.

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

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Stephens (Ronald L.), J., at the 19 September 1994 Criminal Session of Superior Court, Rowan County. Defendant's motion to bypass the Court of Appeals as to an additional conviction was allowed by this Court 22 April 1996. Heard in the Supreme Court 12 November 1996.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

David G. Belser and A. James Siemens for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 11 September 1989 for conspiracy to commit murder and for the first-degree murder of Rufus Coley Watson, Jr. The defendant was tried capitally, and the jury found the defendant guilty of conspiracy to commit murder and guilty of first-degree murder on the basis of premeditation and deliberation and on the basis of felony murder. 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 murder conviction. Judge Stephens sentenced defendant accordingly and to a term of ten years' imprisonment for the conspiracy conviction.

The defendant and the victim, Rufus Watson, were inmates under the control of the North Carolina Department of Correction at the Piedmont Correctional Institute in Salisbury, North Carolina. In May of 1989, both the defendant and the victim resided on the fourth floor of the residence tower in Cell Block D. The defendant resided in cell 6, and the victim resided in cell 2. Piedmont Correctional Institute was built to house medium-custody inmates; however, in 1989 it housed only those inmates requiring the highest level of security. The only time inmates were locked into their individual cells was

between 11:30 p.m. and 6:00 a.m. on weeknights and between 2:00 a.m. and 6:00 a.m. on weekends. Inmates were required to remain in their locked cell blocks every night between 9:30 p.m. and 6:00 a.m. The remainder of the time, the inmates were able to move throughout the facility without escort. To keep track of the inmates, the guards conducted a head count three times a day.

On 13 May 1989, Officer Bobby Ray Settle, a prison guard assigned to the fourth floor, conducted the morning head count shortly after 6:00 a.m. On that morning, Officer Settle found every inmate present and alive. Around 12:30 p.m. on 13 May 1989, Officer Settle participated in the second inmate head count of the day. The door to cell 2 was closed and locked, and paper was covering the cell window. After knocking and hearing no response, Officer Settle unlocked and entered the cell. Upon entering cell 2, Officer Settle discovered Rufus Watson lying face down on his bed, covered with a blanket. Upon receiving no response from Watson, Officer Settle raised the blanket and saw blood on the body.

Dr. Thomas Clark, a forensic pathologist, performed an autopsy on the victim's body on 14 May 1989. Dr. Clark testified that the victim suffered multiple stab wounds to four separate areas of the body. Two stab wounds were located on the right side of the victim's head, one was on the left side of the head, twenty-one stab wounds were located on the left side of the chest, four stab wounds were located on the back of the victim's neck, and three stab wounds were located on the victim's upper back. These wounds would not have caused an immediate loss of consciousness. Dr. Clark determined that the cause of death was multiple stab wounds to the chest.

The two wounds to the right side of the victim's head entered the skin but did not enter the body cavity or the eye because they were stopped by a bone in the skull. The twenty-one stab wounds to the victim's chest caused extensive damage to the victim's ribs and internal organs. Specifically, Dr. Clark testified that there were nine wounds to the lungs, that three wounds entered the left ventricle of the heart, and that the second and third ribs were "essentially destroyed because of repeated stabs through the same area." Any one of the nine wounds to the lungs or the three wounds to the heart could have been fatal. The four stab wounds to the back of the victim's neck penetrated the victim's skin but stopped against the bone in the back of the neck and caused no significant damage. Finally, of the three stab wounds to the victim's back, two entered the left lung

and one entered the right lung. The wound to the right lung did not cause significant bleeding, which indicates that the victim was dead or very near death when this wound was inflicted.

Lorenzo Wilborn, who at the time of the murder was an inmate residing in cell 10 on the fourth floor of Cell Block D, informed investigating officers that he had witnessed the murder. Wilborn stated that on the morning of the murder, he was listening to the radio in cell 7 of Cell Block D. Cell 7 is directly across from the victim's cell. Shortly after arriving at cell 7, Wilborn saw Steven Leazer go into the victim's cell. Wilborn stated that approximately ten minutes later, he heard the sound of the cell block door opening. Wilborn looked through the cell window and saw Michael Moore, John Fuller and defendant nearing the victim's cell. Moore and Fuller went into the victim's cell, and defendant stayed at the cell block door holding it open. Wilborn heard someone say, "[w]hat's going on," and then heard rumbling and banging. Wilborn stated that the cell door then flew open, and the victim staggered out of his cell. Moore and Fuller came out of the cell and dragged the victim back into the cell. Moore was holding some sort of sharp object in his hand, and the victim's shirt was bloody. When they started back into the cell, defendant stuck a broom handle in the cell block door to keep it from closing and locking, and defendant entered the victim's cell. After approximately five minutes, the four inmates left the victim's cell. Leazer was carrying clothes with blood on them as he exited. Based on Wilborn's account of the murder as well as other information collected during the course of the investigation, defendant, Leazer, Moore, and Fuller were charged with the murder of Rufus Watson.

In May of 1991, defendant gave a statement regarding his involvement in the murder to Agent Don Gale of the State Bureau of Investigation (SBI). Defendant admitted killing the victim and stated that he did so because of the way the victim was treating an inmate named "Cupcake" with whom the defendant was involved in a homosexual relationship and also because the victim had put out a contract on the defendant's life. Defendant stated that he pushed the shank used to stab the victim into the ground outside the recreation yard. The location in the yard where defendant told Agent Gale he had concealed the shank was the same location where it had been found. When defendant gave his statement to Agent Gale, the details of the murder, including the location where the shank had been found, had not been published.

In October of 1991, Leazer, Moore and Fuller were tried for the victim's murder. Defendant was called as a witness at that trial. The transcript of defendant's testimony at that trial was introduced into evidence at defendant's trial and read to the jury. In that testimony, defendant admitted stabbing and killing the victim but stated that he alone committed the murder. Defendant stated that after he killed the victim, he forced Leazer to help him clean up the cell and move the body onto the bed. Finally, defendant stated that he was testifying because Leazer, Moore and Fuller were innocent, and he did not want to see them wrongly convicted.

Defendant presented no evidence in either the guilt/innocence or sentencing phases of his trial.

[1] In his first assignment of error, the defendant contends that the trial court erred by refusing to replace defendant's counsel and by allowing defendant to proceed *pro se* in a capital case without a knowing, intelligent and voluntary waiver of his right to counsel.

On 15 September 1989, defendant requested that court-appointed counsel be assigned to his case. The trial court appointed Gary Rhodes and Vic Bost of the Rowan County Bar to represent the defendant. In March of 1991, William D. Kenerly, the Rowan County District Attorney, received a letter from the defendant indicating defendant's desire to dismiss his attorneys and asking the district attorney's assistance in that regard. During the hearing of pretrial motions, Mr. Kenerly brought defendant's letter to the trial court's attention. When questioned by the trial court regarding his reasons for wanting to dismiss his court-appointed attorneys, the defendant indicated generally that his attorneys would not honor his instructions to plea bargain, and that they had not discussed the case with him or met with him sufficiently to represent him adequately. The defendant further indicated that he would like substitute counsel appointed to his case.

At the close of the hearing, the trial court found that defendant's attorneys had furnished him effective representation and denied defendant's request for appointment of substitute counsel. The trial court explained to the defendant that two experienced, well-qualified attorneys had been appointed to his case, and that he could choose either to accept them or represent himself. The defendant responded that he did not want his court-appointed attorneys and would represent himself.

We first hold that the trial court properly found that the defendant's court-appointed counsel had provided defendant effective representation. The record shows that defendant's counsel had the requisite experience and ability to try a capital case, had competently conducted pretrial preparation of the defendant's case, and had communicated to the district attorney defendant's desire to plea bargain. The record shows no evidence of a communication problem between the defendant and his attorneys. The defendant simply did not like his court-appointed counsel. Accordingly, the trial court properly refused to grant defendant's request for substitute counsel. *See State v. Cunningham*, 344 N.C. 341, 351, 474 S.E.2d 772, 775 (1996) (an indigent defendant does not have the right to counsel of his choice, and when such defendant refuses to accept available counsel, the trial court is not required to appoint counsel of the defendant's choosing).

[2] We next must determine whether the trial court violated the defendant's constitutional rights by allowing him to proceed *pro se*. Before a defendant is allowed to waive in-court representation, he must first clearly and unequivocally waive his right to counsel and instead elect to proceed *pro se*. *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Moreover, the trial court must determine whether the defendant knowingly, intelligently and voluntarily waived his right to in-court representation by counsel. *Id.* This Court has held that the inquiry required by N.C.G.S. § 15A-1242 satisfies these constitutional requirements. N.C.G.S. § 15A-1242 provides:

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

N.C.G.S. § 15A-1242 (1988).

We hold that the defendant clearly and unequivocally waived his right to counsel and that his waiver was made knowingly, intelligently and voluntarily. When informed by the trial court that it would not appoint substitute counsel to his case, the defendant, in clear and unequivocal terms, stated that he would represent himself. After a recess, which provided the defendant ample opportunity to reconsider his decision, the defendant reaffirmed his desire to represent himself. During the ensuing discussion between the trial court and the defendant, the trial court twice went through the matters required by N.C.G.S. § 15A-1242. The defendant was advised of his right to the assistance of counsel and clearly stated that he understood the consequences of representing himself. The defendant also stated that he understood the nature of the charges and proceedings and that he was facing a possible sentence of death. In July of 1992, more than a year after electing to proceed *pro se*, the defendant wrote the trial court and requested that court-appointed counsel be assigned to his case. Defendant's request was granted, new counsel were appointed and defendant was represented at all phases of this trial. This demonstrates that defendant clearly knew how to ask for counsel when he wanted representation. Moreover, this defendant had a prior familiarity with the criminal justice system and with capital proceedings. In 1982, the defendant was tried capitally for a murder occurring in Wilkes County. That case proceeded through both the guilt/innocence and sentencing phases of trial. On appeal, this Court found error in the defendant's sentences, and defendant's case was returned to the trial court for resentencing.

Based upon the defendant's prior experience with a capital trial, his familiarity with the criminal justice system, and the detailed warnings and explanations of the consequences of proceeding *pro se* provided by the trial court, we find no error in the trial court's decision to allow defendant to proceed *pro se*. This assignment of error is overruled.

[3] In his second assignment of error, the defendant contends that the trial court erred by failing to prevent the State from changing the theory of guilt upon which it sought conviction. In the trial of Flowers' codefendants, the State argued that Flowers was only a lookout and not one of the actual participants in the stabbing. At defendant's own trial, the trial court allowed the district attorney to argue to the jury that the defendant was both the lookout for the codefendants and one of the actual stabbers of the victim. Defendant argues that the inconsistent positions taken by the district attorney

amounted to a knowing use of false evidence and violated his constitutional due process rights.

We note for purposes of our review that the defendant failed to object to the prosecutor's argument in this regard. When no objections are made at trial, the prosecutor's argument is subject to limited appellate review for gross improprieties. *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996).

After a thorough review of the record, we conclude that the prosecutor's argument was a fair and accurate interpretation of the evidence and the reasonable inferences that could be drawn therefrom. The record reveals that the State's evidence was essentially the same in both trials—that all four defendants were equally culpable.

In each trial, the State relied heavily upon the testimony of Lorenzo Wilborn, the only eyewitness to the murder. Wilborn testified at both trials that the defendant first remained at the cell block door, holding it open. Wilborn further testified that the defendant later stuck a broom handle in the cell block door and joined the other defendants in the victim's cell. It is reasonable to infer from Wilborn's testimony that the defendant acted first as a lookout and then as an actual participant in the stabbing.

The State also relied on the defendant's own testimony from the trial of the codefendants. However, in that testimony, the defendant stated that he alone was responsible for the victim's murder. The district attorney presented evidence tending to show that defendant's statement that he acted alone was false. This Court has held that the State is not bound by all statements contained in a defendant's confession which the State introduces into evidence if the State also introduces other evidence tending to contradict those statements. *State v. Rose*, 335 N.C. 301, 324-25, 439 S.E.2d 518, 531, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). The State's use of defendant's prior trial testimony against him in his own trial was not an attempt to convict defendant with false evidence. It was necessary and appropriate for the district attorney to emphasize the false portions of defendant's prior testimony in order to show that, consistent with the evidence, each of the four defendants was culpable. Although defendant's trial focused on evidence tending to show defendant's guilt, the same evidence and the same theory were used in both trials.

We therefore find no impropriety with the prosecutor's argument in this regard and no merit to the defendant's assignment of error. Accordingly, we overrule this assignment of error.

[4] In his third assignment of error, the defendant contends that the trial court erred by failing to dismiss jurors after discovering that the courtroom bailiff, Sergeant Wayne Harrington, was a State's witness. Although defendant has not alleged any actual prejudice, he argues that prejudice must be conclusively presumed whenever a witness serves as a bailiff in a criminal trial. We disagree.

In *State v. Jeune*, 332 N.C. 424, 420 S.E.2d 406 (1992), this Court held that prejudice will be conclusively presumed only "where a witness for the State acts as *custodian or officer in charge of the jury.*" *Id.* at 431, 420 S.E.2d at 410 (emphasis added). "To determine whether the State's witness . . . acted as a custodian or officer in charge of the jury, 'we look to factual indicia of custody and control and not solely to the lawful authority to exercise such custody or control.' " *Id.* (quoting *State v. Mettrick*, 305 N.C. 383, 386, 289 S.E.2d 354, 356 (1982)).

In *Mettrick*, this Court held that two State's witnesses, a sheriff and a deputy, did act as custodians or officers in charge of the jury. The Court found it important that the jurors "were in these law enforcement officers' custody and under their charge out of the presence of the court for protracted periods of time with no one else present." *Mettrick*, 305 N.C. at 386, 289 S.E.2d at 356. By contrast, in *Jeune and State v. Macon*, 276 N.C. 466, 173 S.E.2d 286 (1970), this Court found no exercise of custodial authority where the only service provided by sheriff's deputies, who would later serve as State's witnesses, consisted of opening the door to send the jurors out of or to call them into the courtroom. This Court held that the jury's exposure to these witnesses was brief, incidental and without legal significance. *See Jeune*, 332 N.C. at 432-33, 420 S.E.2d at 411; *Macon*, 276 N.C. at 473, 173 S.E.2d at 290.

The facts of this case are remarkably similar to those of *Jeune* and *Macon*. The record reveals that Sergeant Harrington's only contact with the jurors occurred while letting groups of jurors into and out of the courtroom and while directing those jurors to their seats. Sergeant Harrington's contact with the jurors took place in the courtroom and occurred at various times over a period of less than a day and a half. Sergeant Harrington did not have specific contact or communication with any individual juror. Moreover, the trial court took

steps to remedy the potential conflict by ordering Sergeant Harrington not to have any direct contact with the jurors as soon as the potential conflict was brought to its attention by counsel for the defendant.

After a careful review of the record, we find no evidence to suggest that Sergeant Harrington at any time acted as a custodian or officer in charge of the jury. Sergeant Harrington's contact with the jury was brief, incidental, entirely within the courtroom, and was thus without legal significance. Accordingly, we hold that the defendant was not prejudiced by such contact. This assignment of error is overruled.

[5] In his fourth assignment of error, the defendant contends that the trial court erred by failing to poll the jurors individually after the jury returned its verdicts in the guilt/innocence phase of defendant's trial.

The record shows that, as required by N.C.G.S. § 15A-1237(b), the courtroom clerk read each of the two verdicts in open court, and the jurors responded collectively to each that their verdict was guilty. After each verdict was read, the trial court asked the jurors to raise their hands if that was their verdict. The trial court accepted the verdicts after all twelve jurors raised their hands, and the trial court directed the record to so reflect. The trial court then excused the jurors for the lunch recess and admonished them not to discuss the case.

Individual polling of the jury is governed by N.C.G.S. § 15A-1238, which provides:

> Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C.G.S. § 15A-1238 (1988). The defendant concedes that he made no request for an individual polling of the jurors but contends that the trial court undertook on its own motion to poll the jury. Defendant argues that the trial court's directive to the jury as a whole, and the jury's collective response, was insufficient to protect defendant's rights.

There is nothing in the record suggesting that the trial court undertook on its own motion to poll the jurors individually. The trial court's questions were directed to the jury as a group and not individually. The procedure followed by the trial court merely served to insure that before the verdicts were accepted, the record reflected the fact that the written verdicts were returned in open court and were unanimous as required by N.C.G.S. § 15A-1237(b). Accordingly, we find no undertaking by the trial court to poll the jurors individually on its own motion. Since the defendant made no request that the jury be polled as required by N.C.G.S. § 15A-1238, he has waived his right to such individual polling. *See State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 403 (1991). This assignment of error is therefore overruled.

[6] In his fifth assignment of error, the defendant contends that the trial court erred by failing to properly instruct the jury on the principle of acting in concert by misstating the type of intent necessary for premeditated murder. The portion of the trial court's instruction which the defendant now contends is erroneous is contained in the following paragraph:

> I charge you again in regards to *both of these theories*, now, ladies and gentlemen of the jury, that for a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute that crime. If two or more persons act together with a common purpose to commit *first degree murder or robbery with a dangerous weapon*, and are actually or constructively present at the time the crime is committed, each of them is held responsible for the acts of the others done in the commission of that crime or crimes, as well as any other crime committed by the other in furtherance of that common plan or purpose.

(Emphasis added.) Defendant argues that this instruction permitted the jury to convict the defendant of premeditated murder without finding the requisite specific intent to kill.

Defendant acknowledges that he made no objection to the instruction at trial. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure bars this assignment of error. Our review therefore is for plain error.

> 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. Collins*, 334 N.C. 54, 62,

> 431 S.E.2d 188, 193 (1993). When reviewing the instruction for error, we must construe it contextually. If the charge, read as a whole, is correct, isolated portions will not be held prejudicial.

State v. Payne, 337 N.C. 505, 523, 448 S.E.2d 93, 103 (1994), *cert. denied,* 514 U.S. 1038, 131 L. Ed. 2d 292 (1995).

Defendant's argument that the instruction given by the trial court constitutes plain error is without merit. Defendant and his codefendants committed the murder in question on 13 May 1989. At that time, the law regarding acting in concert required that the State prove that each defendant possessed "the requisite *mens rea*—willfulness, premeditation, and deliberation" before the jury could find each defendant guilty of first-degree murder by premeditation and deliberation. *State v. Reese,* 319 N.C. 110, 142, 353 S.E.2d 352, 370 (1987). More specifically,

> one [could] not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent.

State v. Blankenship, 337 N.C. 543, 558, 447 S.E.2d 727, 736 (1994) (citing *Reese,* 319 N.C. at 141, 353 S.E.2d at 370), *overruled by State v. Barnes,* 345 N.C. 184, 231, 481 S.E.2d 44, 71 (1997).

An examination of the instructions reveals that the trial court properly instructed the jury regarding the law of acting in concert as set forth in *Reese.* On more than one occasion, it emphasized to the jury that in order to find defendant guilty of premeditated and deliberated murder, the jury must find that the defendant specifically intended to kill the victim. It instructed: "If the State proves beyond a reasonable doubt that the defendant *intentionally* killed the victim with a deadly weapon or *intentionally* inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer first, that the killing was unlawful, and second, that it was done with malice." It instructed further that the jury must find: "Third, the defendant—that the defendant *specifically intended* to kill the victim." It instructed further still: "Fourth, the State must prove that the defendant acted and *formed a specific intent* to kill after premeditation . . . ." The charge, when read as a whole, sufficiently informed the jury on this issue, and plain error has not been demonstrated. *Payne,* 337 N.C. at 523, 448 S.E.2d at 103. Accordingly, this assignment of error is overruled.

In his sixth assignment of error, the defendant contends that the trial court erred by admitting into evidence certain pretrial statements made by the defendant contained in: (1) the trial transcript of defendant's testimony at the trial of the codefendants, (2) the letter written by the defendant to District Attorney Kenerly, and (3) the defendant's confession.

[7] The defendant first argues that his previous trial testimony was the product of a Sixth Amendment violation, and therefore, the trial court erred in allowing defendant's testimony at the trial of his codefendants into evidence at defendant's own trial. We disagree. As discussed in defendant's first assignment of error, defendant was not deprived of his Sixth Amendment right to counsel. Defendant clearly and unequivocally waived his right to counsel after being informed of his rights pursuant to N.C.G.S. § 15A-1242. Defendant's waiver was made knowingly, intelligently and voluntarily. Defendant made no request for counsel before testifying in the trial of his codefendants, notwithstanding the fact that he clearly knew how to ask for counsel when he wanted representation. Nevertheless, the trial court provided defendant standby counsel before and during his testimony. Finally, prior to his testimony, defendant in response to the trial court's inquiries stated that he had no questions, that his testimony was voluntary, and that he felt no compulsion to testify. Accordingly, we hold that the defendant's Sixth Amendment rights were fully protected in the trial of his codefendants, and we find no error in the admission of defendant's prior testimony at his own trial.

[8] Defendant contends that even if the transcript was properly admitted, certain portions of his testimony should have been redacted pursuant to N.C.G.S. § 15A-1025, which prohibits the introduction of any evidence relating to plea discussions or arrangements. After the trial court ruled that defendant's prior testimony was admissible, the trial court told defendant to bring any specific objections regarding any portion of the transcript to the trial court's attention. However, defendant made no objection or request through counsel to omit any portion of his trial testimony pursuant to N.C.G.S. § 15A-1025. Defendant has therefore waived appellate review of this issue.

[9] The defendant next argues his letter to District Attorney Kenerly was erroneously admitted in violation of N.C.G.S. § 15A-1025 because it contained statements concerning defendant's desire to plea bargain. N.C.G.S. § 15A-1025 provides:

> The fact that the defendant or his counsel and the prosecutor *engaged in plea discussions or made a plea arrangement* may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

N.C.G.S. § 15A-1025 (1988) (emphasis added). This statute makes inadmissible plea discussions between the prosecutor and the defendant and plea arrangements which have been made between the prosecutor and the defendant.

In the case *sub juice,* there were no plea discussions or plea arrangements between the defendant and the prosecutor mentioned in the defendant's letter. The letter reads in part as follows:

> I am writing to inform you that I wish to dismiss my attorneys that are presently representing me on the charge of murder. My attorneys are Mr. Gary C. Rhodes, and Mr. William V. Bost. I have written to them of my wish and was informed I would need to notify your office.
>
> The reason for my wishing to dismiss my attorneys is that we have a communication problem, my attorneys not only refuse to keep occassional contact with me, but they refuse to assist me in the manner I wish for them to. I have repeatedly ask them or rather informed them that I was responsible for the charge that myself, and several others have been charged with, that the others were not guilty and I did not want to chance them possibly being convicted for something they are not guilty of, to get me a plea bargain or whatever, but they refuse to and tell me there's no evidence on me, this is not the point, the point is the others are not guilty and I do not want to chance them maybe being convicted of something they have not done.
>
> I was there at the superior court during a trial in August of 1990, where I saw S.B.I. Agent Gale, and spoke to him of the possibility of me taking a plea bargain which he seem to be willing to check and see what he could do, but I mention it to my lawyer and he refuse to assist me on this course of action.
>
> And has repeatedly done so every since, so in December of 1990 I wrote out a affidavit and had sent to the others so that maybe their attorneys would do something where I can not seem to get my lawyers to assist me to take the course I have ask them repeatedly to assist me with.

> Mr. Kennerly, I hope you will assist me with this matter in one manner or another. I realize that the courts are busy and it would take up alot of unnecessary time and money to trial all the persons charged not to mention the fact that the others are in fact not even guilty, I trust you will assist me with this matter. I hope to hear your response in the very near future. Thanks for your time and any assistance you may can give me on this matter.

The defendant's letter is essentially an admission of defendant's guilt, a statement of defendant's desire that the codefendants not be tried for the murder, a request to have counsel removed and a mention of the possibility of a plea bargain. The letter does not state what plea the defendant may have had in mind or any other specifics. The prosecutor did not respond to defendant's letter, did not engage in plea discussions with the defendant and did not enter into a plea arrangement with the defendant. Therefore, admission of the letter is not barred by N.C.G.S. § 15A-1025.

[10] The defendant next argues that the trial court erred by failing to suppress his confession to SBI Agent Gale. In the case *sub judice*, the defendant initially exercised his right to remain silent. On 11 March 1991, defendant wrote a letter to the district attorney admitting he committed the murder and requesting removal of his attorneys. On 16 May 1991, at the request of the district attorney, Agent Gale met with the defendant. Defendant was advised of and waived his *Miranda* rights and gave a confession to Agent Gale. The trial court, based on these facts, found that defendant initiated the request for contact. The defendant contends that the trial court erred in finding that defendant voluntarily initiated contact with the State because defendant's letter was limited only to a request for plea discussions. We disagree.

There is no dispute that the defendant voluntarily sent the letter. The letter does not express a desire to begin plea discussions. The letter stated that defendant was accepting responsibility for the murder. A review of the record indicates that the defendant knowingly and voluntarily waived his *Miranda* rights, and that he wanted to talk to Agent Gale. The defendant in no way indicated that the discussion was limited to plea negotiations. To the contrary, defendant willingly confessed to the crime. Accordingly, we find that the trial court properly found that defendant initiated the request for contact in his letter to the district attorney, and that defendant's confession was made voluntarily and after a knowing waiver of his constitutional rights to

silence and counsel. The arguments constituting this assignment of error are without merit. This assignment is therefore overruled.

[11] In his seventh assignment of error, the defendant contends that he was denied his constitutional right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the North Carolina Constitution. In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the United States Supreme Court identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. 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) whether the defendant has suffered prejudice as a result of the delay. *Id.* at 530, 33 L. Ed. 2d at 117; *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994). We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution. *Webster*, 337 N.C. at 678, 447 S.E.2d at 351; *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 532-33 (1984).

A. Length of the Delay.

The length of the delay is not *per se* determinative of whether the defendant has been deprived of his right to a speedy trial. *Webster*, 337 N.C. at 678, 447 S.E.2d at 351. The United States Supreme Court has found post-accusation delay "presumptively prejudicial" as it approaches one year. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992). However, presumptive prejudice "does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Id.*

The length of delay in this case, from indictment to trial, was five years and eight days. This delay is clearly enough to trigger examination of the other factors.

B. Reason for the Delay.

Defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. *Webster*, 337 N.C. at 679, 447 S.E.2d at 351. Defendant makes no contention that the prosecution willfully delayed his trial. Instead, defendant argues that the delay was caused by the State's neglect. The record does not reveal that the delay was because of prosecutorial negligence. To the contrary, it shows numerous nonnegligent causes for the delay including:

the defendant's request to represent himself; codefendants' request that their trial be severed from defendant's so that defendant could be called as a witness; codefendants' trial, which resulted in a mistrial as to codefendant Fuller; the joinder and subsequent severance of defendant's trial and Fuller's retrial; and two venue changes.

Moreover, in August of 1992, substitute counsel were appointed to represent defendant. Defendant's new counsel stated that they could not be prepared for trial until January or February of 1993. In February of 1993, defendant's case was set for trial on 24 May 1993. Defendant's attorneys notified the trial court that they could not be ready for trial until they received a copy of the transcript from Fuller's second mistrial. The defense did not request a copy of the Fuller transcript until August of 1993. At that time, the prosecutor stated that the defendant's trial would be set within two weeks of notice that defendant was ready for trial. The district attorney confirmed by letter that he could be ready to try the case within two weeks of defense counsel's letting him know they were prepared for trial. In June of 1994, after defense counsel failed for ten months to notify the district attorney that they were ready for trial, defendant's trial date was set. Based on these factors, we conclude that there has been no showing that the prosecutor willfully or through neglect delayed defendant's trial.

C. Assertion of the Right.

Defendant first asserted his right to a speedy trial on 2 August 1993, nearly four years after his indictment. At the hearing on defendant's motion, counsel indicated that they were not yet prepared for trial. Defendant filed his second motion for a speedy trial on 19 September 1994, the day the case was called for trial. Defendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, but does weigh against his contention that he has been denied his constitutional right to a speedy trial. *See Webster*, 337 N.C. at 680, 447 S.E.2d at 352.

D. Prejudice to the Defendant.

In considering whether the defendant has been prejudiced because of a delay between indictment and trial, this Court noted that a speedy trial serves

> "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

Id. at 681, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118).

Defendant has failed to show that he was prejudiced in any manner. At the time of this murder, defendant was serving a life sentence for another murder and therefore has not suffered "oppressive pretrial incarceration" as a result of any delay in trying his case. Defendant has made no showing of "anxiety and concern" because of any delay in his case. Defendant's sole contention is that the delay impaired his defense. Specifically, defendant contends that the delay prevented him from calling as a witness Vernon Lunsford, who, according to the defense, admitted killing the victim. A careful review of the record reveals that the defendant made no showing that he could present admissible evidence of third-party guilt through Vernon Lunsford.

After balancing the four factors set forth above, we hold that defendant's constitutional right to a speedy trial has not been violated. This assignment of error is overruled.

[12] In his eighth assignment of error, the defendant contends that the trial court erred by denying his request to instruct the jury on second-degree murder as a possible verdict.

Murder in the first degree, the crime of which the defendant was convicted, is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Brown*, 300 N.C. 731, 735, 268 S.E.2d 201, 204 (1980). A defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support that lesser-included offense. *Id.* at 735-36, 268 S.E.2d at 204. "The determinative factor is what the State's evidence tends to prove." *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). If the State's evidence establishes each and every element of first-degree murder and there is no evidence to negate these elements, it is proper for the trial court to exclude second-degree murder from the jury's consideration. *Id.*

Here, evidence of the lesser-included offense of second-degree murder is totally lacking. The defendant presented no evidence. Lorenzo Wilborn testified for the State that the defendant arrived in

the victim's cell, together with the three codefendants; that the defendant remained at the door of the cell block when the victim tried to escape from the other three inmates; that defendant stood by while two codefendants dragged the victim back into his cell; and that shortly thereafter, the defendant joined the three codefendants in the victim's cell. The State also introduced the defendant's own statement in which he stated that he alone was responsible for the murder. In his statement, the defendant admitted that he went to the victim's cell to kill the victim, that he stabbed the victim numerous times, and that he stole the victim's jewelry as he left.

There is nothing in either Wilborn's testimony or defendant's statement which would negate premeditation and deliberation or support a conviction of second-degree murder. There was no evidence that the defendant was surprised that his codefendants were stabbing the victim, nor was there evidence of suddenly aroused passion or that the defendant sought out help for the victim. The evidence permits no inference other than that the defendant went to the victim's cell with the intent to kill him. To suggest that defendant acted without premeditation and deliberation is to invite total disregard of the evidence. We therefore conclude that the trial court correctly denied defendant's request to submit the offense of second-degree murder to the jury. In this assignment, we conclude there is no error.

[13] In his ninth assignment of error, the defendant contends that the trial court erred by submitting the defendant's 1982 conviction for armed robbery as one of the felonies supporting the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence. Specifically, defendant argues that because the 1982 conviction for armed robbery served as the underlying felony for defendant's 1982 felony murder conviction and judgment was arrested as to the armed robbery conviction, it was error to submit the 1982 armed robbery in support of the (e)(3) aggravating circumstance.

Assuming, *arguendo*, that submission of the 1982 armed robbery conviction was improper under these circumstances, any error was harmless. Four other prior felony convictions were submitted in addition to the 1982 armed robbery. The jury unanimously found the existence of each prior felony conviction submitted in support of the (e)(3) prior violent felony aggravating circumstance. Each of the other four felonies was sufficient if submitted alone to support the

(e)(3) aggravating circumstance. Therefore, we find no reasonable possibility that, had the armed robbery conviction not been submitted, the jury would have reached a different result and rejected the existence of the (e)(3) aggravating circumstance. Accordingly, this assignment of error is overruled.

[14] In his tenth assignment of error, the defendant contends that the trial court erred by instructing the jury that it was free to decide whether two statutory mitigating circumstances had mitigating value. The trial court submitted the following statutory mitigating circumstances for the jury's consideration: (1) that the murder was actually committed by another person and the defendant was only an accomplice, N.C.G.S. § 15A-2000(f)(4); and (2) that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). The trial court also submitted the "catchall" mitigating circumstance. No nonstatutory mitigating circumstances were submitted to the jury.

The trial court instructed the jury generally in regard to mitigating circumstances as follows:

> Our law identifies several possible mitigating circumstances.
>
> However, in considering issue number two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for sentence less than death, *and any other circumstances arising from the evidence which you deem to have mitigating value.*
>
> The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists.
>
> If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the issues and recommendation form. A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors or by any other juror. In any event, you would move on to consider the other mitigating circumstances and continue in a like manner

> until you have considered all of the mitigating circumstances listed on the form, *and any others which you deem to have mitigating value in your deliberation process.* It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

Following that instruction, the trial court instructed the jury specifically regarding the two submitted statutory mitigating circumstances as follows:

> Number one, as indicated again on your—on your sheet, which is the first mitigating circumstance reads: Consider whether this murder was actually committed by another person or persons and the defendant was only an accomplice in the murder and his participation in the murder was relatively minor. The distinguishing feature of an accomplice is that he is not the person who actually committed the murder.
>
> You would find this mitigating circumstance if you find the victim was killed by another person and that the defendant was only an accomplice to the killing and that the defendant's conduct constituted relatively minor participation in the murder. If one or more of you finds by a preponderance of the evidence that the—that this circumstance exists, you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write "no" in that appropriate space.
>
> Number two mitigating circumstance, the second mitigating circumstance: Consider whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. . . .
>
> . . . Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it has—was lessened or diminished.
>
> Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform his conduct to the law was impaired, since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

> . . . You would find this mitigating circumstance if you find that the defendant had voluntarily consumed drugs or impairing substances and that this—before the killing of Rufus Watson, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The trial court then gave the jury the following instruction regarding the "catchall" mitigating circumstance:

> Number three on your form, the third mitigating circumstance finally: You may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value. If one or more of you so find by a preponderance of the evidence, you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance on the issues and recommendations form. If none of you finds any such circumstances to exist, you would so indicate by having your foreperson write "no" in that space.

The defendant specifically contends that the italicized portions of the second and fourth paragraphs of the trial court's general instructions failed to make a meaningful or readily understandable distinction between statutory and nonstatutory mitigating circumstances and do not clearly instruct the jury which circumstances the jury is free to deem with or without mitigating value. We disagree.

The trial court instructed the jury in accordance with the pattern instructions. *See* N.C.P.I.—Crim. 150.10 (1992). In the first four paragraphs, the trial court's instructions provided general information regarding mitigating circumstances. The trial court explained first that the law identifies several possible mitigating circumstances which the jury must consider, which the *defendant* contends are mitigating, and second, that the jury could consider any other circumstance arising from the evidence which *it* deemed to have mitigating value. Next, the trial court instructed the jury as to the two statutory mitigating circumstances. As to these circumstances, the trial court made it clear that the circumstances were mitigating, specifically stating, "[i]t would be your duty to consider *as a mitigating circumstance* . . . the circumstances of this murder that the defendant contends [are] a basis for sentence less than death . . . ." (emphasis added), and that the jury's only decision here was to determine from the evidence if the circumstances existed. The instructions on these two statutory mitigating circumstances did not give the jury the

option of finding no mitigating value. The only instance in which the jury was instructed that it could consider any other circumstance arising from the evidence which it deemed to have mitigating value was in regard to the "catchall" mitigating circumstance. This instruction mirrored the language contained in N.C.G.S. § 15A-2000(f)(9), was clearly separate from the instructions given for the two statutory mitigating circumstances, and was proper in all respects. Accordingly, we hold that there was no possibility that the trial court's instructions allowed the jury to determine for itself whether the statutory mitigating circumstances had mitigating value. This assignment of error is overruled.

[15] In his next assignment of error, the defendant contends that the trial court erred in submitting for the jury's consideration both the N.C.G.S. § 15A-2000(e)(2) aggravating circumstance that the defendant had previously been convicted of a capital felony and the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that the defendant had previously been convicted of a felony involving the use or threat of violence. Specifically, defendant argues that the prior first-degree murder and the five other prior felonies all arose out of the same transaction, and therefore the same evidence was used to support both aggravating circumstances, in violation of this Court's decision in *State v. Goodman*, 298 N.C. 1, 28-30, 257 S.E.2d 569, 586-88 (1979).

To support the (e)(2) prior capital felony aggravating circumstance, the evidence need show only that defendant was convicted of a crime for which he could have received the death penalty. *See State v. Bunning*, 338 N.C. 483, 493-94, 450 S.E.2d 462, 467 (1994). The (e)(3) prior violent felony aggravating circumstance requires proof that the defendant was convicted of either a felony in which the use or threat of violence to the person is an element of the crime or a felony which actually involved the use or threat of violence. *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 support of the (e)(2) prior capital felony aggravating circumstance, the State introduced documents proving the defendant had previously been convicted of first-degree murder in 1982. The State also presented testimony from a witness who stated that he was present at that trial and that the defendant was tried capitally. This evidence is sufficient to support the (e)(2) aggravating circumstance but does not support any other aggravating circumstance submitted for the jury's consideration.

In support of the (e)(3) prior violent felony aggravating circumstance, the State introduced documents proving the defendant had previously been convicted of first-degree burglary, robbery with a dangerous weapon, second-degree kidnapping, breaking and entering and felonious larceny. In order to prove that the larceny, breaking and entering and burglary convictions involved the use or threat of violence, the State presented testimony that the victims were assaulted by the defendant and forced at gunpoint to cooperate with their assailants. This evidence supports the (e)(3) aggravating circumstance and is not sufficient to support any other aggravating circumstance submitted for the jury's consideration.

Thus, since the jury logically could not have used evidence of one aggravating circumstance to support the other, it is clear that the two aggravating circumstances did not rely on the same evidence. Accordingly, the trial court did not err in submitting both the (e)(2) and (e)(3) aggravating circumstances. This assignment of error is therefore overruled.

[16] In his next assignment of error, the defendant contends that the trial court erred by admitting defendant's previous felony indictments into evidence to support the (e)(2) prior capital felony and (e)(3) prior violent felony aggravating circumstances. Defendant contends that this was in violation of N.C.G.S. § 15A-1221(b), which prohibits the reading of indictments to the jury. N.C.G.S. § 15A-1221(b) provides:

> At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury.

N.C.G.S. § 15A-1221(b) (Supp. 1996).

This Court has stated that the purpose of N.C.G.S. § 15A-1221(b) is to insure that the jurors do not receive a "distorted view of the case before them by an *initial exposure* to the case through the stilted language of indictments and other pleadings." *State v. Leggett,* 305 N.C. 213, 218, 287 S.E.2d 832, 836 (1982) (emphasis added). Based on this stated purpose, it appears clear that N.C.G.S. § 15A-1221(b) is applicable only: (1) during the jury selection and guilt/innocence phases of criminal trials, and (2) with respect to the indictment(s) that pertain to the case currently being tried. Once a case has reached the sentencing proceeding after the trial, fear that the jury's *initial exposure* to the case will result in a *distorted* view is no

longer a concern. Accordingly, we hold that N.C.G.S. § 15A-1221(b) does not prohibit publication during the sentencing proceeding of indictments from cases not currently before the jury. We also note that this Court, while not facing the identical issue as presented in the case *sub judice,* found no error in a case in which a prior indictment was read to the jury for the purpose of proving the existence of a prior felony. *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). This assignment of error is overruled.

[17] In his next assignment of error, the defendant contends that the trial court erred by failing to intervene *ex mero motu* to correct four instances of grossly improper conduct by the prosecutor during closing arguments in the sentencing proceeding. We note for purposes of our review that the defendant failed to object with respect to any of these instances at any time during the State's closing arguments.

It is well established that control of counsel's arguments is left largely to the discretion of the trial court. *State v. Johnson,* 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979). When no objections are made at trial, as in this case, the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu. See 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); *State v. Pinch,* 306 N.C. 1, 17, 292 S.E.2d 203, 218, *cert. denied,* 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v.* Rouse, 339 N.C. 59, 451 S.E.2d 543, *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), *and by State v. Benson,* 323 N.C. 318, 372 S.E.2d 517 (1988). In order to determine whether the prosecutor's remarks were grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they referred. *Pinch,* 306 N.C. at 24, 292 S.E.2d at 221.

Further, prosecutors are given wide latitude in the scope of their argument. *State v. Syriani,* 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied,* 510 U.S. 948, 126 L. Ed. 2d 341 (1993). "Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence." *Johnson,* 298 N.C. at 368, 259 S.E.2d at 761. Counsel may, however, argue to the jury the law, the facts in evidence

and all reasonable inferences drawn therefrom. *Syriani*, 333 N.C. at 398, 428 S.E.2d at 144.

In light of these principles, the defendant first argues that the prosecutor trivialized differences in the culpability of the defendant and codefendants which denied him the individualized consideration required for the imposition of the death penalty. We disagree.

When read in context, it is clear that the prosecutor's remarks fell well within the wide latitude afforded prosecutors during closing arguments. The portion of the prosecutor's argument of which defendant now complains, placed in context, is set forth in italics below:

> Number five, this murder was especially heinous, atrocious or cruel. Rufus Watson was in prison. Closing argument, Mr. Locklear called him what, a homosexual pimp, a loanshark, a drug dealer, all sorts of things. But he was a human being. He did not deserve to die like that.
>
> . . . .
>
> . . . . Now here, this factor is about what happened to Rufus Watson and how he died, what he felt. *This factor is not about what the defendant did or how many blows the defendant struck.*
>
> This factor is about Rufus Watson. 31 stab wounds, a break in between to run for his life at some point. And the doctor told you he lived for a few minutes, he was conscious, he was there for feeling. I don't want you to forget that he was a human being. I don't want you to forget what he felt. You must seriously think of, consider, and maybe even live and feel what Rufus Watson went through for this aggravating circumstance, heinous, atrocious and cruel.
>
> This is the weapon that killed him, a homemade shank sharpened somewhere. 31 times. Ladies and gentlemen, could not have been fast, and it could not have been easy in any way: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.
>
> To participate in killing another human being in that manner, for him to die in that way, to feel each and every one of those blows and to live however few minutes afterwards, it's outra-

> geous. It's shocking. It's evil. It's vile. No mitigating circumstance offered to you can outweigh that. What could possibly outweigh how he died?
>
> . . . .
>
> . . . Consider if you will a remarkable similarity between the 1981 murder and the 1989 murder. You've heard that in each of them, it involved other men, two other men in 1981, and then three other men in 1989.
>
> You listened to the pathologist describe to you the injuries to Thomas Greer. What comes to mind? Massive overkill. They didn't need to do that to him. There were no defensive wounds that the doctor could identify for you. That means Thomas Greer didn't have a chance to fight for his life. Mr. Carlton tells you he kept his .38 on a bed stand right there in the bedroom. There's no evidence he had any opportunity to get to that.
>
> What does that mean? Just like '89. Has to have been more than one person that held that man down. *Has to have been more than one person that participated in that. But this trial is not about what anybody else did.*
>
> This trial is about Wendell Flowers. This punishment phase is about what is appropriate for him, given what he has done. And a jury back in '82 found him guilty of first degree murder and armed robbery and burglary and kidnap and breaking and entering. They found him guilty of first degree murder. And what you are assessing here is what is the appropriate penalty for this man at this stage, given what he has done, and to factor it all in.

The prosecutor's argument did not attempt to trivialize the differences in defendant's and codefendants' culpability. Rather, the prosecutor's argument explained to the jury that the focus of the "especially heinous, atrocious, or cruel" circumstance is on the victim and not the defendant's role in the murder or how many blows the defendant struck. This argument is in accord with prior holdings of this Court defining the (e)(9) circumstance in terms of harm to the victim. *See State v. Kandies*, 342 N.C. 419, 450, 467 S.E.2d 67, 84 (N.C.G.S. § 15A-2000(e)(9) circumstance appropriate when the level of brutality involved exceeds that normally found in first-degree murders or when the murder in question is conscienceless, pitiless or unnecessarily torturous to the victim), *cert. denied,* — U.S. —, 136 L. Ed. 2d 167 (1996). Accordingly, we find no impropriety in the pros-

ecutor's argument in this regard and no error in the trial court's decision not to intervene to prevent this argument.

[18] The defendant next contends that the prosecutor acted improperly by arguing that "any penalty other than death would be meaningless." We disagree.

In support of his argument that a life sentence would provide a meaningless punishment and would not deter defendant from killing again, the prosecutor reminded the jury that at the time of the murder in this case, the defendant was serving a life sentence for a previously committed capital murder. The prosecutor emphasized that another life sentence would not protect the other inmates and guards who were forced to be around the defendant in prison. Finally, noting that the jury had heard testimony about one inmate who had escaped from the facility where defendant was serving his first sentence, the prosecutor argued that a life sentence did not guarantee the defendant would never get out of prison.

The prosecutor's argument was grounded in the evidence and properly emphasized the appropriateness of the death penalty in light of the specific facts in this case. This is a proper specific-deterrence argument. *See Payne*, 337 N.C. 505, 448 S.E.2d 93. Accordingly, we find no error in the trial court's failure to intervene *ex mero motu*.

[19] The defendant next contends that the prosecutor improperly urged the jury to consider the defendant's 1982 armed robbery conviction to support the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that the defendant had previously been convicted of a prior violent felony. The defendant asserts that this conviction was not properly submitted. However, the portion of the argument which the defendant cites does not ask the jury to consider the armed robbery in connection with the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance. Rather, the prosecutor asks the jury to consider the defendant's previous crimes while evaluating the appropriateness of the death penalty during the weighing process.

The prosecutor argued as follows:

> This trial is about Wendell Flowers. This punishment phase is about what is appropriate for him, given what he has done. And a jury back in '82 found him guilty of first degree murder and armed robbery and burglary and kidnap and breaking and entering. They found him guilty of first degree murder. And what you

are assessing here is what is the appropriate penalty for this man at this stage, given what he has done, and to factor it all in.

The armed robbery verdict supported the prior first-degree murder conviction which was submitted in this case as an aggravating circumstance pursuant to N.C.G.S. § 15A-2000(e)(2). Although the judgment was arrested on the armed robbery verdict, the verdict itself remained intact. This Court has recognized that an arrest of judgment does not void the underlying verdict. *See State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). Therefore, it was proper for the jury to consider the armed robbery verdict during the weighing of aggravating and mitigating circumstances. Accordingly, we find no error with respect to this argument.

[20] Finally, the defendant contends that the prosecutor improperly argued that psychological torture should be considered in support of the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel." After thoroughly reviewing the record, we find that the prosecutor's argument falls well within the wide latitude accorded prosecutors in the scope of their argument and was not so grossly improper as to require the trial court's intervention. For the foregoing reasons, this assignment of error is overruled.

[21] In his next assignment of error, the defendant contends that the trial court committed constitutional error in instructing the jury on the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel." Specifically, defendant argues that the instruction was unconstitutionally vague and overbroad. We disagree. The trial court's instruction was identical to the pattern instructions contained in N.C.P.I.—Crim. 150.10. This Court has consistently upheld the constitutionality of this instruction. *See State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994); *Syriani*, 333 N.C. 350, 428 S.E.2d 118. We find no compelling reason to depart from our prior holdings on this issue. This assignment of error is overruled.

[22] In his next assignment of error, the defendant contends that the trial court erred by imposing a sentence in excess of the presumptive sentence for conspiracy to commit murder without making findings in aggravation as required by N.C.G.S. § 15A-1340.4(a). We agree.

N.C.G.S. § 15A-1340.4(a) was repealed effective 1 October 1994 for crimes occurring on or after that date. Because the conspiracy

in the instant case occurred prior to 1 October 1994, this statute applied to defendant's sentencing. Pursuant to N.C.G.S. § 15A-1340.4(a), the sentencing judge must find and weigh aggravating and mitigating factors before imposing a sentence greater than the presumptive sentence set by the statute. The presumptive sentence for the crime of conspiracy to commit murder was three years. Accordingly, the trial court erred by imposing a sentence of ten years without first making findings in aggravation. Therefore, we remand this case to the trial court for a new sentencing hearing on the conspiracy conviction.

[23] Defendant next assigns error to the trial court's excusal for cause of eight prospective jurors.

In *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), the Supreme Court held that a prospective juror may not be excused for cause simply because he "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522, 20 L. Ed. 2d at 785. However, a prospective juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985). Further, prospective jurors may be properly excused if they are unable to " 'state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)). Finally, this Court has recognized "that a prospective juror's bias may not always be 'provable with unmistakable clarity.' " *Brogden*, 334 N.C. at 43, 430 S.E.2d at 908 (quoting *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)). In such instances, " 'reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially.' " *Id.* (quoting *Davis*, 325 N.C. at 624, 386 S.E.2d at 426).

In the case *sub judice*, the defendant specifically argues that the trial court improperly used leading questions to stake the jurors out to the position from which they were disqualified. We disagree. The transcript indicates that in each instance, the trial court questioned prospective jurors only after each of them had been challenged for cause and their answers to the prosecutor's questions showed that

they would have difficulty following the law. In all instances, the trial court's conduct was proper.

The colloquy between the trial court and prospective juror Hensley illustrates the pattern of questioning used by the trial court as to each of the eight prospective jurors defendant claims were improperly excused for cause.

When questioned by the prosecutor concerning her beliefs regarding the death penalty, prospective juror Hensley stated, "I have thought about it, yes. I hesitate to give a yes or no answer, but I'd have to say no, I don't believe in it, if it comes to a yes or no answer. I have mixed feelings." Prospective juror Hensley further stated that she did not think she could participate in a capital trial. After the prosecutor moved that she be excused for cause, the trial court properly continued questioning prospective juror Hensley as follows:

> THE COURT: This belief that you have in regards to the capital punishment issue and as potential possible aspect of this case, Ms. Hensley, is that a religious belief, moral belief, combination or—
>
> MS. HENSLEY: I'd say a combination.
>
> THE COURT: Is that something that you have held for some period of time?
>
> MS. HENSLEY: Yes. I—I really believe that God is the one that should decide matters like that as far as everybody being human. We make mistakes. And as far as the decision to—to end someone's life, I just don't mean—I don't believe in it as a human being. And I wouldn't want to have to decide that.
>
> THE COURT: All right, ma'am. And again, we appreciate your candor and would expect you to be as candid, because that is very important. You understand that the State is entitled to have prospective jurors that will not only consider, but if the jury determines from the law and the evidence that it is appropriate to consider it, but would recommend the death penalty as the penalty in a case to which the jury determined it to be appropriate.
>
> Are you saying that since that is the law and the requirement of the sworn—the requirement of the jurors, and each juror, that you would not be able to follow those instructions because of your strong beliefs in opposition to the death penalty?

MS. HENSLEY: Yes. Yes.

. . . .

THE COURT: All right, ma'am. So you feel like that—that your personal views in regards to capital punishment, then, and the death penalty, would prevent or substantially impair your being able to follow out the duties that the Court will tell you that each juror would be required to do?

MS. HENSLEY: Yes.

THE COURT: All right, I'll allow your motion for cause.

The trial court scrupulously followed the law and acted well within its discretion in conducting the jury *voir dire*. Prospective juror Hensley's responses to both the prosecutor and the trial court indicated with unmistakable clarity that her bias against the death penalty would substantially impair her ability to perform her duties as a juror. Therefore, we conclude that the trial court did not err in excusing prospective juror Hensley for cause.

Similarly, after a thorough review of the exchanges among the prosecutor, counsel for the defendant, the trial court and each of the remaining seven prospective jurors whom the defendant claims were improperly excused for cause, we cannot say that the trial court abused its discretion in determining that the views of these prospective jurors would prevent or substantially impair them from performing their duties as jurors. Deferring to the trial court's judgment, we find no error in the excusal, for cause, of prospective jurors Clinding, Blue, Wells, Freeman, Tucker, Kluttz and Wilson. This assignment of error is overruled.

ADDITIONAL ISSUES

Defendant raises twenty-five additional issues which he concedes have been decided against him by this Court. He raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for possible further judicial review of this case. Counsel makes no argument in support of these assignments of error and fails to cite any authority in support of these issues. Therefore, under the North Carolina Rules of Appellate Procedure, these assignments of error are deemed abandoned. N.C. R. App. P. 28(b)(5). Moreover, we have carefully considered each of these additional assignments of error and find no

compelling reason to depart from our prior holdings. We therefore overrule defendant's additional assignments of error.

PROPORTIONALITY REVIEW

[24] Having found no error in either the guilt/innocence phase of defendant's trial or the capital sentencing proceeding, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether passion, prejudice or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (1988) (amended 1994). We have thoroughly reviewed the record, transcript and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (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. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In the case *sub judice*, the jury found the defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and on the basis of felony murder. At sentencing, the trial

court submitted five aggravating circumstances, each of which the jury found: that the murder was committed while the defendant was lawfully incarcerated, N.C.G.S. § 15A-2000(e)(1); that the defendant had been previously convicted of another capital felony, N.C.G.S. § 15A-2000(e)(2); that the defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); that the murder was committed while the defendant was engaged in the commission of a robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury specifically declined to find the two statutory mitigating circumstances submitted for its consideration or the statutory "catchall" mitigating circumstance. No nonstatutory mitigating circumstances were submitted to the jury.

This case has several distinguishing characteristics. The defendant was lawfully incarcerated at the time of the murder because of a prior capital conviction; the jury convicted the defendant under the theory of premeditation and deliberation; the victim's brutal beating and stabbing was found by the jury to be especially heinous, atrocious, or cruel; the victim suffered great physical and psychological pain before death; and finally, the jury found the existence of more than one aggravating circumstance. "It is also relevant that no juror found the existence of any mitigating circumstances." *State v. Barrett*, 343 N.C. 164, 186, 469 S.E.2d 888, 901, *cert. denied*, — U.S. —, 136 L. Ed. 2d 259 (1996). These characteristics distinguish this case from those in which we have held the death penalty disproportionate.

In our proportionality review, it is proper to compare the present case to those cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Of the cases in which this Court has found the death penalty disproportionate, none involved a defendant who was lawfully incarcerated at the time of the murder. In fact, none involved a defendant with any prior convictions for violent felonies. In the present case, the defendant was lawfully incarcerated at the time of the murder and had numerous prior felony convictions, including a capital felony. Moreover, only two of the cases in which this Court has found the death penalty disproportionate 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, or that defendant Stokes deserved a sentence of death any more than another party to the crime who received only a life sentence. In the present case, the defendant, while not solely responsible for the victim's death, played a significant role in the killing. Defendant Stokes was only seventeen years old at the time of the crime. In this case, the defendant was thirty-five years old at the time of the crime and was already incarcerated for a previous murder. Finally, 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).

In *Bondurant*, the victim was shot while riding with the defendant in a car. *Bondurant* is distinguishable because the defendant had no prior violent felony convictions, immediately exhibited remorse and concern for the victim's life by directing the driver to go to the hospital, 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, defendant did not seek aid for his victim, participated in the attempt to cover up the crime, showed no remorse toward the victim and had numerous prior felony convictions.

As noted above, one distinguishing characteristic of this case is that five aggravating circumstances were found by the jury. Of the seven cases in which this Court has found a sentence of death disproportionate, including *Stokes* and *Bondurant*, in only two, *Bondurant* and *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), did the jury find the existence of multiple aggravating circumstances. *Bondurant* is distinguishable as shown above. 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 five aggravating circumstances found by the jury was that the murder was especially heinous, atrocious, or cruel.

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

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all of the cases in the pool when engaging in our duty of proportionality review, we have repeatedly stated that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It suffices to say here that we conclude the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

Finally, we noted in *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995), that similarity of cases is not the last word on the subject of proportionality. *Id.* at 287, 446 S.E.2d at 325. Similarity "merely serves as an initial point of inquiry." *Id.; see also 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 on the charge of first-degree murder and a fair capital sentencing proceeding, free of prejudicial error. We hold that the trial court erred in sentencing the defendant on the charge of conspiracy to commit murder, and we remand to the Superior Court, Rowan County, for a new sentencing hearing on the conspiracy conviction.

NO. 89CRS9093, FIRST-DEGREE MURDER: GUILT/INNOCENCE PHASE—NO ERROR; SENTENCING PHASE—NO ERROR.

NO. 89CRS9096, CONSPIRACY TO COMMIT MURDER: REMANDED FOR NEW SENTENCING HEARING.

STATE OF NORTH CAROLINA v. THOMAS MARK ADAMS

No. 3A89-2

(Filed 5 September 1997)

1. Criminal Law § 1359 (NCI4th Rev.)— capital resentencing—stipulation from prior sentencing—disregarded—no error

A defendant was not deprived of due process in a capital resentencing where the State was allowed to disregard a stipulation from defendant's first sentencing proceeding that there was insufficient evidence to prove that defendant had an intent to rape the victim when he entered the building or that he actually raped her. The genuine belief of the previous prosecutor that there was a lack of evidence to support an aggravating circumstance cannot bind the State at a resentencing proceeding where the prosecutor at the resentencing has evidence to support the aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law § 1335 (NCI4th Rev.)— capital resentencing—stipulation at prior sentencing—waiver of cross-examination—stipulation disregarded—pathologist now deceased—no violation of right to confront witnesses

The trial court did not deprive defendant of his right to confront witnesses against him in a capital resentencing by allowing the State to disregard a stipulation from the first sentencing proceeding that there was insufficient evidence to prove that defendant had an intent to rape the victim where defendant contended that the doctor who performed the autopsy on the victim was deceased at the time of the resentencing and could not be cross-examined. The results of the autopsy were admitted through the testimony of another doctor, whom defendant was able to fully cross-examine and from whom defendant elicited favorable opinions. Additionally, certain evidence in the stipulation was not accurate and there was some disagreement concerning when loss of consciousness would have occurred.

Am Jur 2d, Criminal Law §§ 598, 599.

Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior. 65 ALR Fed. 519.

3. Criminal Law § 1359 (NCI4th Rev.)— capital resentencing—aggravating circumstances—not submitted at first proceeding—submitted at second—no double jeopardy violation

A defendant's right not to be subjected to double jeopardy in a capital resentencing proceeding did not preclude submission of aggravating circumstances not submitted or supported at the first capital sentencing proceeding. Although defendant contends that the State failed to introduce sufficient evidence on these points during the previous trial and was barred from putting defendant in jeopardy on these issues in the second proceeding and should also have been barred from introducing otherwise inadmissible evidence supporting these circumstances, jeopardy attaches in a capital sentencing proceeding for double jeopardy purposes only after there has been a finding that no aggravating circumstance is present. Because three aggravating circumstances were submitted and found in the prior proceeding in this case, and because the aggravating circumstances submitted were supported by the evidence, defendant's double jeopardy and due process rights were not violated.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Constitutional Law § 230 (NCI4th)— capital resentencing—relitigation of mitigating circumstances—not precluded by double jeopardy

The trial court did not violate a defendant's rights under the Double Jeopardy Clause and the constitutional doctrine of collateral estoppel in a capital resentencing proceeding by refusing to instruct the jury that the mitigating circumstances found by the jury at the first proceeding were established as a matter of law. Under the analysis of the United States Supreme Court, the capital sentencing hearing is not a set of mini-trials on the existence of each aggravating circumstance; the finding of any particular aggravating circumstance does not of itself require the death penalty and the failure to find any particular aggravating circumstance does not preclude the death penalty; the rejection of an aggravating circumstance is not an acquittal of that circumstance for double jeopardy purposes; and the use of that circumstance

in a second proceeding is not prohibited. It follows that the Double Jeopardy Clause does not apply to preclude relitigation of the existence of mitigating circumstances.

Am Jur 2d, Criminal Law §§ 309 et seq.

5. Criminal Law § 1340 (NCI4th Rev.)— capital resentencing—evidence of remorse excluded—no evidence of subject of remorse

There was no plain error in a capital resentencing where the trial court excluded evidence of defendant's remorse. Although defendant contends that the trial court apparently believed that this evidence was hearsay and thus inadmissible, relevant mitigating evidence cannot be excluded at a sentencing hearing based upon evidentiary rules. However, the evidence must be relevant to defendant's character or record and the circumstances of the offense and this defendant failed to except to the ruling or to preserve what the witness's testimony would have been. There is no way to know what defendant said he was "sorry about" when his family saw him at the jail.

Am Jur 2d, Criminal Law §§ 598, 599.

6. Criminal Law § 564 (NCI4th Rev.)— capital resentencing—statement by witness—defendant seen on death row—no mistrial

The trial court did not err in a capital resentencing by not granting a mistrial where a defense witness stated on cross-examination that she had seen defendant on death row. This case is more similar to *State v. Spruill*, 338 N.C. 612, than to *State v. Britt*, 288 N.C. 699. The witness made only one mention of death row, the record indicates that it was inadvertent, and several witnesses testified concerning defendant's behavior in prison, so that it was clear to the jury that defendant had been in prison and the jury could have inferred that defendant had previously been sentenced to death. Most importantly, the remark came from a defense witness and it was impossible for the prosecutor to foresee that her question would elicit this response. It does not appear that the prosecutor had any improper motive in asking this question or that it was an intentional attempt to elicit the fact that defendant had been on death row; in fact, the prosecutor had not had any contact with the witness prior to trial. The remark concerning seeing defendant on death row

did not result in substantial and irreparable prejudice to defendant's case.

Am Jur 2d, Criminal Law §§ 580-586.

7. Criminal Law § 560 (NCI4th Rev.)— capital resentencing— juror's question—defense attorney's integrity—no mistrial

The trial court did not err in a capital resentencing by denying defendant's motion for a mistrial following jurors' questions concerning defense counsel's integrity. During defense counsel's cross-examination of a detective, rolling papers fell out of the pocket of the pants defendant had been wearing at the time of the offense as defense counsel examined the pants. A juror informed the trial court during a recess that he had questions about how the rolling papers fell out of the pants, suggesting that defense counsel might have planted them there. The prosecutor was eventually able to establish that references to the rolling papers were included in the lab notes made by an SBI agent during his examination of the pants and, after the jury had returned, stated that neither she nor defense counsel had searched the pocket, that an SBI agent had informed them that lab notes contained references to the rolling papers, and that it was clear that the papers had been in the pants pocket at the time they were seized and for at least seven and one half years. The trial court informed the jurors that he had known defense counsel for at least fifteen years and that none of the attorneys in the case would manipulate or alter or plant evidence, the judge asked the jurors whether any of them felt they could not be fair to the State or the defense and each indicated that he or she could be fair, and defense counsel was allowed to inform the jury that the attorney who had picked up the pants had not been involved with the case until about one year previously.

Am Jur 2d, Criminal Law §§ 580-586.

8. Criminal Law § 690 (NCI4th Rev.)— capital resentencing— mitigating circumstances—peremptory instructions—no error

There was no plain error in a capital resentencing proceeding in the trial court's peremptory instructions on mitigating circumstances where defendant contended that the peremptory instruction given by the judge failed to make clear the uncontroverted nature of the evidence, but the court's instruction properly

allowed the jury to determine the credibility of the evidence presented and also conformed with the North Carolina Pattern Jury Instructions.

Am Jur 2d, Criminal Law §§ 628.

9. Criminal Law § 690 (NCI4th Rev.)— capital resentencing—mitigating circumstances—remorse— peremptory instruction refused—no error

The trial court did not err in a capital resentencing proceeding by not giving a peremptory instruction on defendant's remorse where the testimony tended to show that defendant was remorseful for having hurt his family and for the effect his conduct was going to have on his own life and did not clearly demonstrate that defendant was sorry he took the victim's life.

Am Jur 2d, Criminal Law §§ 628.

10. Criminal Law § 690 (NCI4th Rev.)— capital resentencing—mitigating circumstances—good relationship with family—peremptory instruction refused—no error

The trial court did not err in a capital resentencing proceeding by not giving a peremptory instruction that defendant generally maintained a good and loving relationship with his parents and other family members. The trial court noted that there was some question as to whether it was defendant or his family who had maintained the relationship; both of defendant's parents testified concerning defendant's quitting school and the pain and expense defendant's criminal activities had caused the family; and defendant's mother testified that there was a lot defendant had done which they would never understand. The evidence was controverted and defendant was not entitled to the requested peremptory instruction.

Am Jur 2d, Criminal Law §§ 628.

11. Criminal Law § 690 (NCI4th Rev.)— capital resentencing—mitigating circumstances—level of maturity—evidence controverted—peremptory instruction refused

The trial court did not err in a capital resentencing by not peremptorily instructing the jury that defendant had a level of maturity that would reduce his culpability where the evidence showed that he had earned his GED by the time he was seventeen and had a stable, loving home and family, but also that he had

planned the crime for at least a couple of days and had a prior criminal record. The evidence concerning defendant's maturity level was not uncontroverted.

Am Jur 2d, Criminal Law §§ 628.

12. Criminal Law § 1335 (NCI4th Rev.)— capital resentencing—evidence that victim would have lived with treatment—admissible

There was no plain error in a capital resentencing where the trial court admitted medical testimony that the victim may have survived if treated. The Rules of Evidence do not apply in sentencing hearings; any evidence the court deems relevant to sentence may be introduced. Here, although defendant argues that he had no reason to realize that medical attention could have saved the victim and that the testimony had no relevance, defendant stated to law enforcement officers that he continued to stab the victim because she wouldn't die and that she slowly bled to death, so that the medical testimony served to corroborate defendant's statements, and whether death is immediate or delayed is relevant to whether the crime was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(a)(3).

Am Jur 2d, Criminal Law §§ 580-586.

13. Criminal Law § 1335 (NCI4th Rev.)— capital resentencing—evidence of infraction of prison rules—relevant

The trial court did not abuse its discretion in a capital resentencing by admitting evidence concerning the punishment defendant received for an infraction of prison rules where defendant argued that the evidence may have left the jury with the impression that defendant was not subject to any real control in prison because the punishment may have been viewed as too light, but defense counsel had presented evidence that defendant has and will likely perform well in a structured environment. The testimony was relevant to prove that defendant had not performed well and was not likely to perform well.

Am Jur 2d, Criminal Law §§ 598, 599.

14. Jury § 222 (NCI4th)— capital resentencing—jurors excused—opposition to death penalty

The trial court did not err in a capital resentencing by striking two jurors because they would be unable to consider a sen-

tence of death where one juror stated that he would not be able to stand in open court and state that he had so voted and the entire transcript of his responses to the court, the prosecutor, and defense counsel provides clear support for the decision to grant the prosecutor's motion to strike him from the jury for cause. The second juror plainly indicated that she did not believe she could impose a death sentence and that her personal beliefs would substantially impair her ability to fairly and impartially apply the law. A prospective juror's bias against the death penalty need not be proven with unmistakable clarity; instead, the record need only contain sufficient evidence to provide the court with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law and the trial court's decision as to the juror's ability to follow the law is entitled to deference.

Am Jur 2d, Jury § 279.

15. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A sentence of death was not disproportionate where the evidence supported each aggravating circumstance found; the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and this case is distinguishable from each of the seven cases in which the sentence of death was found disproportionate. This defendant was convicted on the theory of premeditation and deliberation and felony murder whereas in three of the seven disproportionate cases the defendant either pled guilty or was convicted solely of felony murder; a finding of premeditation indicates a more cold-blooded and calculated crime; multiple aggravating circumstances were found in only two of the disproportionate cases (a previous statement that multiple aggravating circumstances were found in only one disproportionate case was incorrect); this case is distinguishable from both of those cases in that the jury in one did not find the especially heinous, atrocious, or cruel aggravating circumstance, while that circumstance was found here, and the defendant in the other disproportionate case immediately exhibited remorse and concern for the victim's life, going into the hospital to secure medical help and voluntarily speaking to police and admitting shooting the victim, unlike this defendant. Finally, while juries have imposed sentences of life imprisonment in several robbery-murder cases which are similar to the present

case, many of those involved robbery-murders at convenience stores or the defendant's impaired ability to appreciate the criminality of his conduct. The victim here was murdered in the sanctity of her own home and there was no evidence of any impairment of defendant's ability to appreciate the criminality of his conduct.

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 DeRamus, J., on 1 September 1995 in Superior Court, Iredell County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 May 1997.

Michael F. Easley, Attorney General, by Thomas J. Ziko and Ellen Scouten, Special Deputy Attorneys General, for the State.

Rudolf & Maher, P.A., by Thomas K. Maher, for defendant-appellant.

ORR, Justice.

On 14 March 1988, defendant was indicted for first-degree burglary, robbery with a dangerous weapon, and first-degree murder. Defendant pled guilty to the burglary and robbery charges against him. At trial, the jury found defendant guilty of first-degree murder based on the theory of premeditation and deliberation and the felony murder theory and recommended a sentence of death. Defendant was subsequently sentenced to consecutive forty-year sentences for the burglary and robbery convictions and to death for the first-degree murder conviction. On appeal, this Court found no error in the convictions. However, the Court ordered a new sentencing proceeding on the first-degree murder conviction based on the United States Supreme Court's decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *State v. Adams*, 335 N.C. 401, 439 S.E.2d 760 (1994). At the new capital sentencing proceeding, the jurors once again returned a recommendation of death. In accordance with the jury's recommendation, Judge Judson D. DeRamus imposed a sentence of death. Defendant appeals as of right from this sentence.

A detailed summary of the evidence introduced during defendant's original trial is set forth in our prior opinion on defendant's direct appeal, in which the majority of this Court found no error in

defendant's trial. *Id.* Except where necessary to develop and to determine the issues presented to this Court arising from defendant's resentencing proceeding, we will not repeat the evidence supporting defendant's 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 sentencing proceeding, free from prejudicial error. For the reasons set forth below, we affirm his sentence.

I.

[1] In his first assignment of error, defendant contends that the trial court erred by allowing the State to disregard a factual stipulation and pursue aggravating circumstances not found at defendant's first sentencing proceeding. Defendant argues that this ruling violated his constitutional right to due process and right to confront the witnesses against him. Defendant also argues that his right not to be subjected to double jeopardy precluded the submission of aggravating circumstances not submitted or supported at the first sentencing proceeding.

A.

We will first address defendant's contention that the trial court erred by allowing the State to disregard a factual stipulation entered into at defendant's prior sentencing hearing. Defendant argues that the trial court's ruling was based on an erroneous application of this Court's holding in *State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991). We disagree.

At defendant's first trial, defendant made a motion to prohibit the prosecutor from making any references to rape or attempted rape. Judge Lewis subsequently made a ruling which prohibited the prosecutor from mentioning rape or attempted rape of the victim during jury selection, but reserved a final ruling for a later stage of the trial. At the conclusion of jury selection, the prosecutor and counsel for defense announced that they had agreed to a stipulation which would eliminate the need for the trial court to rule on defendant's motion. The parties stipulated as to the time of death and manner of death and also that there was insufficient evidence to prove that defendant had an intent to rape the victim when he entered the building or that he actually raped her. Further, over the State's objection, the words

"sex" and "rape" were deleted from a handwritten note which was introduced at trial. Pursuant to the stipulation and Judge Lewis' ruling, no evidence of defendant's intent to rape the victim was introduced at trial.

Prior to defendant's resentencing proceeding, defense counsel filed a motion to prevent the prosecutor from alluding to rape or attempted rape at the resentencing proceeding. At a hearing on this motion, the prosecutor stated that there was evidence of attempted rape and that it was her duty, consistent with this Court's holding in *State v. Case*, 330 N.C. 161, 410 S.E.2d 57, to present such evidence to the jury at the resentencing because it would support an aggravating circumstance. The trial judge at the resentencing proceeding, Judge DeRamus, denied defendant's motion and ruled that the stipulation, entered into at defendant's previous trial, appeared to be against public policy as stated in *Case* and that the trial court did not consider any of the parties to be bound by this stipulation.

Based on the trial court's ruling, the State introduced the note, written by defendant several days before the murder, in which defendant stated that he intended to rape the victim. The note was introduced without the deletion of the words "sex" and "rape." Based on that evidence, along with the evidence of the position of the victim's body and clothing found at the crime scene, the trial court submitted the aggravating circumstance that the murder occurred during the commission of a burglary with intent to commit rape. N.C.G.S. § 15A-2000(e)(5) (Supp. 1996).

This Court was asked to determine a similar issue in *State v. Case*. In that case, the prosecutor agreed to present evidence of only one aggravating circumstance as part of a plea bargain. This Court held that it was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence. *Case*, 330 N.C. at 163, 410 S.E.2d at 59. We stated that

> [i]f our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional. Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance.

Id. at 163, 410 S.E.2d at 58-59. Accordingly, this Court ordered a new trial and stated that "neither the State nor the defendant will be bound by the plea bargain previously made." *Id.* at 164, 410 S.E.2d at 59.

In the present case, the prosecutor at defendant's first sentencing hearing stipulated that there was insufficient evidence to prove that defendant had an intent to rape the victim when he entered the building or that he actually raped her. Defendant contends that because the stipulation was based upon the prosecutor's belief that there was a genuine lack of evidence, the stipulation should be enforceable. However, the genuine belief of the previous prosecutor that there was a lack of evidence to support an aggravating circumstance cannot bind the State at a resentencing proceeding where the prosecutor at the resentencing has evidence to support the aggravating circumstance previously withheld. This Court has held that a concession by the State that facts it was asserting did not support an aggravating circumstance "cannot prevail if the evidence before the court does in fact support that aggravating circumstance." *State v. Gaines*, 332 N.C. 461, 475, 421 S.E.2d 569, 576 (1992), *cert. denied*, 507 U.S. 1038, 123 L. Ed. 2d 486 (1993). Thus, the trial court correctly ruled that the district attorney should not be bound by the stipulation entered into at defendant's previous trial.

B.

[2] We next address defendant's contention that the trial court's ruling deprived defendant of his right to confront the witnesses against him. In his brief, defendant notes that the State could have called Dr. Scharyj, who performed the autopsy on the victim, to testify during defendant's trial. Defendant then would have had the opportunity to cross-examine him to establish that the victim died quickly. Instead, the State stipulated to the facts and circumstances of the victim's death, and defendant waived his right to confront the witness against him. Defendant argues that because Dr. Scharyj, who performed the autopsy on the victim, was deceased at the time of the resentencing and could not be cross-examined, defendant's due process rights were violated by allowing testimony concerning the results of the autopsy report.

During defendant's resentencing hearing, the results of the autopsy report were admitted through the testimony of Dr. Lantz. Dr. Lantz's testimony was based on the autopsy report prepared by Dr. Scharyj and on the autopsy photographs. Defendant was able to fully

cross-examine Dr. Lantz and bring out opinions favorable to him. Additionally, certain evidence contained in the stipulation pertaining to the circumstances of the victim's death was not accurate. For example, the stipulation provided that the victim had a "cut on the throat," while Dr. Lantz testified, based on Dr. Scharyj's report and the autopsy photographs, that there were multiple cuts to the throat. Further, there was some disagreement concerning when loss of consciousness would have occurred. As previously noted, defendant was not entitled to rely on this stipulation because it was not supported by the evidence and because the prosecutor cannot be precluded from presenting evidence that supports an aggravating circumstance. Accordingly, the trial court did not err by permitting Dr. Lantz to testify.

C.

[3] Next, we address defendant's contention that defendant's right not to be subjected to double jeopardy precluded the submission of aggravating circumstances not submitted or supported at the first capital sentencing proceeding. Defendant argues that under the stipulated facts from the previous trial, there was insufficient evidence to support aggravating circumstances relating to the manner of death or relating to any claim that defendant had raped the victim. Defendant contends that having failed to introduce sufficient evidence on these points during the previous trial, the State was barred from putting defendant in jeopardy on these issues in the second sentencing proceeding and should also have been barred from introducing otherwise inadmissible evidence to support these factors.

Defendant relies on this Court's decision in *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), as support for his contention. However, in *State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133, this Court recently modified its interpretation of double jeopardy principles in light of the United States Supreme Court's decisions in *Poland v. Arizona*, 476 U.S. 147, 90 L. Ed. 2d 123 (1986), and *Bullington v. Missouri*, 451 U.S. 430, 68 L. Ed. 2d 270 (1981). In *Sanderson*, we stated:

> In accordance with the principles discussed in [*Poland* and *Bullington*], 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.

346 N.C. at 679, 488 S.E.2d at 138, slip op. at 10.

In the present case, during defendant's first sentencing proceeding, the following three aggravating circumstances were submitted by the trial court and found by the jury: (1) Was this murder committed for the purpose of avoiding a lawful arrest? (2) Was this murder committed while the defendant was engaged in the commission of first-degree burglary? (3) Was this murder committed for pecuniary gain? As we stated in *Sanderson*, "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." *Id.* Because three aggravating circumstances were submitted and found at the previous sentencing proceeding, it was not a violation of defendant's due process rights for the trial court to submit aggravating circumstances not submitted at the first sentencing proceeding. Further, a review of the record reveals that the aggravating circumstances which were submitted were supported by the evidence. Accordingly, defendant's right to be free of double jeopardy was not violated, and this assignment of error is overruled.

II.

[4] Defendant also contends that the trial court committed reversible error by refusing to instruct the jury that the mitigating circumstances unanimously found by the jury at his first sentencing proceeding were established as a matter of law. Defendant argues that the trial court's refusal to instruct the jury that these mitigating circumstances must be considered violated defendant's rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the corresponding provision of the North Carolina Constitution, N.C. Const. art. I, § 19. Defendant further argues that the failure of the trial court to so instruct violated the constitutional doctrine of collateral estoppel. We disagree.

In *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469 (1970), the United States Supreme Court addressed the issues of double jeopardy and collateral estoppel. The Court was asked to determine whether the State may prosecute a defendant a second time for armed robbery where the jury at defendant's first trial found the State did not meet its burden of proof on the issue of identifying defendant as one of the perpetrators. In *Ashe*, the Court held that prior acquit-

tal of an essential issue precludes the State, on double jeopardy grounds, from trying defendant on that issue again. In its analysis, the Supreme Court also defined the doctrine of collateral estoppel as follows: "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443, 25 L. Ed. 2d at 475. In *State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985), this Court recognized the *Ashe* holding and noted that "[e]mbodied within the prohibition against double jeopardy is the concept of collateral estoppel." *Id.* at 264, 328 S.E.2d at 263. This Court stated, " 'Collateral estoppel' means that once an issue of ultimate fact has been determined by a valid and final judgment, that issue may not be relitigated by the same parties in a subsequent action." *Id.*

Subsequently, in *Bullington v. Missouri*, 451 U.S. 430, 68 L. Ed. 2d 270, the United States Supreme Court held that a defendant sentenced to life imprisonment at a capital sentencing proceeding is protected by the Double Jeopardy Clause against imposition of the death penalty in the event that he obtains reversal of his conviction and is retried and reconvicted. At that time, the United States Supreme Court had yet to address the issue of whether the Double Jeopardy Clause applied to individual aggravating and mitigating circumstances.

However, as noted above, in *Poland v. Arizona*, 476 U.S. 147, 90 L. Ed. 2d 123, the United States Supreme Court was asked to determine whether the Double Jeopardy Clause applies to individual aggravating circumstances in a capital sentencing proceeding. The Court stated that it did not "view the capital sentencing hearing as a set of mini-trials on the existence of each aggravating circumstance." *Id.* at 156, 90 L. Ed. 2d at 132. The Court noted that "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 Court went on to hold that the rejection of an aggravating circumstance "was not an 'acquittal' of that circumstance for double jeopardy purposes" and that the Double Jeopardy Clause did not prohibit its use at a second sentencing hearing. *Id.* at 157, 90 L. Ed. 2d at 133. Similarly, it follows that the Double Jeopardy Clause does not apply to preclude relitigation of the existence of mitigating circumstances.

Based on the above analysis, it is clear that the trial court did not err by refusing to instruct the jury that the mitigating circumstances found at the previous sentencing proceeding were established as a matter of law. Accordingly, this assignment of error is overruled.

III.

[5] Next, defendant contends that the trial court committed reversible constitutional error by excluding evidence of defendant's remorse. Defendant argues that because this sentencing proceeding took place almost eight years after the murder, the evidence of remorse is important to establish defendant was "remorseful at the time of the offense, and was not simply arguing remorse as a way of avoiding the death penalty." Defendant argues that this evidence was admissible and that the trial court's exclusion of it entitles defendant to a new trial. We disagree.

We note that defendant did not properly preserve this alleged error by any action taken at trial or by specifically and distinctly arguing plain error. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996). Notwithstanding defendant's failure to preserve this issue for appeal, "in the exercise of our discretion under Rule 2 of the Rules of Appellate Procedure and following the precedent of this Court electing to review unpreserved assignments of error in capital cases, we elect to consider defendant's contention under a plain error analysis." *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996).

In the present case, during defense counsel's direct examination of defendant's father, Mickey Adams, the following exchange occurred:

> Q. What was Tommy's condition when you arrived at the Mocksville Jail, sir, and you first saw him?
>
> A. Well, when we got up there, he was crying and telling us how sorry he was, that all this out—
>
> [THE PROSECUTOR]: Object and move to strike.
>
> [THE COURT]: Sustained to the statements of the defendant, members of the jury, as testified to by this person. You may consider the testimony of this witness as to crying; overruled in that respect.

Defendant states in his brief that the trial court apparently believed that this evidence was hearsay and, thus, inadmissible. However, defendant notes that even if the witness' statement was hearsay, relevant mitigating evidence cannot be excluded at a sentencing hearing based upon hearsay rules. *Green v. Georgia*, 442 U.S. 95, 97, 60 L. Ed. 2d 738, 741 (1979).

We agree with defendant that relevant mitigating evidence cannot be excluded at a sentencing hearing based upon evidentiary rules. However, as defendant concedes, the testimony must be relevant to defendant's character or record and the circumstances of the offense. Here, defendant failed to except to the trial court's ruling and also failed to preserve for the record what the witness would have testified to had he been permitted to complete his answer. These omissions are dispositive of this issue because " '[a]n exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified had he been permitted to answer.' " *State v. McCoy*, 303 N.C. 1, 27, 277 S.E.2d 515, 533 (1981) (quoting *State v. Fletcher*, 279 N.C. 85, 99, 181 S.E.2d 405, 414 (1971)). Because the witness' answer was not preserved, we have no way of knowing what defendant was "sorry about" and cannot determine whether the excluded testimony is relevant mitigating evidence. Accordingly, this assignment of error is overruled.

IV.

[6] Defendant also contends that the trial court erred by refusing to grant a mistrial when the State allegedly elicited testimony that defendant had previously been sentenced to death. Defendant argues that once the jury learned that he had been previously sentenced to death, his chances of receiving a fair trial were "greatly reduced," and the trial court should have granted a mistrial. We disagree.

During his case-in-chief, defendant called Lieutenant Barbara Hoffner, assistant unit manager of the hospital at Central Prison, as a witness. Lieutenant Hoffner testified that she was assigned to work at the hospital on 1 March 1995 and met defendant shortly thereafter. She further testified that she had supervised defendant's work and that he was a "pleasant person" who did not require as close supervision as other inmates. Lieutenant Hoffner had never had problems with defendant and had never had to reprimand defendant.

During the prosecutor's cross-examination of Lieutenant Hoffner, the following exchange occurred:

Q. How long have you known [defendant]?

A. Since he came back from court, or wherever he magically appeared from, after I started there on March the 1st.

Q. And you never knew him in any of your duties prior to March the 1st of 19—

A. Other than his name and the fact that he was a smaller fellow in a red jump suit.

Q. So you saw him?

A. When he was on death row, yes, ma'am.

After the jury had been excused for lunch, defense counsel moved for a mistrial on the grounds that the district attorney deliberately pursued a line of questioning regarding Lieutenant Hoffner's prior knowledge of defendant with the intent of eliciting testimony that defendant had previously been on death row.

After hearing arguments from both the prosecutor and defense counsel on the motion for a mistrial, the trial court denied the motion. In denying the motion, the trial court found "from its observations that the response about [the witness'] observation on death row was not elicited by the State." The trial court further noted that the reference to death row was made in a "fairly offhand way without the intent to emphasize it to the jury." The prosecutor then requested that the record reflect "that before this woman took the witness stand [the prosecutor] had never seen her before." Defense counsel subsequently refused the trial court's offer of any curative instruction because, as stated in defendant's brief, "the damage was already irreparable, and any further instruction would only serve to emphasize defendant's prior death sentence."

Defendant relies on *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975), as support for his contention that the witness' comment entitles him to a new sentencing hearing. In *Britt*, this Court found that the prosecutor improperly questioned defendant in a manner that elicited testimony that defendant had been previously sentenced to death and that this Court had ordered a new sentencing hearing. Defendant, however, concedes in his brief that there is no *per se* rule in North Carolina that a mistrial is always the appropriate remedy when jurors in a capital resentencing hearing learn of a prior death sentence.

In *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 63 (1995), this Court held that the district attorney's inadvertent reference to defendant's presence on death row did not warrant a new sentencing hearing. Defendant attempts to distinguish *Spruill* by noting that in that case, defense counsel did not object or move for mistrial, but rather, the prosecutor brought to the attention of the court the fact that defendant's prior sentence had been mentioned. Thus, defendant contends "the impact on the jury was probably the same as the impact on defense counsel, and the exposure to this information was truly accidental."

However, we are not persuaded by defendant's argument that the "holding in *Britt* should be extended to cases such as this, in which the prosecutor may not have desired to bring out this information, but nonetheless persisted in a line of question[ing] that had a high risk of eliciting this information." An examination of the facts of this case leads us to the conclusion that this case is more similar to *Spruill* than to *Britt*. In *Spruill*, this Court distinguished *Britt* as follows:

> First, the prosecutor made only one mention of death row, and the record makes clear that it was inadvertent. Second, when the remark was made, it went unnoticed by defense counsel or the court and so was never brought to the jury's attention by way of an objection or limiting instruction. Third, defendant did not move for a mistrial. Fourth, from the testimony of Dr. Groce, the prison chaplains, and a prison guard, it was clear that defendant had been in prison since 1984. From this evidence the jury could have inferred already that defendant had previously been sentenced to death; otherwise, he would not be receiving a new capital sentencing hearing.

Id. at 645, 452 S.E.2d at 296-97. This Court went on to conclude that "[i]n light of all the circumstances, we cannot say that the prosecutor's inadvertent comment constituted a transgression so gross or highly prejudicial that it alone constituted the source of adverse impression, if any, in the minds of the jurors." *Id.* at 645-46, 452 S.E.2d at 297.

All of the circumstances on which this Court based its decision are present in this case, except for the fact that the witness' remark did not go unnoticed by defense counsel and defendant did move for a mistrial. Here, the witness made only one mention of death row, and the record indicates it was inadvertent. Also, several witnesses

testified concerning defendant's behavior in prison. Thus, it was clear to the jury that defendant had been in prison, and from this evidence, the jury could have inferred that defendant had previously been sentenced to death. However, the most important distinction in this case, which sets it apart from both *Spruill* and *Britt*, is the fact that the remark came from a defense witness rather than the prosecutor. An examination of the record reveals that it was impossible for the prosecutor to foresee that her question, "So you saw him?" would elicit a response that not only had the witness seen him, but she saw him on death row. It does not appear from the record that the prosecutor had any improper motive for asking this question or that it was an intentional attempt to elicit the fact that defendant had been on death row. In fact, the record reflects that the prosecutor had not had any contact with the witness prior to trial.

The trial court is required to declare a mistrial upon a defendant's motion "if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988). It is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable. *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992). Here, the remark made by the witness concerning seeing defendant on death row did not result in substantial and irreparable prejudice to defendant's case. Accordingly, the trial court did not err by refusing to grant defendant's motion for a mistrial. This assignment of error is overruled.

V.

[7] In his next assignment of error, defendant contends that the trial court erred by denying his motion for a mistrial following jurors' questions concerning defense counsel's integrity. Defendant argues that the fact that jurors questioned defense counsel's integrity made it impossible for them to give defendant a fair trial. We do not agree.

During defense counsel's cross-examination of Jerry Williams, a detective with the Davie County Sheriff's Department at the time of the offense, counsel picked up the pants defendant had been wearing at the time of the offense. As defense counsel was examining the pants, some rolling papers fell out of the pocket. During the next recess, the bailiff informed the trial court that Juror Nine, Dale

Brown, wanted to know if he could ask a question regarding the rolling papers. Brown was brought into the court for questioning and stated that he had questions about how the rolling papers fell out of the pants, suggesting that defense counsel might have planted them there. He further stated that he had not discussed his feelings with other jurors, but that he thought the idea was "on their minds."

An inquiry into the matter occurred with discussion among the trial court and counsel for both parties. The prosecutor was eventually able to establish that references to the rolling papers were included in the lab notes made by SBI Agent Bendure during his examination of the pants on 19 January 1988. However, no official record of that evidence had been made. The trial court then allowed the prosecutor to explain to the jury that the evidence had been in the pants since January 1988 and to give a personal "testimonial" on behalf of all the attorneys.

After the jury had returned to the courtroom, the prosecutor stated that during prior examinations of the pants, neither she nor defense counsel had searched the pocket. She further stated that, while the official lab report from the SBI makes no mention of the items, during the recess an SBI agent had informed them that his lab notes contained references to the rolling papers. In concluding, the prosecutor informed the jury that "it is clear that those items were in those pants pockets at the time that they were seized and for the past seven and a-half-years." The trial judge then informed the jurors that he had known defense counsel for at least fifteen years and stated that none of the attorneys involved in the case would

> try to manipulate or alter evidence or plant evidence in any fashion whatsoever, and to the extent that it's [sic] been any suggestion of that raised in the jury room, the Court wants to be sure that all jurors who are hearing this case can, in the absence of any evidence to indicate that, keep any such speculation of that out of their minds.

The trial judge then proceeded to ask the jurors whether any of them felt they could not be fair to the State or the defense. Each juror indicated that he or she could be fair and had no questions concerning his or her ability to be fair. Finally, defense counsel was allowed to inform the jury that Mr. Bingham, who had picked up the pants, had not been involved with the case until 1994. Defense counsel subsequently moved for a mistrial based upon the fact that jurors had questioned his integrity, making it impossible for defendant to

receive a fair trial. After hearing arguments from both sides, the trial court denied the motion.

As noted above, the trial court is required to declare a mistrial upon a defendant's motion "if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061. "The trial court's decision in this regard is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996).

In considering the context of the entire incident, including the statements made by both counsel to the jury and the trial court's inquiry of the jury, we believe the trial court was able to avoid any "substantial and irreparable prejudice to the defendant's case." The record reflects that the trial court effectively addressed questions regarding defense counsel's handling of the evidence by directing the prosecutor to present evidence to the jury absolving defense counsel of any wrongdoing. Further, the trial court instructed the jurors to keep "any such speculation of [evidence tampering] out of their minds." When the trial court instructs the jury not to consider incompetent evidence, any prejudice is ordinarily cured. *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). Finally, under questioning from the trial court, all the jurors indicated that they could and would treat the parties fairly. Accordingly, this assignment of error is overruled.

VI.

[8] Next, defendant contends that the trial court erred by failing to give adequate peremptory instructions on a statutory mitigating circumstance and several nonstatutory mitigating circumstances. First, defendant contends that the trial court erred in failing to give an adequate peremptory instruction on the statutory mitigating circumstance N.C.G.S. § 15A-2000(f)(2), that defendant acted under the influence of a mental or emotional disturbance. Defendant argues that the inadequacy of the instruction constituted error and thus entitled defendant to a new sentencing hearing. We do not agree.

At trial, defendant requested a peremptory instruction be given concerning the (f)(2) mitigating circumstance, and the trial court complied with his request by giving the following instruction:

> Second, members of the jury, "Consider whether this murder was committed while the defendant was under the influence of mental or emotional disturbance."
>
> A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills. You would find this mitigating circumstance if you find the defendant was under the influence of mental or emotional disturbance when he killed the victim.
>
> The defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence, as I explained to you. According to this mitigating circumstance, I charge if one or more of you find the facts to be as all the evidence tends to show, you will answer "yes" as to Mitigating Circumstance Number Two on the Issues and Recommendation form.
>
> If none of you finds this circumstance to exist, as all the evidence tends to show, you would so indicate by having your foreman write "no" in that space.

Defendant did not object to the above instruction at the sentencing hearing and argues for the first time, on appeal, that the peremptory instruction given by the judge on this circumstance failed to make clear the uncontroverted nature of the evidence. When defendant fails to object to a jury instruction at trial, the plain error standard is applied. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). To demonstrate plain error, defendant must show "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). In the present case, defendant has failed to meet this burden.

"A peremptory instruction tells the jury that if it finds that the facts exist as all the evidence tends to show, it will answer the question put to it in the manner directed by the trial court." *State v. Carter*, 342 N.C. 312, 322, 464 S.E.2d 272, 279 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 957 (1996). However, even when peremptorily instructed, jurors have the right to reject the evidence if they question its credibility. *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990).

This Court has approved an instruction almost identical to the instruction defendant assigns as error. In *State v. Carter*, the trial court's instruction concerning two statutory mitigating circumstances read: "[A]s to this mitigating circumstance, I charge you that if one or more of you finds the facts to be as all the evidence tends to show, you will answer yes." *Carter*, 342 N.C. at 322, 464 S.E.2d at 279. This Court stated that the instruction "properly left the credibility determination to the jury and permitted individual jurors to disbelieve the evidence if they so chose." *Id.* Further, it was noted that the instruction was in conformity with the North Carolina Pattern Instructions relating to peremptory instructions for mitigating circumstances and fairly represented applicable legal principles. *Id.*

In the present case, the instruction properly allowed the jury to determine the credibility of the evidence presented and also conformed with the North Carolina Pattern Instructions. *See* N.C.P.I.—Crim. 150.10 (1997). Thus, we find no error, much less plain error, in the trial court's instructions.

[9] Defendant also contends that the trial court erred in refusing to give peremptory instructions on the following nonstatutory mitigating circumstances: (1) defendant's remorse, (2) defendant's relationship with his family, and (3) defendant's level of immaturity. Defendant contends he was prejudiced by the failure to give the requested peremptory instruction and is entitled to a new sentencing hearing. Once again, we do not agree.

This Court has held that a trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence. *State v. Green*, 336 N.C. 142, 172-74, 443 S.E.2d 14, 32-33, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). In the present case, the State contends that the evidence was not uncontroverted as to each of the following nonstatutory mitigating circumstances and that the trial court did not err by refusing to instruct on them.

First, defendant contends that the jury should have been peremptorily instructed as to his remorsefulness for the crimes he committed. Defendant argues that testimony from his family members supported this nonstatutory mitigating circumstance. However, the testimony tended to show that defendant was remorseful for having hurt his family and the effect his conduct was going to have on his own life, rather than remorsefulness for having committed the

crimes. Further, as the trial court noted, "there's always an ambiguous nature to expressions of sorrow and requests for forgiveness." The evidence presented did not clearly demonstrate that defendant was sorry he took the victim's life. Accordingly, the trial court did not err in refusing to instruct the jury on defendant's remorsefulness, as the evidence was not uncontroverted.

[10] Defendant also sought a peremptory instruction concerning his relationship with his family. Defendant requested that the jury be instructed that defendant generally has maintained a good and loving relationship with his parents and other family members. In refusing to give the requested instruction, the trial court noted that while a relationship had been maintained between defendant and his family, there was some question as to whether it was defendant or his family who had maintained the relationship. Both defendant's mother and father testified concerning defendant's quitting school and the pain and expense defendant's criminal activities had cost the family. Further, his mother testified that there is a lot that defendant had done which they would never understand. Therefore, the evidence as to this nonstatutory mitigating circumstance was controverted, and defendant was not entitled to the requested peremptory instruction.

[11] Finally, defendant contends that the jury should have been peremptorily instructed that he had a "level of maturity that would reduce his culpability for the murder." The evidence presented showed that defendant had earned his GED by the time he was seventeen and that he had a stable, loving home and family. *See State v. Richardson*, 342 N.C. 772, 790, 467 S.E.2d 685, 696 (evidence that defendant came from a stable background and had performed competently in school controverted claim that defendant was immature), *cert. denied*, — U.S. —, 136 L. Ed. 2d 160 (1996). Evidence also showed that defendant had planned the crime for at least a couple of days and had a prior criminal record for several breaking and enterings. Thus, the evidence concerning defendant's level of maturity was not uncontroverted, and he was not entitled to the requested peremptory instruction.

VII.

[12] Defendant also contends that the trial court erred in admitting irrelevant and prejudicial testimony. First, defendant assigns as error the admission of Dr. Lantz's testimony that the victim may have survived if treated. Defendant argues that he had no reason to realize that medical attention could have saved the victim and that, unless a

defendant knows that the victim could have been saved, the testimony has no relevance to any issue before the jury.

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. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. (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).

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. 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).

In defendant's own statement to law enforcement officers, defendant stated that he continued to stab the victim, but "she wouldn't die." He further stated that the victim slowly bled to death. Thus, Dr. Lantz's testimony that the victim's wounds were not immediately fatal and that the victim may have survived with treatment

serve to corroborate defendant's statements to law enforcement officers. Further, whether death is immediate or delayed is relevant to whether the crime was especially heinous, atrocious, or cruel. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985). Accordingly, this is not the exceptional case where, after reviewing the entire record, we can say that the claimed error is so fundamental that justice could not have been done.

[13] Defendant also contends that the trial court erred in admitting testimony, over defendant's objection, concerning the punishment defendant received for an infraction of prison rules. Defendant argues that the punishment, which was twenty days of disciplinary segregation, twenty days' loss of good time, and thirty hours of extra duty, may have left the jury with the impression that defendant was not subject to any real control in prison because the punishment may have been viewed as too light.

Evidence of defendant's ability to " 'adjust well to prison life' " is proper evidence in mitigation. *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994) (quoting *State v. Ali*, 329 N.C. 394, 421, 407 S.E.2d 183, 199 (1991)), *cert. denied*, — U.S. —, 133 L. Ed. 2d 60 (1995). Defense counsel presented evidence to show that "the defendant has and will likely perform well in a structured environment" by eliciting testimony from two Central Prison employees. In an effort to rebut the testimony of the employees, the prosecution presented testimony from a lieutenant at Central Prison who held a disciplinary hearing on the charge that defendant illegally possessed a homemade knife. This testimony was relevant, as it tended to prove that defendant had not performed well and was not likely to perform well in prison, and the trial court did not abuse its discretion in overruling defendant's objection. Accordingly, this assignment of error is without merit.

VIII.

[14] Defendant next contends that the trial court erred in striking two jurors on the grounds that they would be unable to follow the law and consider a sentence of death. Defendant argues that the State failed to establish that the jurors' views on capital punishment would prevent or impair the performance of their duties and that the exclusion of these jurors violated defendant's constitutional rights. We do not agree.

Jurors who express opposition to the death penalty may be removed for cause in capital cases if their opposition would prevent

or substantially impair the performance of their duties as jurors in accordance with the trial court's instructions and the jurors' oath. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985); *State v. Brown*, 327 N.C. 1, 14, 394 S.E.2d 434, 442 (1990). A prospective juror's bias against the death penalty need not be proven with "unmistakable clarity." *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 852. Instead, the record need only contain sufficient evidence to provide the trial court "with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. *Id.* at 426, 83 L. Ed. 2d at 852. Further, the trial court's decision as to the juror's ability to follow the law is entitled to deference. *Id.* at 426, 83 L. Ed. 2d at 853.

In the present case, the record shows that when questioned by the prosecutor, prospective juror Padgett stated that if he voted for the death penalty in this case, he could not stand in open court and state he had so voted. When defense counsel reminded prospective juror Padgett that he had previously told the trial court that he could fairly consider recommending a death sentence, Padgett candidly admitted, "I changed my mind." The entire transcript of prospective juror Padgett's responses to questions from the trial court, the prosecutor, and defense counsel provides clear support for the trial court's decision to grant the prosecution's motion to strike him from the jury for cause. Therefore, this assignment of error is overruled.

The second prospective juror defendant contends was improperly excused is prospective juror Posey. In response to questions from the trial court, prospective juror Posey plainly stated that she did not believe she could impose a death sentence and that her personal beliefs would substantially impair her ability to fairly and impartially apply the law. This is sufficient evidence to support the trial court's ruling that prospective juror Posey would be unable to faithfully and impartially apply the law. Accordingly, the trial court also did not err in excusing prospective juror Posey for cause.

PRESERVATION ISSUES

Defendant raises five additional issues which he concedes have been decided contrary to his position previously by this Court: (1) the trial court committed reversible constitutional error in ruling that defendant's age at the time of the offense did not preclude imposition of the death penalty; (2) the trial court committed reversible constitutional error in refusing to give the jury the option of sentencing defendant to life without parole; (3) the trial court committed

reversible constitutional error in precluding defendant from arguing that the length of other sentences defendant was serving at the time is a basis for sentencing defendant to less than death; (4) the trial court committed constitutional error in defining the meaning of "especially heinous, atrocious, or cruel"; and (5) the trial court committed clear constitutional error in defining what constitutes mitigating circumstances.

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 argument on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[15] Having found no error in defendant's sentencing proceeding, 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 to prevent arrest or effect escape, N.C.G.S. § 15A-2000(e)(4); that the murder was committed while the defendant was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). We conclude that the evidence supports 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 con-

ducting proportionality review, we determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

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

However, we find the present case is distinguishable from each of these seven cases. In three of those cases *Benson*, 323 N.C. 318, 372 S.E.2d 517; *Stokes*, 319 N.C. 1, 352 S.E.2d 653; and *Jackson*, 309 N.C. 26, 305 S.E.2d 703, 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 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).

Further, multiple aggravating circumstances were found to exist in only two of the disproportionate cases. *See Young*, 312 N.C. 669, 325 S.E.2d 181; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. This Court

has previously stated that multiple aggravating circumstances were found to exist in only one of the disproportionate cases. *See State v. Cole*, 343 N.C. 399, 471 S.E.2d 362 (1996), *cert. denied*, — U.S. —, 136 L. Ed. 2d 624 (1997); *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 794 (1996); *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 478 (1996). However, we note that the above statement is incorrect and should not be considered authoritative in conducting our proportionality review. Thus, there are two disproportionate cases which contain multiple aggravating circumstances.

The present case, however, is distinguishable from both of those cases. In determining the death penalty was disproportionate in *Young*, this Court noted that the jury failed to find the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9). *Young*, 312 N.C. at 691, 325 S.E.2d at 194. Here, however, the jury found the especially heinous, atrocious, or cruel aggravating circumstance. In *Bondurant*, this Court found the death penalty disproportionate because the defendant immediately exhibited remorse and concern for the victim's life. The defendant went into the hospital to secure medical help for the victim, voluntarily spoke to police, and admitted shooting the victim. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. Here, the evidence showed that defendant entered the victim's house and stabbed her in the chest. Defendant admitted to police that he stabbed the victim several more times to keep her from further suffering. After killing the victim, defendant took money from her purse and fled the house. Thus, we find no significant similarity between this case and *Young* or *Bondurant*.

Several additional characteristics of this case support the determination that imposition of the death sentence was not disproportionate. In the present case, the victim was killed in her own bedroom in the middle of the night. A murder in the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Further, the elderly victim would have been no match for the physical strength of defendant, a healthy seventeen-year-old.

We recognize that juries have imposed sentences of life imprisonment in several robbery-murder cases which are similar to the

present case. However, this fact "does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. This Court has long rejected a mechanical or empirical approach to comparing cases that are superficially similar. *State v. Robinson*, 336 N.C. 78, 139, 443 S.E.2d 306, 337 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). Many of the robbery-murder cases in which defendants were sentenced to life imprisonment involved robbery-murders at a convenience store or cases in which the jury found as a mitigating circumstance that the defendant's ability to appreciate the criminality of his conduct was impaired. *See, e.g.*, *State v. Medlin*, 333 N.C. 280, 426 S.E.2d 402 (1993); *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983). Here, the victim was murdered in the sanctity of her own home, and there was no evidence of any impairment of defendant's ability to appreciate the criminality of his conduct.

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 of death disproportionate or those in which juries have consistently returned recommendations of life imprisonment. Accordingly, we cannot conclude that defendant's death sentence is disproportionate.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair capital sentencing proceeding, free from prejudicial error. 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 excessive or disproportionate. Therefore, the sentence of death entered against defendant must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. WALTER THOMAS YORK

No. 550A95

(Filed 5 September 1997)

1. Evidence and Witnesses § 763 (NCI4th)— murder and kidnapping—blood test report—hearsay—second test properly admitted—no prejudice

There was no plain error in a prosecution for first-degree murder by torture and first-degree kidnapping where the trial court allowed hearsay testimony by an SBI agent regarding blood tests conducted by the SBI lab. Blood tests from the crime scene were analyzed by two SBI serologists, their reports reached identical conclusions, and the testimony about which defendant complains involved only one report. The tests from the other report were properly admitted and their substance was identical to that of the contested report.

Am Jur 2d, Appellate Review §§ 752-760.

2. Evidence and Witnesses § 763 (NCI4th)— murder and kidnapping—DNA—chain of custody—other evidence to same effect

There was no plain error in a prosecution for first-degree murder by torture and first-degree kidnapping where defendant contended that the trial court allowed DNA testimony without requiring the State to establish a proper chain of custody. Other evidence to the same effect was introduced and the DNA evidence cannot be said to have caused a different result.

Am Jur 2d, Appellate Review §§ 752-760.

3. Evidence and Witnesses § 2851 (NCI4th)— murder and kidnapping—officer allowed to read from notes—recollection refreshed—no error

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by allowing a captain in the sheriff's department to read during his testimony from notes he took of his interview with defendant where the use of the notes was for the purpose of refreshing recollection to facilitate accurate testimony and did not violate the present recollection refreshed rule. The captain first testified from memory and

in detail about the events surrounding the interview with defendant, he reviewed the reading of *Miranda* warnings by reference to the waiver form and read without objection from that form in describing the beginning of the interview, he was then questioned about the specific contents of the conversation and referred to the redraft of his contemporaneous notes, he spoke in the second person throughout his testimony about the interview, his recounting of the interview was interrupted by the prosecutor, whom he answered independently of his notes, and he had extensive independent recall about the events surrounding the interview and the interview itself.

Am Jur 2d, Witnesses §§ 769-799.

Refreshment of recollection by use of memoranda or other writings. 82 ALR2d 473.

4. Criminal Law § 475 (NCI4th Rev.)— murder and kidnapping—prosecutor's argument—characterization of evidence

There was no error requiring the trial court to intervene *ex mero motu* in a prosecution for first-degree murder by torture and first-degree kidnapping where the prosecutor in opening and closing arguments referred to defendant's statements during an interview with an officer as a confession. Although the statements were not introduced as a confession, they were sufficiently self-incriminating to be so characterized in argument and the characterization by the prosecution was not belabored or emphasized. The references were not so grossly improper as to amount to a denial of defendant's right to a fair trial.

Am Jur 2d, Trial §§ 522, 554.

5. Evidence and Witnesses § 2812 (NCI4th)— murder and kidnapping—witness not declared hostile—latitude in questioning allowed—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for first-degree murder by torture and first-degree kidnapping by denying defendant's request to have one of his witnesses declared hostile where defense counsel sought to ask leading questions in order to establish the witness's motive for lying to investigating officers, the court allowed defense counsel considerable latitude in examining the witness, and defense counsel

succeeded in eliciting the full substance of the testimony desired by defendant.

Am Jur 2d, Witnesses §§ 54, 754, 984.

6. Evidence and Witnesses § 831 (NCI4th)— first-degree murder by torture and kidnapping—codefendants' statements—original recording introduced—secondary evidence excluded—best evidence rule

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by denying defendant's motion to provide the jury with transcripts of recorded statements given to the police by codefendants where defendant had introduced the tape recordings into evidence. The best evidence rule requires that secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available.

Am Jur 2d, Evidence §§ 1049-1052, 1069.

Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence. 57 ALR3d 746.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR3d 598.

7. Evidence and Witnesses § 831 (NCI4th)— first-degree murder by torture and kidnapping—transcripts of recorded conversations with officers—excluded

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by preventing defendant *ex mero motu* from using transcripts of codefendants' recorded conversations with police officers. The court intervened without objection from either party when the officer who had interviewed the codefendants referred to the transcripts during his testimony. When defendant asserted that portions of the tape were inaudible, the court refused to reverse the ruling and stated, "Well, they've heard the tapes." Although defendant now contends that the court impermissibly conveyed to the jury the opinion that the interviews were irrelevant, the court's statement was merely a recognition that the jury had already heard the evidence.

Am Jur 2d, Evidence §§ 1049-1052, 1069.

Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence. 57 ALR3d 746.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR3d 598.

8. Criminal Law § 553 (NCI4th Rev.)— first-degree murder by torture and first-degree kidnapping—prosecutor's argument—codefendant's silence—mistrial denied

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by denying defendant's motion for a mistrial and curative instructions after allegedly impermissible comments by the State about a codefendant's failure to testify. The trial court sustained all of defendant's objections to these statements and had issued instructions to the jury at the outset of the trial regarding the consideration to be given evidence to which an objection is raised and sustained. Those instructions were sufficient to cure any prejudicial effect suffered by defendant; assuming that the trial court's rejection of defendant's motion for a precautionary instruction was erroneous, it does not appear that there was a reasonable possibility that the result would have been different but for the error because the codefendant was identified and referred to a number of times throughout the trial and the fact that he was not testifying was readily apparent to the jury. Finally, the references to the codefendant in the State's closing argument were within the wide latitude granted parties during closing argument. The codefendant was repeatedly referred to throughout the case and particularly during defendant's presentation of evidence. The State's reference to him and to the defendant's failure to have him testify was not improper in the context of the case.

Am Jur 2d, Trial §§ 577-587.

9. Evidence and Witnesses § 221 (NCI4th)— first-degree murder by torture and first-degree kidnapping—testimony by codefendant's cellmate—excluded—irrelevant—confusing

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by sustaining the State's objection to the proposed testimony of a cellmate of a codefendant where the cellmate who was to testify, another cell-

mate, and the codefendant composed a letter which was intended to result in defendant's taking the entire blame for the murder. The proffered testimony involved alleged purposes for the codefendant's actions while in prison and did not concern defendant's motives for the killing or any actions taken by defendant in relation to proving his guilt or innocence, does not go to prove the existence of any fact that is of consequence in the determination of the charge of murder for which defendant was found guilty, and was collateral and irrelevant. Even so, the reliability of the testimony was questionable and would likely have confused the jury on a collateral matter, and it was properly excluded under N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 308, 347-350.

10. Homicide § 688 (NCI4th)— murder by torture—instructions on accidental death, misadventure, intervening agency refused—unlawful purpose

The trial court did not err in a prosecution for first-degree murder by torture and first-kidnapping by denying defendant's request for jury instructions on accidental death, death by misadventure, and intervening agency. Any defense based on death by accident or misadventure must be predicated upon the absence of an unlawful purpose on defendant's part; in this case, abundant evidence shows that defendant and other individuals intended to punish the victim through cruel and torturous treatment over the course of numerous days, including binding him and confining him in a closet, and that the cumulative effect of the torturous treatment was the death of the victim. There was no basis for defendant's requested instructions.

Am Jur 2d, Homicide § 514; Trial §§ 1427-1433.

11. Criminal Law § 805 (NCI4th Rev.)— murder by torture—acting in concert—instructions—no error

The trial court did not erroneously instruct the jury on acting in concert in a prosecution for first-degree murder by torture where defendant contended that there was insufficient evidence to prove that each of the codefendants shared a common plan or scheme to intentionally inflict torture on the victim and that the instruction lessened the State's burden of proof. The common thread running throughout the case was the desire of defendant and the other residents of the trailer to inflict punishment on the

victim, which was accomplished by repeated acts of brutality and torture. Premeditation and deliberation is not an element of first-degree murder by torture or felony murder, and intent to kill is not an essential element of first-degree murder either by torture or under the felony murder rule. The State was not required to prove that defendant possessed a particular *mens rea*, all of the elements for acting in concert were met, and the trial court did not err in its jury instructions.

Am Jur 2d, Trial §§ 1077 et seq.

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 Hyatt, J., at the 10 July 1995 Criminal Session of Superior Court, Jackson County, upon jury verdicts finding defendant guilty of first-degree kidnapping and guilty of first-degree murder by torture and under the felony murder rule. Heard in the Supreme Court 17 March 1997.

Michael F. Easley, Attorney General, by James P. Erwin, Jr., Special Deputy Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

LAKE, Justice.

On 2 May 1994, defendant was indicted for first-degree murder and first-degree kidnapping. He was tried capitally to a jury at the 10 July 1995 Criminal Session of Superior Court, Jackson County, Judge J. Marlene Hyatt presiding. The jury found defendant guilty of first-degree kidnapping and guilty of first-degree murder by torture and under the felony murder rule. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment for the first-degree murder conviction. On 25 July 1995, Judge Hyatt sentenced defendant to a term of life imprisonment for the first-degree murder conviction and to a twelve-year consecutive term of imprisonment for the kidnapping conviction. On the same day, Judge Hyatt arrested judgment on the kidnapping conviction. Defendant appeals to this Court as of right from the first-degree murder conviction.

The State presented evidence tending to show that the defendant, Walter Thomas York, met one of the codefendants, Vickie Fox, when he was fourteen years old and in the eighth grade. Fox was twenty-six years old at the time. Defendant initially went to Fox's trailer,

located in the Wike's Trailer Park, to party, drink beer and smoke marijuana. He became sexually involved with Fox and moved in with her soon thereafter. Defendant quit school and began looking for work to help pay the bills. Defendant was illiterate, and Fox took care of any paperwork he needed, such as filling out job applications. Although still married to her husband, Kenneth Fox, who lived in the trailer intermittently, Vickie Fox was sexually involved with several other young men in addition to defendant. She had a reputation for providing alcohol and other things to male college students.

At the time of the events giving rise to this case, as many as thirteen people were living in Fox's three-bedroom, single-wide trailer. Among the residents was the twenty-four-year-old victim, Tony Queen. Fox met Queen and became sexually involved with him in late 1992. He moved into the trailer after defendant began living there.

On or about 17 March 1994, Vickie Fox's five-year-old daughter, Kendra, told codefendant Michelle Vinson that the victim, Tony Queen, had "messed" with her. When questioned by the defendant, Queen admitted that he had molested Kendra and that he had placed a bottle of soapy water in Vickie's son's crib. The defendant became enraged and hit Queen. That evening, several other residents beat the victim, forced him to drink soapy water and made him sleep in the hall. Over approximately the next two weeks, the residents of the trailer and sundry other acquaintances systematically tortured the victim as punishment for his actions. Although the testimony at trial was conflicting as to who performed the various acts, the torture included: repeated beating and kicking of the victim, shaving his head, scraping the word "faggot" on his arm, attempting to burn a tattoo containing Vickie's name off his arm with a soldering iron, hitting his penis with a billy stick, cutting his throat with a knife, burning his genitals and legs with a torch made from an aerosol can, and forcing him to ingest his own urine. Defendant had a primary role in either the direction or carrying out of the majority of these actions. The victim was restrained in the trailer by a dog collar when the residents were not present, although witnesses testified that Queen was told he could leave the trailer if he so desired.

During the course of this systematic treatment, the residents decided that they needed to stop beating Queen for a while so that his face could heal and he could cash his unemployment check for them. However, after a short while, the residents realized that Queen's face

was too injured to heal quickly, so they forged his name and cashed the check themselves. On the night of Queen's death, the residents decided to use the money from Queen's check to go out to eat at Pizza Hut. They placed a dog collar on Queen, taped his feet, gagged his mouth with a cloth and tape, and locked him in a bedroom closet by placing a screwdriver in the door and then nailing the door shut. When they returned, Tony Queen was dead. Several of the residents placed Queen's body in the trunk of Kenneth Fox's car and drove to Toccoa, Georgia, where they dumped his body in the woods. One of the codefendants, Robert Trantham, led authorities to the body.

An autopsy indicated that the victim died as a result of gagging and positional asphyxia. The autopsy revealed that the position in which the victim was placed caused interference with the mechanics of breathing. Pneumonia present in the victim's left lung was also a likely contributor to the victim's death.

[1] In his first assignment of error, defendant contends that the trial court committed plain error by allowing the hearsay testimony of State Bureau of Investigation (SBI) Agent Kevin West regarding blood tests conducted by a serologist at the SBI lab. At trial, Agent West testified that blood tests conducted by serologist Brenda Vissitte showed the presence of the victim's blood in various rooms of the trailer. The purpose of the testimony was to bolster the State's theory that the victim was tortured by establishing, through scientific evidence, that the victim was tortured throughout the trailer. Defendant asserts that the evidence was inadmissible hearsay and improper lay-opinion testimony because the State failed to establish Agent West's competency to analyze and report on the test results in the manner allowed at trial. As a result, defendant argues that the evidence was so prejudicial that he is entitled to a new trial.

We note at the outset that the State concedes the testimony in question was hearsay. However, defendant did not object at trial to the introduction of this evidence. The trial court's admission of this evidence is thus reviewable by this Court only under the plain error rule. *State v. Ocasio*, 344 N.C. 568, 577, 476 S.E.2d 281, 286 (1996); *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994); *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806 (1983). Plain error is error which was " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321

N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). Defendant has failed to establish such error. Blood tests from the crime scene were analyzed by two SBI serologists, Brenda Vissitte and Mark Boodee. The reports reached identical conclusions regarding the critical question of whose blood was present in the trailer. The testimony by Agent West, about which defendant complains, involved only the results of the Vissitte report. Because the blood tests from the Boodee report were properly admitted and because their substance was identical to that of the Vissitte report about which Agent West testified, no plain error can be shown. This assignment of error is overruled.

[2] In his next assignment of error, defendant asserts that the trial court committed plain error by allowing DNA testimony from SBI serologist Mark Boodee without requiring the State to establish a proper chain of custody for the items on which the analysis was conducted. Defendant argues that, because circumstances indicate something happened during handling to skew the DNA analysis and because the testimony was so prejudicial to defendant, defendant is entitled to a new trial.

A review of the record reveals that defendant failed to object at trial to the authenticity of the disputed evidence. Assignments of error based on improper authentication of exhibits introduced at trial will not be heard unless objection was made in a timely manner at trial. *State v. Terry*, 329 N.C. 191, 196, 404 S.E.2d 658, 661 (1991). Furthermore, the trial court's actions do not constitute plain error. The value of the DNA evidence was that it was intended to bolster the State's theory that the victim was tortured by showing that the victim's blood was present throughout the trailer. However, other evidence was introduced establishing that the victim was tortured throughout the trailer, including the results of the blood tests conducted by Vissitte, the testimony of codefendants who participated in the torture, and the statement of defendant himself. Thus, the trial court's admission of the DNA analysis cannot be said to have caused a different result in defendant's trial. This assignment of error is overruled.

[3] Defendant next assigns error in the trial court's allowing Captain Jamison of the Jackson County Sheriff's Department to read during his testimony from notes he took of his interview with the defendant. Defendant argues that the "reading" of the notes, which were a typed version of misplaced, rough handwritten notes, was prejudicial

because it led the jury to believe the notes were defendant's confession. This was exacerbated, defendant contends, by the State's reference to the statements made by the defendant in the interview as a "confession." Defendant maintains that he is entitled to a new trial as a result. We find defendant's contention to be without merit.

The State did not offer the notes in question as a confession of the defendant. Captain Jamison testified that he did not have the defendant review the notes, nor did he attempt to record the interview or make a verbatim transcript of his interview with the defendant. Captain Jamison conceded that the notes at issue were a typed facsimile of his original rough handwritten notes. The question then becomes whether the trial court properly allowed Captain Jamison's use of the notes during his testimony in order to refresh his present recollection.

In *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993), this Court clarified the review required by appellate courts in situations involving the use of notes or other statements for refreshing witness recollection:

> In present recollection refreshed the evidence is the testimony of the witness at trial. . . . "Under present recollection refreshed the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch," and he testifies from his memory so refreshed. *State v. Corn*, 307 N.C. 79, 83, 296 S.E.2d 261, 264 (1982). "Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present." *State v. Smith*, 291 N.C. [505,] 516, 231 S.E.2d [663,] 670-71 [(1977)].
>
> The rule in *Smith* which we hold controls the resolution of this issue states, "Where the testimony of the witness purports to be from his refreshed memory but is *clearly* a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge." *Id.* at 518, 231 S.E.2d at 671. Thus, we must determine whether the spirit of the rule of present recollection refreshed has been violated by testimony which was not the product of a refreshed memory, but clearly nothing more than a recitation of the witness' notes.

Gibson, 333 N.C. at 50, 424 S.E.2d at 107. The fact that a witness appears to read from a refreshing memorandum is not a *per se* violation under *Gibson*. Such an interpretation would elevate form above substance. What must be examined is whether the witness has an independent recollection of the event and is merely using the memorandum to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall.

A review of the particular facts and circumstances surrounding Captain Jamison's use of his notes during his testimony indicates that certainly the spirit of the present recollection refreshed rule was not violated in this case. Captain Jamison first testified from memory, and in particular detail, about the events surrounding the interview with the defendant. He reviewed the reading of the *Miranda* warnings to defendant by reference to a waiver form signed by the defendant, and Captain Jamison read without objection from that form in describing the beginning of the interview. Captain Jamison then was questioned about the specific contents of the conversation. At that point, he referred to the redraft of his notes made contemporaneously with the interview. Captain Jamison spoke in the second person throughout his testimony about the details of the interview, consistently prefacing his testimony with the phrase, "Thomas [defendant] stated." Further, Captain Jamison's recounting of the interview was interrupted by questions from the prosecutor, to which Jamison answered independently of his notes. This witness had extensive independent recall about the events surrounding the interview and the interview itself. It is thus evident from the full circumstances that this witness used his notes, much like his use of the waiver form, in order to specifically recall for the jury what occurred during his interview with defendant. Accordingly, we hold that the use of these notes in this instance was for the purpose of refreshing recollection to facilitate accurate testimony and as such did not violate the present recollection refreshed rule.

[4] With respect to defendant's contention that the trial court erroneously allowed the State to refer to defendant's interview statements as a "confession" during opening statement and closing argument, we are not persuaded. Defendant made no objection to such reference. "[W]here 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. Fernandez*, 346 N.C. 1, 25, 484 S.E.2d 350, 365 (1997).

Although the statements at issue were not introduced into evidence as a confession, they were sufficiently self-incriminating to be so characterized in argument, and such characterization by the prosecution was not belabored or emphasized. As a result, we hold that the references were not so grossly improper as to amount to a denial of defendant's right to a fair trial. This assignment of error is overruled.

[5] Defendant's next assignment of error involves the trial court's denial of defendant's request to have one of his witnesses declared hostile. At trial, defendant called as a witness Kenneth Fox, the husband of Vickie Fox, defendant's girlfriend. During direct examination, Kenneth Fox testified that he lied to the police when he gave statements implicating the defendant. Defendant attempted to establish the motive for such lying by asking Kenneth Fox a leading question. The trial court sustained the State's objection to the leading question and then denied defendant's motion to have Kenneth Fox declared a hostile witness. Defendant argues that the trial court erred because the record reveals Kenneth Fox was only nominally a defense witness, and that the error was prejudicial because it prevented defendant from establishing Kenneth Fox's motive for lying to the police. We do not agree.

Whether to allow a leading question on direct examination clearly falls within the discretion of the trial court. *State v. Shoemaker*, 334 N.C. 252, 261, 432 S.E.2d 314, 318 (1993). In *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986), this Court stated that, "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason . . . ." *Id.* at 756, 340 S.E.2d at 59; *see also Shoemaker*, 334 N.C. at 261, 432 S.E.2d at 318. A careful examination of the record in this case shows that the trial court did not abuse its discretion. The trial court allowed defense counsel considerable latitude in his examination of Kenneth Fox. Defense counsel sought to ask leading questions in order to establish Kenneth Fox's motive for lying to investigating officers about the roles of the defendant and Vickie Fox in the killing of Tony Queen. After the trial court denied the request to have Kenneth Fox declared a hostile witness, defense counsel succeeded in eliciting testimony that Fox's motive for lying to the police about defendant's role in the killing was Fox's anger over defendant living with Fox's wife and his desire to protect her from implication in the killing. This was the full substance of the testimony desired by defendant. Thus, defendant cannot show error, prejudicial or otherwise, by the denial

of his motion to have Kenneth Fox declared a hostile witness. This assignment of error is overruled.

[6] Defendant next contends that the trial court erred by denying his motion to provide the jury with transcripts of recorded statements given to the police by codefendants in this case. During the investigation of this case, Kenneth and Vickie Fox were interviewed by the police—first Vickie alone, and then the two of them together. The police tape-recorded both of these interviews. At trial, the defendant introduced the tape recordings into evidence without objection from the State. However, when defendant attempted to introduce transcripts of these recordings, portions of which were allegedly inaudible, the trial court sustained the State's objections on both occasions. Defendant insists that this amounted to a denial of his Sixth Amendment right to present a defense. We find this argument without merit.

Rule 1002 of the North Carolina Rules of Evidence, commonly known as the "best evidence rule," provides that, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C.G.S. § 8C-1, Rule 1002 (1992). The best evidence rule requires that secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available. N.C.G.S. § 8C-1, Rules 1002-1004 (1992); 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 253-257 (4th ed. 1993). In the present case, the tape recordings themselves were available, were introduced by defendant and were played for the jury. As such, the trial court properly excluded introduction of the transcripts under the best evidence rule. Defendant fails to offer any explanation as to how his constitutional right to present a defense was prejudiced by the denial of his request to introduce, in addition, the transcripts. This assignment of error is overruled.

[7] In a related assignment of error, defendant contends that the trial court expressed an impermissible opinion when it prevented defendant *ex mero motu* from using transcripts of codefendants' recorded conversations with police officers. At trial, defendant called as a witness Agent West, the police officer who interviewed Kenneth and Vickie Fox. When West referred to the transcripts of the recorded interviews, the trial court intervened without objection from either party and ordered the witness and defendant to refrain from referring to the transcripts. Defendant argued to the trial court that mention of

the transcripts was necessary because portions of the tape were inaudible. The trial court refused to reverse the ruling, stating, "Well, they've heard the tapes." Defendant asserts that the trial court's response impermissibly conveyed to the jury the opinion that the trial court found the interviews irrelevant. We do not agree.

The trial court must at all times be absolutely impartial, *State v. Brady*, 299 N.C. 547, 264 S.E.2d 66 (1980), and the trial court is prohibited from expressing any opinion in the presence of the jury on any question of fact, *State v. Bearthes*, 329 N.C. 149, 405 S.E.2d 170 (1991); N.C.G.S. § 15A-1222 (1988). However, the trial court also has the duty to ensure that time is not wasted in useless and repetitive presentation of the evidence. *State v. Paige*, 316 N.C. 630, 650, 343 S.E.2d 848, 860 (1986). In the present case, the trial court had already allowed the actual tapes to be introduced into evidence and to be published to the jury. The trial court also had ruled the transcripts inadmissible before Agent West began referring to them in his testimony and before defendant began the disputed line of questioning. Therefore, we hold that the trial court properly exercised discretion in limiting reference to the transcripts, and that the trial court's statement was merely a recognition that the jury had already heard the evidence in question. The statement cannot be fairly interpreted as an impermissible opinion. This assignment of error is overruled.

[8] Defendant next contends that the trial court's denial of a motion for mistrial after allegedly impermissible comments by the State about a codefendant's failure to testify constitutes prejudicial error. Only two of the seven codefendants involved in this case testified in defendant's trial. During defendant's presentation of the evidence, the State cross-examined defense witness Agent West regarding his trip to Georgia with Robert Trantham to locate the victim's body. Agent West noted that he had interviewed Trantham. The State then asked, "And it was heard from everybody else: Will you please tell us what Robert Trantham had to say?" Defendant's objection to this question was sustained, but defendant's motions for a mistrial and for a curative instruction were denied. The State also made references to the lack of Trantham's testimony during its closing argument, stating:

> MR. LEONARD: . . . Mr. Seago [defendant's counsel] talked about Mr. Trantham, the close friend of Mr. York. . . . His best friend, like a brother, his constant companion, the man who saw and knew everything, one way or the other. They've got their contention; we've got ours. Mr. Trantham, the person who knows, would

know one way or the other. Now, two things here. The question I ask, of course, is, why, oh why, did they not call his star number one witness, his best friend. . . .

MR. SEAGO: Objection, Your Honor.

MR. LEONARD: —-to court.

THE COURT: Objection sustained.

MR. LEONARD: Excuse me, Your Honor. Mr. Seago says this, he says, "Trantham has a right to remain silent, Fifth Amendment." True, no problem. You know, I abide by the law, and this Court abides by the law. Two things though. A person can be granted immunity. . . . No problem at all. But more importantly than that is, if they had any problem with that proposition, West was on the stand. I didn't—you know, Trantham hadn't come close to the courthouse. My question was, What did he tell you. Objection was made to that and the objection was sustained, because that would be hearsay. But if these gentlemen really wanted you to hear that, they would have let you have heard it—

MR. SEAGO: Objection.

MR. LEONARD: —at that time.

THE COURT: Objection sustained.

Defendant argues that these statements were made solely to prejudice the minds of the jurors and that he is entitled to a new trial as a result. We disagree.

A review of the record indicates that the trial court sustained all of defendant's objections to these allegedly improper statements. The trial court issued general instructions to the jury at the outset of the trial. Among these were instructions regarding the consideration to be given evidence to which an objection had been raised and sustained. These instructions are sufficient to cure any prejudicial effect suffered by defendant regarding evidence to which an objection was raised and sustained. *State v. Franks*, 300 N.C. 1, 265 S.E.2d 177 (1980); *State v. Vines*, 105 N.C. App. 147, 412 S.E.2d 156 (1992). Assuming *arguendo* that the trial court's rejection of defendant's motion for a precautionary instruction was erroneous, it does not appear from the record that the error was prejudicial error within the meaning of N.C.G.S. § 15A-1443(a). That is, it does not appear that but for such error, there was a reasonable possibility that the result

would have been different from that which occurred. *State v. Faison*, 330 N.C. 347, 357, 411 S.E.2d 143, 149 (1991); *State v. Freeman*, 313 N.C. 539, 548, 330 S.E.2d 465, 473 (1985). Robert Trantham was identified and referred to a number of times throughout the trial, including several times by defendant's own testimony. The fact that Trantham was not testifying was readily apparent to the jury, and the questions of the prosecutor which were disallowed cannot reasonably be said to have caused the jury to reach a different result.

Regarding references to Trantham in the State's closing argument, we hold that they were within the wide latitude granted parties during closing argument. During direct examination of the defendant, defendant repeatedly referred to Robert Trantham as having been involved in the circumstances leading to the death of the victim. As such, it was permissible for the State to draw the jury's attention to the failure of the defendant to produce Trantham as a source of exculpatory evidence. *State v. Alston*, 341 N.C. 198, 243, 461 S.E.2d 687, 711-12 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996); *State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977). Furthermore, considering the wide latitude granted parties during closing argument, *State v. Worthy*, 341 N.C. 707, 709-10, 462 S.E.2d 482, 483-84 (1995), we do not find the comments to 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, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Trantham was repeatedly referred to throughout the case and particularly during defendant's presentation of evidence. Therefore, the State's reference to him and to the defendant's failure to have him testify was not improper in the context of this case.

Regarding defendant's requests for a mistrial, this Court has held that "[t]he decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." *State v. Primes*, 314 N.C. 202, 215, 333 S.E.2d 278, 286 (1985); *accord State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). For the above reasons, the trial court did not abuse its discretion in refusing to grant defendant's motions for a mistrial based on the allegedly improper comments of the prosecutor. This assignment of error is overruled.

[9] In his next assignment of error, defendant contends that the trial court erred by sustaining the State's objection to the proposed testimony of Desiree Acosta, a cellmate of Vickie Fox's. The trial court

conducted a *voir dire* of Acosta out of the presence of the jury. The evidence defendant sought to have introduced involved a letter composed by Acosta, Fox and another cellmate while the three were imprisoned together. Acosta testified that the purpose of the letter was to build confidence between herself and the defendant in order to get defendant to take the entire blame for Queen's death. The defendant argued that the testimony was relevant to show Vickie Fox's manipulative hold over the defendant and to impeach her prior testimony to the contrary. The State objected on the grounds that the testimony was collateral to the issue of the defendant's guilt or innocence and also potentially confusing to the jury. The trial court denied defendant's proffer of this testimony. We hold that the trial court properly excluded Acosta's proposed testimony.

Rule 401 of the North Carolina Rules of Evidence defines relevant evidence 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). The testimony proffered by the defendant in this case does not go to prove the existence of any fact that is of consequence in the determination of the charge of murder for which defendant was found guilty. The testimony involved alleged purposes for Vickie Fox's actions while in prison. It did not concern defendant's motives for the killing or any actions taken by defendant in relation to proving his guilt or innocence. As such, the testimony was collateral and therefore irrelevant. Evidence that is not relevant is not admissible. N.C.G.S. § 8C-1, Rule 402 (1992). Even assuming the testimony was relevant, Rule 403 provides that "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). The *voir dire* of witness Acosta revealed that she had been imprisoned for trafficking over seventy-six pounds of marijuana, that her recall of significant events surrounding the drafting of the letter was questionable (including not knowing which portions of the letter were attributable to which of the three women), and that she was speculating on the ultimate purposes underlying the writing of the letter. Thus, the reliability of the testimony regarding the letter was questionable and would likely have confused the jury on a collateral matter. As a result, it was properly excluded by the trial court, and this assignment of error is overruled.

[10] Defendant next assigns as error the trial court's denial of his request for jury instructions on accidental death, death by misadventure and intervening agency. Defendant argues as fact: (1) that the victim voluntarily stayed at the trailer, (2) that there was no evidence defendant intended to torture or to kill the victim, and (3) that the actions of Kenneth Fox in binding the victim in the closet were what led to the victim's death. According to defendant, these serve as bases for the requested instructions. We hold defendant's contention to be without merit.

Any defense based on the suggestion that the death was the result of an accident or misadventure must be predicated upon the absence of an unlawful purpose on the part of the defendant. *State v. Faust*, 254 N.C. 101, 103, 118 S.E.2d 769, 777, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961); *State v. Liner*, 98 N.C. App. 600, 608, 391 S.E.2d 820, 824, *disc. rev. denied*, 327 N.C. 435, 395 S.E.2d 693 (1990). In the present case, abundant evidence shows that the defendant and other individuals intended to punish the victim through cruel and torturous treatment over the course of numerous days. Part of that treatment was binding defendant and confining him in a closet. The cumulative effect of the torturous treatment was the death of the victim. Therefore, there is no basis for defendant's requested instructions, and this assignment of error is overruled.

[11] In his final assignment of error, defendant asserts that the trial court erroneously instructed the jury on the theory of acting in concert. Defendant contends there was insufficient evidence in this case to prove that each of the codefendants shared a common plan or scheme to intentionally inflict torture on the victim. Defendant also argues that the acting in concert instruction lessened the State's burden of proof by allowing the jury to convict the defendant without the particular *mens rea* for the crimes charged. We reject this contention.

The common thread running throughout this case was the desire of defendant and the other residents of Vickie Fox's trailer to inflict punishment on the victim for his admission to molesting Fox's daughter. The punishment was accomplished by repeated acts of brutality and torture, including persistent beating and kicking of the victim, shaving his head, scraping the word "faggot" on his arm, burning his genitals and legs, and forcing him to ingest his own urine. There was clearly a common plan or purpose among defendant and his codefendants to intentionally torture the victim. Furthermore, the trial court in this case instructed the jury only on the theories of murder by tor-

ture and felony murder. In *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986), this Court held that premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of torture. *Id.* at 203, 344 S.E.2d at 781; *see also State v. Anderson*, 346 N.C. 158, 161, 484 S.E.2d 543, 545 (1997). In *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976), we held that premeditation and deliberation is not an element of felony murder. *Id.* at 407, 226 S.E.2d at 669. Further, intent to kill is not an essential element of first-degree murder either by torture or under the felony murder rule. *Johnson*, 317 N.C. at 203, 344 S.E.2d at 781. Thus, the State was not required to prove that the defendant possessed a particular *mens rea*. All of the elements for acting in concert were met, and the trial court did not err in its jury instructions. This assignment of error is overruled.

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

NO ERROR.

PATRICIA M. MEYER, ADMINISTRATRIX FOR THE ESTATE OF CLEARMAN I. FRISBEE v. JO ANN WALLS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS LICENSE HOLDER AND ADMINISTRATOR OF COMMUNITY CARE OF HAYWOOD, NO. 3; GEORGE ANDREW BROWN, III, INDIVIDUALLY AND AS GEORGE ANDREW BROWN D/B/A A & B EXCAVATING, INC.; A & B EXCAVATING, INC.; COUNTY OF BUNCOMBE, BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES; CALVIN E. UNDERWOOD, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES; KAY BARROW, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SUPERVISOR AT THE BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES; MACKEY MILLER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS A SOCIAL WORKER AT THE BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 271PA96

(Filed 5 September 1997)

1. State §§ 30, 38 (NCI4th)— applicability of Tort Claims Act—action against county DSS—jurisdiction in superior court

The Tort Claims Act applies only to actions against State departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State. Therefore, jurisdiction for a negligence suit against a county DSS lies in the superior court rather than in the

Industrial Commission pursuant to the Tort Claims Act, regardless of whether the county DSS was acting as an agent of DHR, since the DSS is not a State agency.

Am Jur 2d, States, Territories, and Dependencies §§ 129 et seq.

2. Counties § 126 (NCI4th)— action against county DSS—waiver of governmental immunity—liability insurance—sufficiency of allegations

Plaintiff sufficiently alleged a waiver of governmental immunity by Buncombe County where plaintiff alleged that Buncombe County waived immunity pursuant to N.C.G.S. § 153A-435(a) through the purchase of liability insurance. Therefore, the trial court improperly dismissed a claim against the Buncombe County DSS for lack of subject matter jurisdiction.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37 et seq.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit. 43 ALR4th 19.

3. Public Officers and Employees §§ 35, 68 (NCI4th); State § 19 (NCI4th)— negligence of DSS and its employees—suit not limited to DHR—superior court claim against DSS and individuals

Plaintiff was not limited to a suit against DHR as principal for alleged negligence by a county DSS and its employees. Although plaintiff may not receive a double recovery, plaintiff may seek a judgment against the agent or principal or both; therefore, the fact that DSS and its employees may have been acting as agents of DHR, a state agency, does not preclude a claim against them in superior court.

Am Jur 2d, Public Officers and Employees §§ 301, 302, 330, 332.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

4. **Election of Remedies § 2 (NCI4th); State § 19 (NCI4th); Public Officers and Employees § 68 (NCI4th)— Tort Claims action against agency—superior court action against agent or employee**

A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common law negligence.

Am Jur 2d, Election of Remedies §§ 8, 9, 16-19; Municipal, County, School, and State Tort Liability §§ 61 et seq.; States, Territories and Dependencies §§ 99-117.

5. **Public Officers and Employees § 35 (NCI4th)— public official—official or individual capacity—acts outside official duties—irrelevancy**

Whether allegations relate to actions outside the scope of a defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity.

Am Jur 2d, Public Officers and Employees §§ 301, 302, 330, 332.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

6. Public Officers and Employees §§ 35, 68 (NCI4th)— claims against DSS official and employees—official and individual capacities

Plaintiff's complaint seeks recovery from the individual defendants, an official and employees of a county DSS, in both their official and individual capacities where the complaint states in its caption and allegations that defendants are being sued in their official and individual capacities, and where plaintiff seeks damages from both the individual defendants and the county DSS.

Am Jur 2d, Public Officers and Employees §§ 301, 302, 330, 332.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

7. Public Officers and Employees §§ 35, 68 (NCI4th)— claims against DSS official and employees—official capacities—superior court action

A claim against an official and employees of a county DSS in their official capacities was a claim against DSS and was properly before the superior court along with a claim against DSS.

Am Jur 2d, Public Officers and Employees §§ 301, 302, 330, 332.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

8. Public Officers and Employees §§ 35, 68 (NCI4th)— claims against public official and employees—improper dismissals—failure to appeal

Holdings by the Court of Appeals that the director of a county DSS was a public official and a DSS social worker and a DSS supervisor of adult protective services were public employees, and that the trial court improperly dismissed a claim against the director in his individual capacity for allegations of willful and wanton conduct and claims against the employees in their individual capacities for mere negligence were allowed to stand where the defendants did not appeal these holdings to the Supreme Court.

Am Jur 2d, Public Officers and Employees §§ 301, 302, 330, 332.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

9. Public Officers and Employees § 35 (NCI4th)— public official—willful and wanton conduct—conclusory allegation

A conclusory allegation that a public official acted willfully and wantonly is not sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss; rather, the facts alleged in the complaint must support such a conclusion.

Am Jur 2d, Public Officers and Employees §§ 301, 302, 330, 332.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 507, 471 S.E.2d 422 (1996), affirming in part, reversing in part, and remanding an order on defendants' motions to dismiss entered 2 November 1994 by Downs, J., in Superior Court, Haywood County. Heard in the Supreme Court 13 February 1997.

Hyler & Lopez, PA, by George B. Hyler, Jr., and Robert J. Lopez, for plaintiff-appellee.

Charlotte A. Wade for defendant-appellants Buncombe County DSS, Underwood, Miller, and Barrow.

Michael F. Easley, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, for the State, amicus curiae.

James B. Blackburn and Womble Carlyle Sandridge & Rice, P.L.L.C., by Robert H. Sasser, III, on behalf of The North Carolina Association of County Commissioners, amicus curiae.

ORR, Justice.

On 9 February 1992, decedent Clearman I. Frisbee committed suicide by placing an explosive blasting cap in his mouth and detonating it with a battery. More than two years prior to Mr. Frisbee's death, the Buncombe County Department of Social Services ("DSS" or "Buncombe County DSS") petitioned the Buncombe County Clerk of Superior Court to declare Mr. Frisbee legally incompetent because his multiple medical and psychological problems rendered him "unable to manage his own affairs." On 28 November 1989, Mr. Frisbee was adjudicated legally incompetent, and defendant DSS was appointed as Mr. Frisbee's legal guardian. While under DSS' care, Mr. Frisbee was placed in and removed from several community care facilities because of his behavior. On 11 February 1991, Mr. Frisbee was admitted to Community Care of Haywood No. 3 ("Community Care #3") by defendant Jo Ann Walls, the administrator of Community Care #3. At that time, defendant Mackey Miller was the DSS social worker handling Mr. Frisbee's case, defendant Calvin E. Underwood was the director of the Buncombe County DSS, and defendant Kay Barrow was the supervisor of the Adult Protective Services Unit at the Buncombe County DSS. Because of their respective positions with DSS, both defendants Underwood and Barrow had general guardianship authority over Mr. Frisbee.

On 9 November 1993, plaintiff Patricia M. Meyer, as administratrix for the estate of Clearman I. Frisbee, filed a wrongful death action alleging that Mr. Frisbee's death was proximately caused by the negligence of the named defendants. Plaintiff alleged, among other things, that defendants Underwood, Barrow, and Miller, individually and in their official capacities as agents of defendant Buncombe County DSS, (1) failed to make proper provisions for Mr. Frisbee's care, comfort, and maintenance; (2) failed to act in his best interest; and (3) failed to adequately respond to information provided by family members regarding Mr. Frisbee's condition and conditions at Community Care #3. Plaintiff also asserted multiple negligence claims against defendant Buncombe County DSS. Defendants Underwood, Barrow, Miller, and Buncombe County DSS filed motions to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6). After a hearing, the trial court dismissed plaintiff's claim against defendant Buncombe County DSS for lack of subject matter jurisdiction, concluding that exclusive jurisdiction over the claim against DSS is in the Industrial Commission, and dismissed plaintiff's claim against defendants Underwood, Barrow, and Miller for failure to state a claim upon which relief can be granted. This appeal pertains solely to these motions to dismiss filed by defendants Underwood, Barrow, Miller, and DSS.

Plaintiff appealed to the Court of Appeals, which held: (1) jurisdiction depends on the statutory authority for waiver of immunity, the jurisdictional provisions of N.C.G.S. § 153-435(b) control over those of N.C.G.S. § 143-291(a) where there is a conflict, and a remand is necessary for a determination as to whether the amount of insurance coverage exceeded the $100,000 cap on recovery under the Tort Claims Act; (2) a suit against Underwood in his official capacity must proceed in the same forum as a suit against DSS and must therefore be remanded along with the suit against DSS; (3) the trial court properly dismissed plaintiff's claim against Underwood in his individual capacity for mere negligence in the performance of his duties and improperly dismissed the claim against Underwood in his individual capacity for allegations of willful and wanton conduct; and (4) the trial court improperly dismissed plaintiff's claims against Barrow and Miller in their individual capacities for mere negligence. We reverse the Court of Appeals' decision as it pertains to the claim against DSS because we hold that since DSS is not a state agency, the Tort Claims Act does not apply to the claim against DSS, and we affirm the Court of Appeals' decision as it pertains to the claims against Underwood, Barrow, and Miller in their official and individual capacities.

DEFENDANT BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES

The trial court dismissed the claim against DSS based on lack of subject matter jurisdiction on the grounds that the action must be brought in the Industrial Commission. The Court of Appeals, however, concluded that jurisdiction depends on the statutory authority for waiver of immunity, that the jurisdictional provisions of N.C.G.S. § 153-435(b) control over those of N.C.G.S. § 143-291(a) where there is a conflict, and that a remand is necessary for a determination as to whether the amount of insurance coverage exceeded the $100,000 cap on recovery under the Tort Claims Act. We disagree with the Court of Appeals' interpretation of the law governing this issue.

[1] The issue before us is whether jurisdiction for the suit against DSS lies before the Industrial Commission pursuant to the Tort Claims Act or before the Superior Court as originally filed by plaintiff. We conclude that jurisdiction resides in the Superior Court. Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. *E.g.*, *Gammons v. N.C. Dep't of Human Resources*, 344 N.C. 51, 54, 472 S.E.2d 722, 723 (1996). Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. *E.g.*, *State ex rel. Hayes v. Billings*, 240 N.C. 78, 80, 81 S.E.2d 150, 152 (1954). An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State. *Prudential Ins. Co. of America v. Powell*, 217 N.C. 495, 8 S.E.2d 619 (1940). Likewise, an action against a county agency which directly affects the rights of the county is in fact an action against the county.

N.C.G.S. § 143-291(a) of the Tort Claims Act provides a limited waiver of immunity for negligence claims against all departments, institutions, and agencies of the State. N.C.G.S. § 153A-435 provides that a county's governmental immunity may be waived by the purchase of liability insurance. "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983). We hold that because Buncombe County DSS is not a state agency, the Tort Claims Act does not apply.

The Tort Claims Act provides in pertinent part:

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

N.C.G.S. § 143-291(a) (1996) (emphasis added).

This Court has held that the Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency. We addressed this issue in *Wirth v. Bracey*, 258 N.C. 505, 507-08, 128 S.E.2d 810, 813 (1963):

> The only claim authorized by the Tort Claims Act is a claim against the State agency. True, recovery, if any, must be based upon the actionable negligence of an employee of such agency while acting within the scope of his employment. However, recovery, if any, against the alleged negligent employee must be by common law action.

Likewise, the Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against a county department that is an alleged involuntary servant or agent of the State. *See Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 109 S.E.2d 211 (1959). In *Turner v. Board of Education*, the plaintiff sued the Gastonia City Board of Education in the Industrial Commission based on the negligence of an employee of the City Board. This Court held that because the City Board was not a state agency, the Tort Claims Act did not constitute a waiver of immunity as to the City Board.

> The General Assembly created the State Board of Education and fixed its duties. It is an agency of the State with statewide application. The General Assembly likewise created the county and city boards and fixed their duties which are altogether local. The Tort Claims Act, applicable to the State Board of Education

and to the State departments and agencies, does not include local units such as county and city boards of education.

. . . .

Tort claims may be filed before the Industrial Commission against "the State Board of Education, State Highway & Public Works Commission, and all other departments, institutions, and agencies of the State." Claims for tort liability are allowed only by virtue of the waiver of the State's immunity. Under the ordinary rules of construction, "departments, institutions, and agencies of the State" must be interpreted in connection with the preceding designation, "State Board of Education and State Highway & Public Works Commission." Where words of general enumeration follow those of specific classification, the general words will be interpreted to fall within the same category as those previously designated. The maxim *ejusdem generis* applies especially to the construction of legislative enactments. It is founded upon the obvious reason that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted. In no sense may we consider the Gastonia City Board of Education in the same category as the State Board of Education and the State Highway & Public Works Commission. For example, we may well consider the State Board of Agriculture, G.S. 106-2, the Board of Conservation and Development, G.S. 113-4, and the State Board of Public Welfare, G.S. 108-1, in the same general category as the State Board of Education and the State Highway & Public Works Commission. The Gastonia City Board of Education does not meet the classification. County and city boards of education serve very important, though purely local functions. The State contributes to the school fund, but the local boards select and hire the teachers, other employees and operating personnel. The local boards run the schools.

Turner v. Board of Education, 250 N.C. at 462-63, 109 S.E.2d at 216 (citations omitted).

The Court of Appeals stated that Buncombe County DSS "is an agent of the Department of Human Resources and a subordinate division of the State and therefore within the purview of G.S. 143-291(a)." *Meyer v. Walls*, 122 N.C. App. 507, 514, 471 S.E.2d 422, 427 (1996). In support of this statement, the Court of Appeals cited *Vaughn v. N.C. Dep't of Human Resources*, 296 N.C. 683, 690, 252 S.E.2d 792, 797

(1979); *EEE-ZZZ Lay Drain Co. v. N.C. Dep't of Human Resources*, 108 N.C. App. 24, 28, 422 S.E.2d 338, 341 (1992); and *Coleman v. Cooper*, 102 N.C. App. 650, 657-58, 403 S.E.2d 577, 581-82, *disc. rev. denied*, 329 N.C. 786, 408 S.E.2d 517 (1991).

In *Vaughn* and *Gammons*, the plaintiffs sued the Department of Human Resources ("DHR") in the Industrial Commission under the Tort Claims Act. The issue in *Vaughn* and *Gammons* was whether DHR could be held vicariously liable as principal for the acts of a county DSS as agent. In the case at bar, plaintiff is seeking recovery directly against a county DSS, the alleged agent, rather than DHR, the alleged principal. Thus, *Vaughn* and *Gammons* do not support a holding that the Tort Claims Act applies to a suit against the alleged agent. In fact, in *Vaughn* and *Gammons*, this Court held that the county departments of social services were agents of DHR. The Tort Claims Act lists agents in a category with officers, employees, and involuntary servants, rather than with state departments, institutions, and agencies. An agent of the State and a state agency are fundamentally different and are treated differently by the Tort Claims Act.

As we stated above, a statutory waiver of sovereign immunity must be strictly construed. Therefore, the Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State. To the extent that any cases are inconsistent with this holding, they are overruled. *See Robinette v. Barriger*, 116 N.C. App. 197, 447 S.E.2d 498 (1994) (holding that the Alexander County Health Department is a state agency, rather than a county agency, and that because the Industrial Commission has exclusive jurisdiction of negligence actions against the State, the trial court did not err in granting summary judgment for the county based on a lack of subject matter jurisdiction), *aff'd per curiam without precedential value*, 342 N.C. 181, 463 S.E.2d 78 (1995); *EEE-ZZZ Lay Drain Co. v. N.C. Dep't of Human Resources*, 108 N.C. App. 24, 422 S.E.2d 338 (holding that because the Transylvania County Health Department acted as an agent of the North Carolina Department of Environment, Health, and Natural Resources ("DEHNR"), the county health department was, like DEHNR, immune from suit); *Coleman v. Cooper*, 102 N.C. App. 650, 658, 403 S.E.2d 577, 582 (holding that a cause of action against Wake County as a subordinate division of the State must be brought before the Industrial Commission under the Tort Claims Act). We note that in *Gammons*, this Court stated that in

Coleman, the Court of Appeals correctly applied *Vaughn* in determining that Wake County DSS was acting as an agent of DHR; however, we made no reference to whether Wake County could be sued under the Tort Claims Act.

[2] For the foregoing reasons, the Tort Claims Act does not apply to the claim against Buncombe County DSS, regardless of whether Buncombe County DSS was acting as an agent of DHR. However, under the doctrine of governmental immunity, the claim would still be subject to dismissal unless Buncombe County waived immunity. In the complaint, plaintiff alleged that Buncombe County waived immunity pursuant to N.C.G.S. § 153A-435(a) through the purchase of liability insurance. N.C.G.S. § 153A-435(a) provides in pertinent part that the "[p]urchase of insurance pursuant to this subsection waives the county's immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function." We conclude that plaintiff sufficiently alleged a waiver of immunity by Buncombe County through the purchase of liability insurance. Therefore, the trial court improperly dismissed the claim against Buncombe County DSS for lack of subject matter jurisdiction.

[3] Defendants DSS, Underwood, Barrow, and Miller argue that this claim may be brought against only DHR, as principal, and not defendants, as agents. This argument is contrary to clearly established law. Although a plaintiff may not receive a double recovery, he may seek a judgment against the agent or the principal or both. *See Bowen v. Iowa Nat'l Mut. Ins.* Co., 270 N.C. 486, 155 S.E.2d 238 (1967); *Wirth v. Bracey*, 258 N.C. 505, 128 S.E.2d 810; *Palomino Mills v. Davidson Mills Corp.*, 230 N.C. 286, 52 S.E.2d 915 (1949). Therefore, the fact that defendants may have been acting as agents of the State does not preclude a claim against defendants.

[4] Furthermore, the fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court. A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence. *See Wirth v. Bracey*, 258 N.C. at 507-08, 128 S.E.2d at 813 (holding that plaintiff's suit against a state employee was not barred by the doctrine of election). As this Court explained in *Wirth v. Bracey*:

> "The decisions generally are to the effect that in an action *ex delicto*, where the doctrine of *respondeat superior* is, or may be, invoked, the injured party may sue the servant alone or the master alone, or may bring a single action against both." *Bullock v. Crouch*, 243 N.C. 40, 42, 89 S.E.2d 749[, 751 (1955)].
>
> Prior to the enactment of the Tort Claims Act the Highway Commission, as an agency or instrumentality of the State, enjoyed immunity to liability for injury or loss caused by the negligence of its employees. Even so, then as now, an employee of such agency was personally liable for his own actionable negligence. The Tort Claims Act, waiving governmental immunity to that extent, permitted recovery against the State agency as therein provided. The obvious intention of the General Assembly in enacting the Tort Claims Act was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment.

Wirth v. Bracey, 258 N.C. at 507-08, 128 S.E.2d at 813 (citations omitted). We note that the State may be joined as a third-party defendant in the state courts in an action for contribution or in an action for indemnification. *See* N.C.G.S. § 1A-1, Rule 14(c) (1990); N.C.G.S. § 1B-1(h) (1983); *Guthrie v. N.C. State Ports Auth.*, 307 N.C. at 540, n.5, 299 S.E.2d at 628, n.5; *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 331, 293 S.E.2d 182, 186 (1982).

For the foregoing reasons, the fact that defendants may have been acting as agents of DHR does not render defendants immune from suit in Superior Court. Therefore, the trial court properly denied the motion to dismiss the claims against Underwood, Barrow, and Miller for lack of subject matter jurisdiction. Also, plaintiff sufficiently alleged a waiver of immunity by Buncombe County through the purchase of liability insurance. Therefore, the trial court improperly allowed the motion to dismiss the claim against Buncombe County DSS for lack of subject matter jurisdiction.

DEFENDANTS UNDERWOOD, BARROW, AND MILLER

The complaint stated in its caption and in its allegations that plaintiff was suing Underwood, Barrow, and Miller in both their official and individual capacities. In its order, the trial court did not refer to the official or individual capacities of these claimants. Instead, without explanation, the court allowed these defendants'

motions to dismiss for failure to state a claim upon which relief can be granted and denied their motions to dismiss for lack of subject matter jurisdiction.

In ruling on the individual defendants' motions to dismiss, the first step is to determine whether the complaint seeks recovery from the individuals in their official or individual capacities, or both. The difference between official- and individual-capacity lawsuits was explained by Anita R. Brown-Graham and Jeffrey S. Koeze in an article published by the Institute of Government: A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent. Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67, at 7 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995 [hereinafter "Law Bulletin"].

As Brown-Graham and Koeze explained:

> The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Id.; *see also Kentucky v. Graham*, 473 U.S. 159, 166, 87 L. Ed. 2d 114, 121 (1985) (explaining that "while an award of damages against an official in his personal [individual] capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself"); *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (holding that claims against the City of Creedmoor police chief and a member of the City of Creedmoor Board of Commissioners in their official capacities were merely another way of bringing suit against the City of Creedmoor).

[5] Thus, " '[o]fficial capacity' is not synonymous with 'official duties'; the phrase is a legal term of art with a narrow meaning—the suit is in effect one against the entity." Law Bulletin at 7. Whether the allegations relate to actions outside the scope of defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity. To hold otherwise would contradict North Carolina Supreme Court cases that have held or stated that public employees may be held individually liable for mere negligence in the performance of their duties. *See, e.g., Givens v. Sellars*, 273 N.C. 44, 159 S.E.2d 530 (1968); *Wirth v. Bracey*, 258 N.C. 505, 128 S.E.2d 810; *Smith v. Hefner*, 235 N.C. 1, 68 S.E.2d 783 (1952); *Hansley v. Tilton*, 234 N.C. 3, 65 S.E.2d 300 (1951); *Miller v. Jones*, 224 N.C. 783, 32 S.E.2d 594 (1945); *Lewis v. Hunter*, 212 N.C. 504, 193 S.E. 814 (1937).

[6] In the case before us, an examination of the complaint reveals that as well as stating in the caption and allegations that Underwood, Barrow, and Miller were being sued in their official and individual capacities, plaintiff was seeking damages from all defendants, including Underwood, Barrow, Miller, and their employer, Buncombe County DSS. Therefore, the complaint seeks recovery from Underwood, Barrow, and Miller in both their official and individual capacities.

[7] Next, we must look at the official-capacity claims separately from the individual-capacity claims. A claim against Underwood, Barrow, and Miller in their official capacities is a claim against DSS and is subject to the same jurisdictional rulings as the suit against DSS. Therefore, for the reasons stated above, the claims against Underwood, Barrow, and Miller in their official capacities are properly before the Superior Court along with the claim against DSS, and as to this aspect of plaintiff's claim, the trial court erred.

We turn now to a determination of whether the trial court properly dismissed the claims against Underwood, Barrow, and Miller in their individual capacities for failure to state a claim upon which relief can be granted. Our standard of review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the trial court should not dismiss the complaint "unless it appears beyond doubt that [the]

plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

Our determination depends partly on whether these defendants are public officials or public employees. Public officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can. *See, e.g.*, *Harwood v. Johnson*, 326 N.C. 231, 241, 388 S.E.2d 439, 445 (1990); *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976); *Givens v. Sellars*, 273 N.C. at 49, 159 S.E.2d at 534; *Smith v. Hefner*, 235 N.C. at 7, 68 S.E.2d at 787; *Hansley v. Tilton*, 234 N.C. at 8, 65 S.E.2d at 303; *Miller v. Jones*, 224 N.C. at 787, 32 S.E.2d at 597.

> It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties. And, while an employee of an agency of government, as distinguished from a public official, is generally held individually liable for negligence in the performance of his duties, nevertheless such negligence may not be imputed to the employer on the principle of *respondeat superior*, when such employer is clothed with governmental immunity.

Smith v. Hefner, 235 N.C. at 7, 68 S.E.2d at 787 (citations omitted). "As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith v. State*, 289 N.C. at 331, 222 S.E.2d at 430 (citing *Carpenter v. Atlanta & C.A.L. Ry. Co.*, 184 N.C. 400, 406, 114 S.E. 693, 696 (1922)).

> The immunity thus extended to officers in the performance of a public duty grows out of a public policy which is fully explained in the two cases cited. *Hipp v. Ferrall*, [173 N.C. 167, 91 S.E. 831 (1917)]; *Templeton v. Beard*, [159 N.C. 63, 74 S.E. 735 (1912)], and cases cited. One reason for the existence of such a rule is that it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be

> held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward anyone who might be affected thereby. However, in proper cases even public officers may be liable for misfeasance in the performance of their ministerial duties where injury has ensued.

Miller v. Jones, 224 N.C. at 787, 32 S.E.2d at 597.

> The [public official] immunity has never been extended to a mere employee of a governmental agency upon this principle, although employed upon public works, since the compelling reasons for the nonliability of a public officer, clothed with discretion, are entirely absent. . . . The mere fact that a person charged with negligence is an employee of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liability for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner. The authorities generally hold the employee individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer, although such negligence may not be imputed to the employer on the principle of *respondeat superior*, when such employer is clothed with a governmental immunity under the rule.

Id.

As the Court of Appeals noted, when categorizing a public servant as either a public officer or a public employee, this Court has recognized several basic distinctions:

> A public officer is someone whose position is created by the constitution or statutes of the sovereign. *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power." *Id.* Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Jensen v. S.C. Dept. of Social Services*, 297 S.C. 323, [322,] 377

S.E.2d 102[, 107] (1988) [, *aff'd,* 304 S.C. 195, 403 S.E.2d 615 (1991)].

Hare v. Butler, 99 N.C. App. 693, 700, 394 S.E.2d 231, 235-36, *disc. rev. denied,* 327 N.C. 634, 399 S.E.2d 121 (1990).

[8],[9] In the case before us, the Court of Appeals concluded that Underwood was a public official and that Barrow and Miller were public employees. The Court of Appeals also held that the allegations in the complaint that Underwood's conduct was "willful, wanton and in reckless disregard of the rights of Clearman Frisbee" were sufficient to pierce his public-official immunity. Therefore, the court held that dismissal of the individual-capacity claim against Underwood was improper. The Court of Appeals also held that as public employees, Barrow and Miller were not entitled to any immunity defense. Therefore, the court held that dismissal of the individual-capacity claims against Barrow and Miller was also improper. Defendants did not appeal these holdings to this Court. Therefore, the Court of Appeals' holdings on the individual-capacity claims against Underwood, Barrow, and Miller stand. However, we note that a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion.

For the foregoing reasons, we reverse the Court of Appeals' decision as it pertains to the claim against DSS because we hold that since DSS is not a state agency, the Tort Claims Act does not apply to the claim against DSS. However, we hold that plaintiff sufficiently alleged a waiver of immunity by Buncombe County through the purchase of liability insurance. Therefore, we hold that the trial court improperly allowed the motion to dismiss the claim against Buncombe County DSS for lack of subject matter jurisdiction. We affirm the Court of Appeals' decision as it pertains to the claims against Underwood, Barrow, and Miller, and we remand the case to the Court of Appeals for further remand to Superior Court, Haywood County, for further proceedings not inconsistent with this opinion. Therefore, this case is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

BARBARA ANN NEWTON LANKFORD v. THOMAS H. WRIGHT AND THELMA IRENE WHITE, ADMINISTRATORS OF THE ESTATE OF LULA NEWTON; THOMAS H. WRIGHT, INDIVIDUALLY; THELMA IRENE WHITE, INDIVIDUALLY; WILLIAM PAUL WRIGHT; JAY CORNELIUS KNIGHT, JR.; JAMES ROBERT COFFEY; AND PATRICIA COFFEY NORTHERN COATES

No. 308PA96

(Filed 5 September 1997)

1. Adoption or Placement for Adoption § 1 (NCI4th)— equitable adoption—recognition in North Carolina

The doctrine of equitable adoption should be recognized in North Carolina.

Am Jur 2d, Adoption §§ 7, 121.

Modern status of law as to equitable adoption or adoption by estoppel. 97 ALR3d 347.

2. Adoption or Placement for Adoption § 1 (NCI4th)— equitable adoption—inheritance rights

The doctrine of equitable adoption is not intended to replace statutory requirements or to create the parent-child relationship; it simply recognizes the foster child's right to inherit from the person or persons who contracted to adopt the child and who honored that contract in all respects except through formal statutory procedures.

Am Jur 2d, Adoption §§ 7, 121.

Modern status of law as to equitable adoption or adoption by estoppel. 97 ALR3d 347.

3. Adoption or Placement for Adoption § 1 (NCI4th)— elements of equitable adoption

The elements necessary to establish the existence of an equitable adoption are: (1) an express or implied agreement to adopt the child; (2) reliance on that agreement; (3) performance by the natural parents of the child in giving up custody; (4) performance by the child in living in the home of the foster parents and acting as their child; (5) partial performance by the foster parents in taking the child into their home and treating the child as their own; and (6) the intestacy of the foster parents.

Am Jur 2d, Adoption §§ 7, 121.

Modern status of law as to equitable adoption or adoption by estoppel. 97 ALR3d 347.

4. Adoption or Placement for Adoption § 1 (NCI4th)— equitable adoption—sufficiency of evidence

The doctrine of equitable adoption applied so as to give plaintiff a right of inheritance from her foster mother where clear, cogent, and convincing evidence in the record tended to show that plaintiff's foster parents agreed to adopt plaintiff; the foster parents and plaintiff relied on that agreement; plaintiff's natural mother gave up custody of plaintiff to the foster parents; plaintiff lived in the foster parents' home, cared for them in their old age, and otherwise acted as their child; the foster parents treated plaintiff as their child by taking her into their home, giving her their last name, and raising her as their child; and the foster mother died intestate several years after the foster father died.

Am Jur 2d, Adoption §§ 7, 121.

Modern status of law as to equitable adoption or adoption by estoppel. 97 ALR3d 347.

Chief Justice MITCHELL dissenting.

Justice PARKER 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. 746, 472 S.E.2d 31 (1996), affirming an order granting defendants' motion for summary judgment entered by Downs, J., on 12 September 1995 in Superior Court, Watauga County. Heard in the Supreme Court 17 March 1997.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III; and Charles M. Welling for plaintiff-appellant.

Di Santi Watson, by Anthony S. di Santi, for defendant-appellees.

FRYE, Justice.

[1] The sole issue in this case is whether North Carolina recognizes the doctrine of equitable adoption. We hold that the doctrine should

be recognized in this state, and therefore, we reverse the decision of the Court of Appeals.

Plaintiff, Barbara Ann Newton Lankford, was born to Mary M. Winebarger on 15 January 1944. When plaintiff was a child, her natural mother entered into an agreement with her neighbors, Clarence and Lula Newton, whereby the Newtons agreed to adopt and raise plaintiff as their child. Shortly thereafter, plaintiff moved into the Newton residence and became known as Barbara Ann Newton, the only child of Clarence and Lula Newton.

The Newtons held plaintiff out to the public as their own child, and plaintiff was at all times known as Barbara Ann Newton. Plaintiff's school records referred to plaintiff as Barbara Ann Newton and indicated that Clarence and Lula Newton were her parents. Plaintiff's high-school diploma also referred to plaintiff as Barbara Ann Newton. After Clarence Newton died in 1960, the newspaper obituary listed Barbara Ann Newton as his surviving daughter. Later, with Lula Newton's assistance, plaintiff obtained a Social Security card issued to her under the name of Barbara Ann Newton.

After plaintiff joined the Navy, plaintiff and Lula Newton frequently wrote letters to each other. In most of the letters, plaintiff referred to Lula Newton as her mother and Lula Newton referred to plaintiff as her daughter. Lula Newton also established several bank accounts with plaintiff, where Lula Newton deposited money plaintiff sent to her while plaintiff was in the Navy. On several occasions, plaintiff took leaves of absence from work to care for Lula Newton during her illness.

In 1975, Lula Newton prepared a will. When she died in 1994, the will was not accepted for probate because some unknown person had defaced a portion of the will. The will named plaintiff as coexecutrix of the estate and made specific bequests to plaintiff. Since the will could not be probated, Lula Newton died intestate.

After Lula Newton's death, plaintiff filed for declaratory judgment seeking a declaration of her rights and status as an heir of the estate of Lula Newton. Defendants, the administrators and named heirs of Lula Newton, filed a motion for summary judgment. The trial court granted defendants' motion. The North Carolina Court of Appeals affirmed the order granting summary judgment, reasoning that plaintiff was not adopted according to N.C.G.S. §§ 48-1 to -38 and that North Carolina does not recognize the doctrine of equitable

adoption. This Court granted plaintiff's petition for discretionary review, and we now conclude that the doctrine of equitable adoption should be recognized in North Carolina.

"It is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done." *Thompson v. Soles*, 299 N.C. 484, 489, 263 S.E.2d 599, 603 (1980). "Equity regards substance, not form," *In re Will of Pendergrass*, 251 N.C. 737, 743, 112 S.E.2d 562, 566 (1960), and "will not allow technicalities of procedure to defeat that which is eminently right and just," *id.* at 746, 112 S.E.2d at 568. These principles form the essence of the doctrine of equitable adoption, and it is the duty of this Court to protect and promote them.

Equitable adoption is a remedy to "protect the interest of a person who was supposed to have been adopted as a child but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption." *Gardner v. Hancock*, 924 S.W.2d 857, 858 (Mo. Ct. App. 1996). The doctrine is applied in an intestate estate to "give effect to the intent of the decedent to adopt and provide for the child." *Id.* It is predicated upon

> principles of contract law and equitable enforcement of the agreement to adopt for the purpose of securing the benefits of adoption that would otherwise flow from the adoptive parent under the laws of intestacy had the agreement to adopt been carried out; as such it is essentially a matter of equitable relief. Being only an equitable remedy to enforce a contract right, it is not intended or applied to create the legal relationship of parent and child, with all the legal consequences of such a relationship, nor is it meant to create a legal adoption.

2 Am. Jur. 2d *Adoption* § 53 (1994) (footnotes omitted).

[2] Adoption did not exist at common law and is of purely statutory origin. *Wilson v. Anderson*, 232 N.C. 212, 215, 59 S.E.2d 836, 839 (1950). Equitable adoption, however, does not confer the incidents of formal statutory adoption; rather, it merely confers rights of inheritance upon the foster child in the event of intestacy of the foster parents.[1] In essence, the doctrine invokes the principle that equity regards that as done which ought to be done. The doctrine is not

1. As used here, the term "foster" means "giving or receiving parental care though not kin by blood or related legally." *Random House Webster's College Dictionary* 525 (1991).

intended to replace statutory requirements or to create the parent-child relationship; it simply recognizes the foster child's right to inherit from the person or persons who contracted to adopt the child and who honored that contract in all respects except through formal statutory procedures. As an equitable matter, where the child in question has faithfully performed the duties of a natural child to the foster parents, that child is entitled to be placed in the position in which he would have been had he been adopted. Likewise, based on principles of estoppel, those claiming under and through the deceased are estopped to assert that the child was not legally adopted or did not occupy the status of an adopted child.

[3] Further, the scope of the doctrine is limited to facts comparable to those presented here. Thirty-eight jurisdictions have considered equitable adoption; at least twenty-seven have recognized and applied the doctrine. *See, e.g., First Nat'l Bank in Fairmont v. Phillips*, 176 W. Va. 395, 344 S.E.2d 201 (1985). A majority of the jurisdictions recognizing the doctrine have successfully limited its application to claims made by an equitably adopted child against the estate of the foster parent. *Geramifar v. Geramifar*, 113 Md. App. 495, 688 A.2d 475 (1997). By its own terms, equitable adoption applies only in limited circumstances. The elements necessary to establish the existence of an equitable adoption are:

(1) an express or implied agreement to adopt the child,

(2) reliance on that agreement,

(3) performance by the natural parents of the child in giving up custody,

(4) performance by the child in living in the home of the foster parents and acting as their child,

(5) partial performance by the foster parents in taking the child into their home and treating the child as their own, and

(6) the intestacy of the foster parents.

See 2 Am. Jur. 2d *Adoption* § 54 (1994). These elements, particularly the requirement of intestacy, limit the circumstances under which the doctrine may be applied. Specifically, the doctrine acts only to recognize the inheritance rights of a child whose foster parents died intestate and failed to perform the formalities of a legal adoption, yet treated the child as their own for all intents and purposes. The doctrine is invoked for the sole benefit of the foster child in determining

heirship upon the intestate death of the person or persons contracting to adopt. Whether the doctrine applies is a factual question, and each element must be proven by clear, cogent, and convincing evidence. *See, e.g.*, *First Nat'l Bank in Fairmont v. Phillips*, 176 W. Va. 395, 344 S.E.2d 201.

[4] In this case, the evidence in the record tends to show that the above elements can be satisfied by clear, cogent, and convincing evidence. The record demonstrates that the Newtons agreed to adopt plaintiff; that the Newtons and plaintiff relied on that agreement; that plaintiff's natural mother gave up custody of plaintiff to the Newtons; that plaintiff lived in the Newtons' home, cared for them in their old age, and otherwise acted as their child; that the Newtons treated plaintiff as their child by taking her into their home, giving her their last name, and raising her as their child; and that Mrs. Newton died intestate several years after Mr. Newton died. These facts fit squarely within the parameters of the doctrine of equitable adoption and are indicative of the dilemma the doctrine is intended to remedy.

We note that our decision to recognize the doctrine of equitable adoption is not precluded by prior decisions of this Court as asserted by defendants and decided by the Court of Appeals. In *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985), we specifically stated that "[w]e find no occasion to address the question of whether North Carolina recognizes the doctrine of equitable adoption." *Id.* at 479, 334 S.E.2d at 753. Likewise, in *Chambers v. Byers*, 214 N.C. 373, 199 S.E. 398 (1938), our holding was limited to whether the agreement at issue was an enforceable contract to make a will. Thus, neither *Ladd* nor *Chambers* foreclosed the possibility of future recognition of equitable adoption by this Court.

The dissent points out that a minority of jurisdictions have declined to recognize the doctrine of equitable adoption. However, we again note that an overwhelming majority of states that have addressed the question have recognized and applied the doctrine. More importantly, it is the unique role of the courts to fashion equitable remedies to protect and promote the principles of equity such as those at issue in this case. We are convinced that acting in an equitable manner in this case does not interfere with the legislative scheme for adoption, contrary to the assertions of the dissent. Recognition of the doctrine of equitable adoption does not create a legal adoption, and therefore does not impair the statutory procedures for adoption.

In conclusion, a decree of equitable adoption should be granted where justice, equity, and good faith require it. The fairness of applying the doctrine once the prerequisite facts have been established is apparent. Accordingly, we reverse the Court of Appeals' decision which affirmed the trial court's entry of summary judgment for defendants and remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Justice MITCHELL dissenting.

In its opinion, the majority for the first time accepts the doctrine of equitable adoption for North Carolina. As applied by the majority in this case, the doctrine results in neither an adoption nor equity. Therefore, although I am convinced the majority is engaged in an honest but unfortunate attempt to do good in the present case, I must dissent.

"Equity" is that established set of principles under which substantial justice may be attained in particular cases where the prescribed or customary forms of ordinary law seem to be inadequate. 27A Am. Jur. 2d *Equity* § 1 (1994). Equity "is a complex system of established law and is not merely a reflection of the judge's sense of what is appropriate." *Id.* § 2. It arose in response to the restrictive and inflexible rules of the common law, and not as a means of avoiding legislation that courts deemed unwise or inadequate.

For purposes of governing and regulating judicial action, equity courts over the centuries "have formulated certain rules or principles which are described by the term 'maxims.' " *Id.* § 108. It is these maxims which must control the equity jurisdiction of the courts if their judgments are to reflect anything other than the peculiar preferences of the individual judges involved.

> A court of equity has no more right than has a court of law to act on its own notion of what is right in a particular case; it must be guided by the established rules and precedents. Where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity. A court of equity is thus bound by any explicit statute or directly applicable rule of law, regardless of its views of the equities.

Id. § 109 (footnotes omitted).

One maxim of equity, as the majority explains, is that equity regards as done that which in fairness and good conscience ought to be done. A court's notion of what is good or desirable does not determine what "ought to be done" in applying equity. The maxim of equity upon which the majority relies must yield to other controlling and established rules or maxims. One such maxim is that a court of equity, however benevolent its motives, is "bound by any explicit statute or directly applicable rule of law, regardless of its view of the equities." *Id.* Thus, no equitable remedy may properly be applied to disturb statutorily defined and established rights, such as those rights created by North Carolina statutes controlling intestate succession or those controlling legal adoption.

The North Carolina Intestate Succession Act provides a comprehensive and extensive legislative scheme controlling intestate succession by, through, and from adopted children. N.C.G.S. § 29-17(a) provides:

> A child, *adopted in accordance with Chapter 48 of the General Statutes* or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents.

N.C.G.S. § 29-17(a) (1995) (emphasis added). The extensive scheme created by the legislature is clear and unambiguous. It provides, in pertinent part, that only those children who are adopted *in compliance with chapter 48* or adopted according to the requirements of another jurisdiction are eligible to take by intestate succession. Therefore, the maxim relied upon by the majority may not properly be applied here.

> Equity will not interfere where a statute applies and dictates requirements for relief. Use of equitable principles to trump an apposite statute thus is legally indefensible. The disregard of an unambiguous law based on sympathy is unjustifiable under the rubric of equity.

27A Am. Jur. 2d *Equity* § 246 (footnotes omitted).

It is well established that "[w]here an extensive legislative scheme governs, it is incumbent upon chancellors to restrain their equity powers." *Id.* The application of the doctrine of equitable adoption by the majority in this case violates this principle of equity

requiring greater restraint when dealing with statutory law than when addressing the common law. The majority's application of the doctrine of equitable adoption here negates the rights of other heirs such as defendants which are expressly provided for in the extensive legislative scheme established by the North Carolina Intestate Succession Act. In the instant case, the application of the doctrine of equitable adoption denies other rightful heirs their statutory intestate shares, in effect voiding the intestate succession hierarchy enacted by our legislature. This result is contrary to established maxims of equity.

Further, contrary to established maxims of equity, the decision of the majority also "trumps" another applicable extensive legislative scheme. Adoption did not exist at common law in North Carolina. Therefore, we have expressly and correctly held that adoption "can be accomplished only in accordance with provisions of statutes enacted by the legislative branch of the State government." *Wilson v. Anderson*, 232 N.C. 212, 215, 59 S.E.2d 836, 839 (1950). The North Carolina General Assembly has enacted a comprehensive and extensive legislative scheme governing adoptions contained in chapter 48 of the General Statutes. Plaintiff does not fall within the requirements of these statutes. Therefore, I believe that the majority errs in failing to apply restraint in the exercise of its equity powers and in applying its own notion of what "ought to be done" in order to improperly "trump" an apposite statute. 27A Am. Jur. 2d *Equity* § 246.

Presently, all states recognize a parent-child relationship through adoption if the certain and unambiguous statutory procedures of each specific state are followed. A strong minority of courts that have reviewed the issue have declined to recognize the doctrine of equitable adoption. *See Wilks v. Langley*, 248 Ark. 227, 235, 451 S.W.2d 209, 213 (1970) (holding inheritance under theory of "virtual adoption" unknown in Arkansas); *Maui Land & Pineapple Co. v. Naiapaakai Heirs of Makeelani*, 69 Haw. 565, 568, 751 P.2d 1020, 1022 (1988) ("to depart from the statutes by creating a doctrine of equitable adoption would import mischief and uncertainty into the law"); *In re Estate of Edwards*, 106 Ill. App. 3d 635, 637, 435 N.E.2d 1379, 1381 (1982) ("Illinois has not expressly recognized the theory of equitable adoption"); *Lindsey v. Wilcox*, 479 N.E.2d 1330, 1333 (Ind. Ct. App. 1985) ("the doctrine of equitable adoption has never been approved in Indiana and it continues to be denied judicial approval"); *In re Estate of Robbins*, 241 Kan. 620, 621, 738 P.2d 458, 460 (1987) ("Kansas courts do not recognize the doctrine of equitable adop-

tion"); *Pierce v. Pierce*, 198 Mont. 255, 259, 645 P.2d 1353, 1356 (1982) (the adoptive parent or parents must follow the required procedures set forth in the Uniform Adoption Act in order for an adoption to occur); *Alley v. Bennett*, 298 S.C. 218, 221, 379 S.E.2d 294, 295 (1989) (the method of adoption provided by statute is exclusive); *Couch v. Couch*, 35 Tenn. App. 464, 476, 248 S.W.2d 327, 333 (1951) ("The right of adoption was unknown to the common law. It is of statutory origin, and to create the contemplated relation the procedure fixed by the statute must be substantially followed.").

Asserting their belief that adoption is singularly defined by statute, these courts have properly deferred to the judgment of their legislators and the procedures established in their state adoption statutes. These courts have also deferred to their legislative bodies to enact laws governing the many complex issues that will arise if the doctrine of equitable adoption is recognized. Such issues would include whether the equitably "adopted" child would inherit from his or her natural parents or from a natural sibling who had not been equitably adopted. Moreover, a court deciding to recognize "equitable adoption" would have to determine for inheritance purposes the relationship between the equitably adopted child's issue and the equitably adoptive parents, versus the child's biological parents. The complexities abound.

The North Carolina General Assembly clearly enacted chapter 48 of the General Statutes of North Carolina with the intent to establish the exclusive procedure by which a minor child may be adopted. The preface to chapter 48 states the legislative intent in adopting this chapter.

> The General Assembly finds that it is in the public interest to establish a *clear judicial process* for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

N.C.G.S. § 48-1-100(a) (1995) (emphasis added). The legislature intended that adoption in North Carolina be accomplished only through the formal judicial proceedings provided for in the extensive legislative scheme created in chapter 48. Therefore, equity may not properly interfere by creating a new form of partial or total adoption.

In effect, this Court preempts statutes enacted by our legislature in order to recognize the doctrine of equitable adoption. However, because our legislature has extensively, comprehensively, and unambiguously acted, both with regard to adoption and with regard to intestate succession, I am persuaded that the majority improperly "trumps" clear legislative intent in the name of equity.

Despite plaintiff's foster parents' verbal acknowledgments and holding plaintiff out as their natural child, they never legally adopted her by complying with the statutory process. "A mere contract to adopt a child, however, is not a contract to devise or bequeath property to that child." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 486, 334 S.E.2d 751, 758 (1985). Thus, it is my opinion that this Court should not declare plaintiff to have been "equitably adopted," thereby subrogating the rights of the statutorily determined heirs for purposes of intestate succession.

Finally, another principle of equity prevents the proper application here of the maxim that equity regards as done that which ought to be done. Defendants in this case include the heirs of Lula Newton under the North Carolina Intestate Succession Act. There is no allegation, contention, or evidence that they are anything other than innocent third parties to the transactions between plaintiff and her natural parents on the one hand and the Newtons on the other concerning any promise to adopt. This Court, like most courts, has expressly recognized and held that the maxim that equity regards as done that which ought to be done *ought not* to be and "will not be enforced to the injury of innocent third parties." *Hood ex rel. N.C. Bank & Trust Co. v. N.C. Bank & Trust Co.*, 209 N.C. 367, 381, 184 S.E. 51, 63 (1936); *see Ladd v. Estate of Kellenberger*, 314 N.C. at 487, 334 S.E.2d at 758; *see also Casey v. Cavaroc*, 96 U.S. 467, 24 L. Ed. 779 (1877); *Riganti v. McElhinney*, 248 Cal. App. 2d 116, 56 Cal. Rptr. 195 (1967); *Kennedy v. Bank of America*, 237 Cal. App. 2d 637, 47 Cal. Rptr. 154 (1965); *Rigby v. Liles*, 505 So. 2d 598 (Fla. Dist. Ct. App. 1987); *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923); *Kelsey v. Kelsey*, 190 N.Y.S. 52 (Sup. Ct. 1921), *rev'd on other grounds*, 204 A.D. 116, 197 N.Y.S. 371 (1922); *Crahane v. Swan*, 212 Or. 143, 318 P.2d 942 (1957); *Smith v. Schwartz*, 398 Pa. 555, 159 A.2d 220 (1960); *Crabb v. Uvalde Paving Co.*, 23 S.W.2d 300 (Tex. 1930). Here, the majority injures such innocent third parties.

The record in the present case does not indicate that either plaintiff or defendants are anything other than innocents. Therefore, gen-

eral principles of equity do not arise concerning what "ought to be done" as between them; "where equities are equal, 'the law must prevail.' " 27A Am. Jur. 2d *Equity* § 139 (footnotes omitted).

In the present case, the controlling maxims of equity clearly require that this Court restrain its equity powers so as not to overrule comprehensive statutory schemes and, thereby, do harm to innocents. For these reasons, I respectfully dissent from the decision of the majority and would affirm the holding of the Court of Appeals which affirmed the order of the trial court.

Justice PARKER joins in this dissenting opinion.

BRENDA McANINCH, EMPLOYEE v. BUNCOMBE COUNTY SCHOOLS, SELF INSURED (EDUCATOR BENEFITS SERVICES, INC., SERVICING AGENT), EMPLOYER

No. 378PA96

(Filed 5 September 1997)

1. **Workers' Compensation § 260 (NCI4th)— average weekly wages—statutory priority of methods**

   N.C.G.S. § 97-2(5) sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed. The fifth method set forth in the statute may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods.

   Am Jur 2d, Workers' Compensation §§ 418-430.

2. **Workers' Compensation § 261 (NCI4th)— Form 21 agreement—average weekly wages—modification by Court of Appeals**

   Where an Industrial Commission Form 21 agreement entered into between the employer and an injured employee (a school cafeteria worker) and approved by the full Commission calculated the employee's average weekly wages using the forty-two weeks she was employed during the school year under the third compensation method in N.C.G.S. § 97-2(5), the Court of Appeals erred by recalculating the employee's wages through application

of the fifth computation method set forth in the statute since (1) this constituted an improper contravention of the Commission's fact-finding authority and its finding of fairness in this case, and (2) the Form 21 agreement could not be modified or set aside on appeal in the absence of a finding that the agreement was obtained by fraud, misrepresentation, undue influence or mutual mistake.

Am Jur 2d, Workers' Compensation §§ 418-430.

3. Workers' Compensation § 264 (NCI4th)— average weekly wages—employment producing injury—earnings from other employment

The calculation of the average weekly wages of an injured employee may not include wages or income earned in employment or work other than that which produced the injury. Therefore, the Court of Appeals erred by recalculating the average weekly wages of an injured school cafeteria worker who worked only forty-two weeks per year for defendant school by including her earnings during the ten-week summer vacation period from babysitting, housekeeping and painting.

Am Jur 2d, Workers' Compensation § 423.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a unanimous decision of the Court of Appeals, 122 N.C. App. 679, 471 S.E.2d 441 (1996), reversing an order of the Industrial Commission entered 13 March 1995. Heard in the Supreme Court 12 May 1997.

John A. Mraz, P.A., by John A. Mraz, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle, Allen C. Smith, and Scott M. Stevenson, for defendant-appellant.

LAKE, Justice.

This case facially involves the proper method of calculating the average weekly wages in a worker's compensation action, and in essence it presents two underlying issues which are controlling. The first such issue is whether an Industrial Commission Form 21 agreement for compensation, entered into between the employer and the injured employee and approved by the full Commission, can be modified or set aside on appellate review in the absence of a finding by the Commission of error due to fraud, misrepresentation, undue

influence or mutual mistake. The second issue presented is whether the calculation of the average weekly wages of an injured employee may include wages or income earned in employment or work other than that in which the employee was injured. For the reasons hereinafter set forth, we hold the Court of Appeals erred in modifying the Form 21 agreement and in calculating the average weekly wages based on wages or income earned in employment other than that which produced the injury. Accordingly, we reverse the Court of Appeals and remand for reinstatement of the Commission's award based on the Form 21 agreement.

The plaintiff, Brenda McAninch, was employed as a cafeteria worker for the defendant, Buncombe County Schools, for approximately eight years until 16 August 1990 when she sustained a compensable injury in the course of her employment. As a result of this injury, the plaintiff remains totally disabled. Because plaintiff's position as a cafeteria worker existed only during the ten-month school year, she worked only forty-two weeks per year for the defendant. The plaintiff elected to receive her wages during the school year, rather than spread them throughout the entire year. Under this payment plan, the plaintiff received an average of $163.37 per week during the forty-two weeks that she worked, and she received no wages during the remaining ten weeks of the year. During the summer, plaintiff earned an average of $150.00 per week by babysitting, housekeeping and painting.

As found by the Commission, the defendant admitted liability for benefits under the Workers' Compensation Act, and on 3 October 1990, the parties entered into a Form 21 agreement reflecting the average weekly wage of $163.37 based on the forty-two-week period that plaintiff worked, which yielded a workers' compensation rate of $108.91 per week. This compensation rate did not reflect any wages the plaintiff earned from other employment undertaken during the ten-week summer vacation. This agreement was approved by the Commission.

Although the agreement provided that plaintiff would be compensated weekly so long as her disability continued, defendant refused to pay plaintiff during the summer vacation period on the ground plaintiff had worked and received paychecks only during the school year. Plaintiff filed a Form 33 request for a hearing, and the matter was heard before a deputy commissioner who determined plaintiff was entitled to compensation throughout the entire year.

However, the deputy commissioner also determined that plaintiff's average weekly wages should reflect her annual salary extended over fifty-two weeks. This calculation yielded average weekly wages of $132.49, instead of the $163.37 stipulated in the Form 21 agreement. The plaintiff appealed to the full Commission, which reinstated plaintiff's original average weekly wages and compensation rate, pursuant to the Form 21 agreement. The Commission also affirmed that plaintiff was entitled to compensation during the summer months and concluded that "[s]ince there is no basis to set aside the Form 21 Agreement in this case, it shall remain in full force and effect. N.C.G.S. § 97-17."

The defendant appealed to the North Carolina Court of Appeals, which reversed and remanded the case to the Industrial Commission. The Court of Appeals, in construing N.C.G.S. § 97-2(5), concluded that to obtain a result that was "fair and just to both parties," the Commission should have used a different method of calculation under the statute, which method "necessarily includes wages earned in employment other than that in which the employee was injured," *McAninch v. Buncombe County Schools*, 122 N.C. App. 679, 683, 471 S.E.2d 441, 445 (1996), and thus recalculated plaintiff's average weekly wages by aggregating her wages from defendant with her summer earnings and then dividing that sum by fifty-two. Defendant's petition for writ of certiorari on the basis of jurisprudential significance and conflict with a prior decision of this Court was allowed on 7 February 1997.

[1] The calculation of an injured employee's average weekly wages is governed by N.C.G.S. § 97-2(5). This statute sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed, and in its opening lines, this statute defines or states the meaning of "average weekly wages." It is clear from its wording and the prior holdings of this Court that this statute establishes an order of preference for the calculation method to be used, and that the primary method, set forth in the first sentence, is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two. *Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979). This statute, as it pertains to this case, is set forth in part as follows:

> [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at

> the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52 . . . . [3] Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. . . .
>
> [5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (Supp. 1996). The final method, as set forth in the last sentence, clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971). Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 795-96 (1956). "Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision." *Id.*

[2] After correctly stating that this statute "provides a hierarchy" of five methods of computing the average weekly wages, and after further stating that "we must first calculate plaintiff's average weekly wages pursuant to the third method in [N.C.G.S. §] 97-2(5)" (the method employed by the Commission), *McAninch*, 122 N.C. App. at 683, 471 S.E.2d at 444, the Court of Appeals then undertook its own "fair and just" analysis and concluded that the third calculation method was not fair and just to defendant and thus that the fifth method of calculation must be employed, *id.* The Court of Appeals noted that this fifth method specifies no mathematical formula to be applied and instead simply states that such other method may be resorted to as will " 'most nearly approximate the amount which the injured employee would be earning were it not for the injury.' " *Id.* at 683, 471 S.E.2d at 444-45 (quoting N.C.G.S. § 97-2(5)). From this language, the Court of Appeals then concluded that such calculation

"necessarily includes wages earned in employment other than that in which the employee was injured." *Id.* at 683, 471 S.E.2d at 445 (citing *Holloway v. T.A. Mebane, Inc.*, 111 N.C. App. 194, 198, 431 S.E.2d 882, 884 (1993)).

In the instant case, the Industrial Commission explicitly found that the plaintiff's average weekly wages of $163.37, which the parties and the Commission determined by applying forty-two weeks under the third computation method, would be most equitable to both parties. Hence, the recalculation of plaintiff's average weekly wages by the Court of Appeals through application of the fifth computation method constituted an improper contravention of the Commissions's fact-finding authority, and specifically its finding of fairness in this case. The final opinion and award of the full Commission concludes:

> In this case the Full Commission finds that a computation based on 10 months instead of 12 months would be most equitable. Also this is set forth in the Form 21 Agreement which was executed by the parties and approved by the Commission.

This Court has long held that, " '[u]nder the Workmen's Compensation Act, the Industrial Commission is made the fact-finding body, and the rule is, as fixed by statute and the uniform decisions of this Court, that the findings of fact made by the Commission are conclusive on appeal . . . when supported by competent evidence.' " *Inscoe v. DeRose Indus.*, 292 N.C. 210, 215, 232 S.E.2d 449, 452 (1977) (quoting *Rice v. Thomasville Chair Co.*, 238 N.C. 121, 124, 76 S.E.2d 311, 313 (1953)). "Appellate review of opinions and awards of the Industrial Commission is strictly limited to the discovery and correction of *legal* errors." *Godley v. County of Pitt*, 306 N.C. 357, 359-60, 293 S.E.2d 167, 169 (1982); *accord* N.C.G.S. § 97-86 (Supp. 1996). When the Court of Appeals reviews a decision of the full Commission, it must determine, first, whether there is competent evidence to support the Commission's findings of fact and, second, whether the findings of fact support the conclusions of law. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986); *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). The Commission's findings of fact and conclusions of law based thereon in the present case were amply supported by the evidence before it and the Form 21 agreement.

Furthermore, the Commission in this case merely upheld the parties' own agreement, concluding that the agreed-upon terms were fair

and equitable. Where the employer and employee have entered into a Form 21 agreement, stipulating the average weekly wages, and the Commission approves this agreement, the parties are bound to its terms absent a showing of error in the formation of the agreement. N.C.G.S. § 97-17 provides in pertinent part:

> [N]o party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement.

N.C.G.S. § 97-17 (1991). "Thus, where there is no finding that the agreement itself was obtained by fraud, misrepresentation, mutual mistake, or undue influence, the Full Commission may not set aside the agreement, once approved." *Brookover v. Borden, Inc.*, 100 N.C. App. 754, 755-56, 398 S.E.2d 604, 606 (1990), *disc. rev. denied*, 328 N.C. 270, 400 S.E.2d 450 (1991). It is well settled that "[a]n agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." *Tucker v. Lowdermilk*, 233 N.C. 185, 188, 63 S.E.2d 109, 111 (1951); *see also* N.C.G.S. § 97-87 (1991); *Hand v. Fieldcrest Mills, Inc.*, 85 N.C. App. 372, 380, 355 S.E.2d 141, 146, *disc. rev. denied*, 320 N.C. 792, 361 S.E.2d 76 (1987). This Court has held that "[in] approving a settlement agreement the Industrial Commission acts in a judiciary capacity and the settlement [agreement] as approved becomes an award enforceable . . . by a court decree." *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976); *see also* N.C.G.S. § 97-82 (Supp. 1996). In the case *sub judice*, the Commission concluded: "Since there is no basis to set aside the Form 21 Agreement in this case, it shall remain in full force and effect. N.C.G.S. § 97-17." Thus, the Court of Appeals had no basis for changing the method of calculating the plaintiff's average weekly wages.

[3] Further, with respect to the Court of Appeals' recalculation to include "wages earned in employment other than that in which the employee was injured," we hold that this aggregation of wages conflicts with our established law. In defining "average weekly wages," N.C.G.S. § 97-2(5) explicitly provides that average weekly wages

"*shall mean* the earnings of the injured employee *in the employment in which he was working at the time of the injury.*" N.C.G.S. § 97-2(5) (emphasis added). This issue was exclusively and definitively addressed by this Court in *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966). In *Barnhardt*, reliance was also placed on the identical language from the fifth method of calculation relied on by the Court of Appeals in the instant case. In rejecting this premise, this Court in *Barnhardt* held:

> [N.C.G.S. § 97-2(5)] contains no *specific* provision which would allow wages from any two employments to be aggregated in fixing the wage base for compensation. Plaintiff contends, however, that such authority is implied in method [5], since "the amount which the injured employee would be earning were it not for the injury" necessarily includes earnings from all sources if the employee had more than one job.
>
> . . . .
>
> It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Plaintiff, of course, will greatly benefit if his wages from both jobs are combined; but, if this is done, [the employer] and its carrier, which has not received a commensurate premium—will be required to pay him a higher weekly compensation benefit than [the employer] ever paid him in wages. . . . [T]o combine plaintiff's wages from his two employments would not be fair to the employer. Method [5], "while it prescribes no precise method for computing 'average weekly wages,' sets up a standard to which results fair and just to both parties must be related." *Liles v. Electric Co.*, 244 N.C. 653, 658, 94 S.E.2d 790, 794.
>
> After having specifically declared, in the usual situations to which method (1) is applicable, that an injured employee's average weekly wages *shall be* the wages he was earning in the employment in which he was injured, had the Legislature intended to authorize the Commission in the exceptional cases to combine those wages with the wages from *any* concurrent employment, we think it would have been equally specific. As was said in *De Asis v. Fram Corp.*, [78 R.I. 249, 253, 81 A.2d 280, 282 (1951)]: "If that radical and important change were intended,

it is not likely that the legislature would have left such intent solely to a questionable inference."

. . . .

We hold that, in determining plaintiff's average weekly wage, the Commission had no authority to combine his earnings from the employment in which he was injured with those *from any other employment.*

Barnhardt, 266 N.C. at 427-29, 146 S.E.2d at 484-86 (final emphasis added).

With respect to the statutory language setting out the fifth calculation method, the Court of Appeals, 122 N.C. App. at 684, 471 S.E.2d at 445, relied on its opinion in *Holloway* as follows: " '[The statute's] language could hardly be more clear: the test is what the claimant would have earned if he had not been injured. . . . The statute does not refer to what he would have earned "in the same employment." ' " *Holloway*, 111 N.C. App. at 198, 431 S.E.2d at 885 (quoting 5 Arthur Larson, *Larson's Workers' Compensation Law* § 60.31(c), at 10-748 (1993)). This acceptance of Professor Larson's construction of the statute is contrary to the analysis in *Barnhardt* as set forth above and to the holding of *Barnhardt* which disallows the combining of earnings from the employment which produced the injury "with those from *any other employment.*" *Barnhardt*, 266 N.C. at 429, 146 S.E.2d at 486 (emphasis added). This holding makes no distinction between the concurrent employment involved in *Barnhardt* and sporadic, seasonal employment such as we have in the instant case. Accordingly, we hold that the definition of "average weekly wages" and the range of alternatives set forth in the five methods of computing such wages, as specified in the first two paragraphs of N.C.G.S. § 97-2(5), do not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured. The decision of the Court of Appeals in *Holloway*, to the extent it is inconsistent with *Barnhardt* and this decision, is overruled.

We therefore reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Industrial Commission for reinstatement of its award based upon the Form 21 agreement.

REVERSED AND REMANDED.

BALTER v. GENERAL ELECTRIC CO.

No. 322P97

Case below: 126 N.C.App. 634

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

BELLSOUTH TELECOMMUNICATIONS v. N.C. DEPT. OF REVENUE

No. 316P97

Case below: 126 N.C.App. 409

Petition by petitioner (Bellsouth) for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

BRING v. N.C. STATE BAR

No. 355PA97

Case below: 126 N.C.App. 655

Motion by respondent (N.C. State Bar) to dismiss the appeal for lack of substantial constitutional question denied 4 September 1997. Petition by petitioner (Ellen Bring) for discretionary review pursuant to G.S. 7A-31 allowed 4 September 1997.

COLDWELL BANKER ALAMANCE REALTY v. HUFFMAN

No. 226P97

Case below: 125 N.C.App. 742

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

COOPERATIVE WAREHOUSE, INC. v. CARDINAL CHEMICALS, INC.

No. 240P97

Case below: 126 N.C.App. 223

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997. Motion by defendant (Cardinal) to dismiss appeal for lack of substantial constitutional question allowed 4 September 1997.

DAVIS v. N.C. DEPT. OF HUMAN RESOURCES

No. 314A97

Case below: 126 N.C.App. 383

Petition by petitioner (Haywood Davis) 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 is deemed a petition for writ of certiorari and is allowed 4 September 1997. Motion by respondant (NCDHR) to dismiss petitioner's petition for discretionary review as to additional issues denied 4 September 1997.

IN RE AERIAL DEVICES, INC.

No. 324P97

Case below: 126 N.C.App. 709

Petition by appellant (Aerial Devices, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

IN RE APPLICATION BY C & P ENTERPRISES, INC.

No. 347P97

Case below: 126 N.C.App. 495

Petition by petitioner (C&P Enterprises) for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

IN RE DOE

No. 306P97

Case below: 126 N.C.App. 401

Petition by petitioner (Jane Doe) for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

KNIGHT PUBLISHING CO. v. CHASE MANHATTAN BANK

No. 70P97

Case below: 346 N.C. 280
125 N.C.App. 1

Motion by defendant to suspend the Rules of Appellate Procedure in order to reconsider petition for discretionary review dismissed 4 September 1997. Motion by plaintiff to suspend rules in order to reconsider petition for discretionary review dismissed 4 September 1997.

LASSITER v. ENGLISH

No. 301P97

Case below: 126 N.C.App. 489

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

MCALLISTER v. HA

No. 298PA97

Case below: 126 N.C.App. 326

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 September 1997.

MORETZ v. MILLER

No. 335P97

Case below: 126 N.C.App. 514

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997. Justice Webb recused.

N.C. DEPT. OF ADMINISTRATION v. SHAW FOOD SERVICES

No. 411PA97

Case below: Court of Appeals, P97-421

Petition by Attorney General for writ of certiorari to review the order of the North Carolina Court of Appeals allowed 4 September 1997. Petition by Attorney General for writ of supersedeas allowed 4 September 1997.

N.C. FARM BUREAU MUT. INS. CO. v. BOST

No. 217P97

Case below: 126 N.C.App. 42

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

PINE KNOLL ASSN. v. CARDON

No. 251P97

Case below: 126 N.C.App. 155

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

ROBBINS v. FREEMAN

No. 416PA97

Case below: 127 N.C.App. 162

Motion by Attorney General for temporary stay allowed 28 August 1997.

ROBERTSON v. ROBERTSON

No. 295P97

Case below: 126 N.C.App. 298

Petition by respondents (Marion Robertson et al) for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

STATE v. ANDERSON

No. 370P97

Case below: 126 N.C.App. 635

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 4 September 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

STATE v. CRANFORD

No. 396P97

Case below: 127 N.C.App. 210

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

STATE v. FLOWERS

No. 553A94

Case below: Rowan County Superior Court

Defendant's motion to dismiss his present counsel is allowed for the limited purpose of entering the following order: "This case is remanded to the Superior Court, Rowan County, for the purpose of conducting an evidentiary hearing pursuant to N.C.G.S. § 7A-457 and § 15A-1242 to determine whether the defendant is making a knowing and intelligent waiver of his right to counsel. Present counsel shall continue to represent the defendant through said hearing and the entry of an order making the findings and conclusions required by said statutes." By the Court in conference, this the 4th day of September 1997.

STATE v. GOODE

No. 10A94-2

Case below: Johnston County Superior Court

Petition by defendant for writ of supersedeas denied 4 September 1997.

STATE v. JONES

No. 395A91-4

Case below: Wake County Superior Court

Motion by defendant (Jones) to hold petition for writ of certiorari/supersedeas in abeyance allowed 4 September 1997.

STATE v. MARLEY

No. 351P97

Case below: 126 N.C.App. 832

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

STATE v. McHONE

No. 148A91-2

Case below: Surry County Superior Court

Motion by Attorney General to vacate certiorari review for defendant's failure to timely file brief denied 4 September 1997.

STATE v. ROUSE

No. 120A92-2

Case below: Randolph County Superior Court

Motion by defendant (Rouse) to hold petition for writ of certiorari in abeyance allowed 4 September 1997.

STATE v. SMITH

No. 374P97

Case below: 126 N.C.App. 832

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

STATE v. WILLIAMSON

No. 312PA97

Case below: 126 N.C.App. 439

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question denied 4 September 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 September 1997.

STATE AUTO INS. COS. v. McCLAMROCH

No. 326P97

Case below: 124 N.C.App. 461

Petition by appellants (the Kaplans) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 September 1997.

UNITED SERVICES AUTOMOBILE ASSN. v. SIMPSON

No. 309P97

Case below: 126 N.C.App. 393

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

U.S. FIDELITY AND GUAR. CO. v. COUNTRY CLUB OF JOHNSTON COUNTY

No. 344P97

Case below: 126 N.C.App. 633

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

VIRMANI v. PRESBYTERIAN HEALTH SERVICES CORP.

No. 62P97

Case below: 127 N.C.App. 71

Motion by defendant for temporary stay allowed 26 August 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997. Petition by defendant for writ of supersedeas denied 4 September 1997.

VSA, INC. v. OFFERMAN

No. 319PA97

Case below: 126 N.C.App. 421

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 4 September 1997.

WORTHINGTON FARMS v. FLAKE

No. 315P97

Case below: 126 N.C.App. 439

Petition by defendant and third party plaintiff (Lurae Flake) for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

YELVERTON v. BRIGHTHURST/BISHOPS RIDGE CONDOMINIUM ASSN.

No. 343P97

Case below: 126 N.C.App. 634

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 September 1997.

STATE OF NORTH CAROLINA v. WILLIAM ROBERT GRAY, JR.

No. 556A93

(Filed 3 October 1997)

1. Criminal Law § 402 (NCI4th Rev.)— capital murder—pretrial remarks by court to jury—introduction of court reporter—possibility of appeal—jury not relieved of responsibility

The trial court did not err in a capital first-degree murder prosecution in its pretrial instruction to the jury on court procedures by introducing the court reporter, indicating that she was appointed by the senior resident judge, and stating that it was her duty to take down and transcribe everything said during the trial and motions so that it could be reviewed by the judge or the Supreme Court should it be appealed. This statement did not imply to the jury that the Supreme Court would correct any errors the jury might make.

Am Jur 2d, Trial § 285.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities. 10 ALR5th 700.

2. Jury § 120 (NCI4th)— capital murder—jury selection—leading questions—no error

The trial court did not err in a capital first-degree murder prosecution in allowing the State to use leading questions during the jury *voir dire*. Although leading questions should not in most cases be used when testimony is being offered to a jury, it is not error to allow such questions at *voir dire*.

Am Jur 2d, Jury §§ 190, 191, 193, 194, 210.

3. Jury § 229 (NCI4th)— capital murder—voir dire—feelings about death penalty—potential juror excused—no error

The trial court did not err during *voir dire* for a capital first-degree murder prosecution by excusing a potential juror who said on questioning by the prosecutor that his feelings about the death penalty would prevent him from considering it; said on questioning by the defendant that he could follow the court's

instructions in regard to the death penalty; said on further questioning by the State that he did not think his feelings would completely block him from considering the death penalty but that they would hinder him from doing so; said that he would not automatically vote against the death penalty but that he did not think he could come into the courtroom and look the defendant in the eye and say he had voted for the death penalty; and said in response to the court that he would be unable to render a verdict with respect to the charge in accordance with the law both as to the guilt-innocence and penalty phases. The colloquy with the potential juror amply supports a finding that his views could substantially impair the performance of his duties as a juror.

Am Jur 2d, Jury §§ 160, 177, 226.

Comment note: beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR3d 172.

4. Jury § 229 (NCI4th)— capital murder—voir dire—feelings about death penalty—bias of juror—trial court's judgment

The trial court did not err during *voir dire* for a capital first-degree murder prosecution by excusing a potential juror who made contradictory statements regarding capital punishment. Where a prospective juror's bias may not be proven with unmistakable clarity, the trial judge's judgment must be depended upon in determining whether the prospective juror would be able to follow the law impartially. The superior court judge was in the best position to judge the bias of the juror and there was an ample showing of bias to support his conclusion.

Am Jur 2d, Jury §§ 160, 177, 226.

Comment note: beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR3d 172.

5. Jury § 227 (NCI4th)— capital murder—voir dire—feelings about death penalty—juror excused—no error

The trial court did not err during *voir dire* for a capital first-degree murder prosecution by excusing a potential juror who said he believed in the death penalty only for a second offense and that he would not impose it for a first murder; said that he would follow the court's instructions when questioned by defendant; and reiterated that he would not impose the death penalty for a first offense of murder when questioned by the court.

Am Jur 2d, Jury §§ 160, 177, 226.

Comment note: beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR3d 172.

6. Jury § 219 (NCI4th)— capital murder—voir dire—potential jurors who would never vote for death penalty—excused—no error

The trial court did not err during *voir dire* for a capital first-degree murder prosecution by excusing potential jurors who said they believed in the death penalty but would not vote to impose it on another human being or who said they would always vote for life in prison and never vote for the death penalty.

Am Jur 2d, Jury §§ 160, 177, 226.

Comment note: beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR3d 172.

7. Constitutional Law § 342 (NCI4th)— capital murder—order for subpoenas duces tecum—defendant not present—no violation of constitutional rights

The constitutional and statutory rights of a defendant in a capital first-degree murder prosecution were not violated by the

trial court's *ex parte* issuance of subpoenas *duces tecum* to the North Carolina Department of Revenue for defendant's intangibles tax documentation, returns and account information. The issuance of the subpoenas and the order were the gathering of evidence for use at trial and were not stages of the trial which entitled the defendant or his attorney to be present. A defendant does not have the right to be present as the State gathers its evidence.

Am Jur 2d, Judges § 169; Motion, Rules, and Orders § 33.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness. 82 ALR4th 567.

8. Homicide § 603 (NCI4th)— capital murder—jury charge on self-defense—not given—no error

The trial court did not err in a capital prosecution for first-degree murder by refusing to charge on self-defense where all of the evidence which would exculpate defendant showed that the shooting was accidental.

Am Jur 2d, Homicide §§ 140 et seq., 249, 529; Trial § 830.

Homicide: burden of proof on defense that killing was accidental. 63 ALR3d 936.

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

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

9. Evidence and Witnesses § 1064 (NCI4th)— capital murder—instructions—flight—not evidence of premeditation and deliberation

There was no plain error in a capital prosecution for first-degree murder where defendant contends that the court allowed evidence of flight to be used as evidence of premeditation and deliberation by not giving the portion of the pattern jury instruc-

tion which said that the evidence could not be so used. The court charged the jury that it could consider evidence of flight as showing a consciousness of guilt, which is a correct statement of law, and did not say that the jury could consider evidence of flight as evidence of premeditation and deliberation. It is speculative as to whether the jury took this to mean it could consider the evidence in that way.

Am Jur 2d, Homicide § 319; Trial § 1333.

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

10. Evidence and Witnesses § 90 (NCI4th)— capital murder—deposit ticket and cash register tape—victim's purchase of stun-gun—excluded—no error

The trial court did not err in a capital prosecution for first-degree murder by excluding from evidence a deposit ticket and cash register tape which defendant contends were some proof that the victim, his wife, had purchased a stun-gun where a stun-gun was found next to the body, a pathologist testified that the victim had been shot in the face with the stun-gun, and defendant attempted to prove that his wife first had possession of the stun-gun. There was no connection between the proffered evidence and the fact to be proved; the evidence did not show that the sale was to a woman, that it was made to the victim, or that there was a sale of a stun-gun. There was as much chance of confusion if the evidence had been introduced as there was that any fact would have been proved. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 324 et seq.; Homicide § 560; Trial § 1965.

11. Evidence and Witnesses § 3096 (NCI4th)— capital murder—recording of conversation between defendant and victim—denied by defendant—motive—not collateral

The trial court did not err in a capital prosecution for first-degree murder by allowing the State to play for the jury on rebuttal a recording of a telephone conversation between defendant and his wife, the victim, where defendant had at first denied asking his wife about some bonds, then said that he could not remember it. Defendant argued that the question concerning the bonds was designed to impeach him on a collateral matter and

that the State was bound by his answer. However, the recording showed defendant's motive for the murder and was not for impeachment purposes only. Although it contained a reference to the "physical harm" defendant had done to the victim which probably should have been excluded, there was substantial other evidence of harm the defendant had done to his wife.

Am Jur 2d, Evidence §§ 1234-1236; Trial §§ 365, 367, 370.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR3d 598.

Right of accused in state courts to inspection or disclosure of tape recording of his own statements. 10 ALR4th 1092.

Admissibility of tape recording or transcript of "911" emergency telephone call. 3 ALR5th 784.

12. **Criminal Law § 116 (NCI4th Rev.); Evidence and Witnesses § 762 (NCI4th)— capital murder—affidavit in which defendant's son lied—read at bond hearing—discoverable at trial—cumulative—no prejudice**

There was no prejudicial error in a capital prosecution for first-degree murder in the trial court requiring that defendant furnish the State an affidavit made by his son and to the reading of the affidavit by the jury where the son testified that his father had called him and his sister into the bathroom after the shooting and told them their mother had suffered an accident but that no one would believe him; told them to tell anyone who asked that their father was in the bathtub at the time of the shooting; the son gave an affidavit in which he said his father was in the bathtub at the time the victim was shot; and defendant's attorney read the affidavit at a bond hearing. Assuming the affidavit was not discoverable under N.C.G.S. § 15A-906, defendant waived his right not to produce it when his attorney read it at the bond hearing. As to its admission into evidence, it could not have prejudiced defendant because defendant and his son had testified that defendant had told his son to lie and the affidavit could only have been cumulative evidence of what was not in dispute.

Am Jur 2d, Evidence §§ 1115, 1260, 1261.

Admissibility of affidavit to impeach witness. 14 ALR4th 828.

13. Evidence and Witnesses § 1256 (NCI4th)— capital murder—right to counsel invoked—subsequent question by jailer—not designed to elicit incriminating testimony

The trial court did not err in a capital prosecution for first-degree murder by not excluding testimony from a jailer that he had asked defendant if there was anything else he could do for defendant as he was putting him in his cell and that defendant had replied, "No. At least now I can get a good night's sleep." Although defendant argues that this colloquy should have been excluded because it came after he had invoked his right to counsel, the question by the jailer was not designed to elicit incriminating evidence and the testimony was properly admitted.

Am Jur 2d, Evidence §§ 870 et seq.; Homicide § 338; Trial §§ 1353, 1357.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods. 43 ALR3d 1375.

14. Criminal Law § 1338 (NCI4th Rev.)— capital sentencing—pending misdemeanor warrants—admissible

The trial court did not err during a capital sentencing hearing by admitting into evidence four misdemeanor warrants charging defendant with false imprisonment, assault on a female, communicating threats, and attempted assault with a deadly weapon. Defendant contends that the warrants contain hearsay testimony, but the Rules of Evidence do not apply in capital sentencing proceedings and the evidence on the warrants that charges were pending against defendant and that his wife would be a witness against him was probative of the aggravating circumstance that defendant killed a witness against him. N.C.G.S. § 15A-2000(a)(3).

Am Jur 2d, Homicide § 554.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 ALR3d 1291.

15. Evidence and Witnesses § 876 (NCI4th)— capital murder—statements of victim—state of mind—admissible

The trial court did not err in a capital murder prosecution by admitting as a state of mind exception to the hearsay rule testimony from several witnesses as to what the victim told them.

Each of the witnesses testified that the victim was in fear for her life, the factual circumstances surrounding her statements of emotion serve only to demonstrate the basis for the emotions, each of the witnesses testified that the victim had stated with specific reason and generally that she was scared of defendant, a searching *voir dire* of each witness took place where appropriate, and the jury was properly instructed that it was to consider the testimony only for the purpose of showing the victim's state of mind. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence §§ 667, 696.

Residual hearsay exception where declarant unavailable: uniform evidence Rule 804(b)(5). 75 ALR4th 199.

16. Criminal Law § 470 (NCI4th Rev.)— capital murder—prosecutor's argument—prior acts of violence against victim

There was no error in closing arguments in a capital murder prosecution where the prosecutor argued defendant's prior acts of violence against his wife, the murder victim, as substantive evidence even though some evidence of the incidents had been admitted to show the victim's state of mind. Evidence of the choking incident and sexual assault came in under another hearsay exception during the testimony of the victim's doctor, and evidence concerning a choking incident and the stealing of the victim's Jeep were testified to by defendant himself.

Am Jur 2d, Homicide § 573; Trial § 496.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

17. Evidence and Witnesses § 1006 (NCI4th)— capital murder—victim's statements—residual hearsay exception—no plain error

There was no plain error in a capital prosecution for first-degree murder where the court admitted testimony that the victim had told the witness that defendant had attempted to rape her in front of her children, defendant objected to the word rape, the court told the jury to use the word "attack"; and the witness also testified that the deceased had told her that defendant had followed her, harassed her, and told her he would kill her.

Am Jur 2d, Homicide § 573; Evidence §§ 667, 696; Trial § 496.

Residual hearsay exception where declarant unavailable: uniform evidence Rule 804(b)(5). 75 ALR4th 199.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

18. Evidence and Witnesses § 1006 (NCI4th)— capital murder—prior acts of violence toward victim—statements of victim—residual hearsay exception

The trial court did not err in a capital prosecution for first-degree murder by admitting under the residual hearsay exception testimony that the victim had displayed a bruise on her hip and had told the witness that defendant, her estranged husband, had forced his way into her apartment, pushed her against a wall, and attempted to force her head into a toilet. The statements had guarantees of trustworthiness in that the alleged action of defendant was consistent with other evidence; the proffered statements were evidence of defendant's intent, a material fact; this testimony as to defendant pushing the victim against the wall was more probative than other evidence on this point; the testimony involved principally factual matters and would not have been admitted under the state of mind exception; the testimony was relevant to matters involved in the case; and the interests of justice were served by its admission. N.C.G.S. § 8C-1, Rule 804(b).

Am Jur 2d, Homicide § 573; Evidence §§ 667, 696; Trial § 496.

Residual hearsay exception where declarant unavailable: uniform evidence Rule 804(b)(5). 75 ALR4th 199.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

19. Evidence and Witnesses § 961 (NCI4th)— capital murder—prior acts of violence—victim's statements to doctor outside office—medical treatment exception

There was no plain error in a prosecution for first-degree murder in the admission of the testimony of the victim's doctor, accepted as a expert in obstetrics and gynecology, who testified that the victim came to see him at his home and told him that defendant had tried to choke her to the point of almost passing

out, that defendant had tried to sexually assault her, that defendant had said, "I could have killed you if I wanted to," during which time the children were screaming and saying "Stop Daddy. Don't hurt her," and that the victim on a subsequent visit had told him that she and defendant had been seeing a marriage counselor but that the counselor had stopped seeing them because she was afraid of defendant. The doctor examined the victim's physical condition and suggested that she go to the hospital, a medical recommendation which was treatment even though he was not in his office, and most of the testimony was admissible as statements made for the purpose of medical treatment. The testimony concerning the children screaming and the marriage counselor probably should have been excluded if an objection had been made, but does not rise to the level of plain error.

Am Jur 2d, Homicide § 573; Evidence §§ 667, 696; Trial § 496.

Residual hearsay exception where declarant unavailable: uniform evidence Rule 804(b)(5). 75 ALR4th 199.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

20. Evidence and Witnesses § 945 (NCI4th)— capital murder—statements from victim during crime—integral and natural part of account of crime

The trial court did not err in a capital first-degree murder prosecution by admitting testimony from a jogger that the victim had said, while defendant was holding her on the ground, "Mister, please don't leave. If you leave, he'll kill me." Evidence which is so intertwined with the evidence of the commission of a crime that it forms an integral and natural part of the account of the crime is admissible.

Am Jur 2d, Homicide § 573; Evidence §§ 667, 696; Trial § 496.

Residual hearsay exception where declarant unavailable: uniform evidence Rule 804(b)(5). 75 ALR4th 199.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

21. Criminal Law § 475 (NCI4th Rev.)— capital murder—prosecutor's argument—flight

There was no gross impropriety requiring intervention *ex mero motu* in the prosecutor's argument in a capital first-degree murder prosecution where defendant contended that the prosecutor improperly argued flight as proof of premeditation and deliberation. It was not clear that the district attorney was referring to flight when he mentioned premeditation and deliberation.

Am Jur 2d, Homicide § 319; Trial § 1333.

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

22. Appeal and Error § 362 (NCI4th)— capital murder—verdict sheet lost—evidence sufficient to determine appeal

The record was sufficient to determine the appeal in a capital prosecution for first-degree murder where the verdict sheet was lost in the office of the clerk of superior court. Although defendant argues that there is no way to determine whether the verdict was properly returned in the absence of a valid verdict sheet, and there are cases holding that the appeal may be dismissed if the verdict sheet is not included in the record, the transcript here reveals that the judge and the clerk examined the verdict sheet after it was taken by the bailiff from the jury and that each juror was polled. There can be no doubt that the jury found defendant guilty of first-degree murder.

Am Jur 2d, Appellate Review § 742; Criminal Law §§ 81, 304.

23. Criminal Law § 78 (NCI4th Rev.)— capital murder—motion for change of venue or special venire—pretrial publicity

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion for a change of venue or for a special venire where a newspaper account, although erroneous, was not prejudicial in that it did not contain any false information that was prejudicial; a television program which reported that one of defendant's attorneys had been shot by his wife could not have prejudiced defendant; and there was a vigorous cross-examination of a polling expert who testified that defendant could not get a fair trial in the county, particularly on

the ability of the respondents in the polls to understand the meaning of a "fair trial." The burden was on defendant to show prejudice and the court could have felt that defendant had not carried his burden.

Am Jur 2d, Criminal Law §§ 378, 380-390; Homicide § 204; Venue §§ 58 et seq.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 34 ALR3d 804.

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

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 ALR3d 760.

24. Arrest and Bail § 63 (NCI4th); Searches and Seizures § 48 (NCI4th); Constitutional Law § 262 (NCI4th)— capital murder—statements to law enforcement officers—admissible

There was no error in a capital prosecution for first-degree murder in the denial of defendant's motion to suppress all of his statements to law enforcement officers and items gathered in a search of his home where defendant contended that he was arrested without probable cause and that his statements should have been suppressed, but officers found the victim's body at the scene when they arrived and a neighbor told them that defendant had killed his wife, so that they had probable cause to arrest; defendant contended that entry into his home without a warrant was illegal, requiring his statements to be suppressed, but he came to the door armed with a pistol which was later found to be a toy, an exigent circumstance which justified entry into the house without a search warrant to arrest defendant; and defendant contends that his request for counsel in his home was ignored, but a neighbor and member of the bar was outside defendant's home as he was being taken to police headquarters, defendant requested that the neighbor represent him, an officer notified the neighbor of the request, and the neighbor followed defendant to the police station and remained with defendant during the police interrogation.

Am Jur 2d, Arrest §§ 42-45.

25. Criminal Law § 1369 (NCI4th Rev.)— capital sentencing—murder of spouse during divorce proceeding—pending misdemeanor warrants—two circumstances

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstances that the murder was committed to disrupt or hinder the lawful exercise of a governmental function and that the murder was committed against this victim because of the exercise of her official duty as a witness. Although the same evidence cannot be used to support two aggravating circumstances, the circumstance dealing with disrupting or hindering a governmental function was supported by evidence that defendant had been served with a show cause order for an accounting of marital monies in a divorce action which was returnable a few days after the murder. That evidence did not support the circumstance that the victim was to be a witness in a criminal case, and the evidence that the victim had sworn out warrants and was to be a witness against defendant did not support the circumstance that the murder disrupted a civil proceeding. The court adequately explained to the jury how to consider the evidence by defining the two aggravating circumstances and explaining the evidence supporting each of them. N.C.G.S. § 15A-2000(e)(7); N.C.G.S. § 15A-2000(e)(8).

Am Jur 2d, Criminal Law §§ 598, 599.

26. Criminal Law § 1372 (NCI4th Rev.)— capital sentencing—aggravating circumstances—especially heinous, atrocious or cruel—evidence sufficient

There was sufficient evidence in a capital sentencing proceeding to submit the especially heinous, atrocious, or cruel aggravating circumstance where the victim was defendant's wife; he abused her psychologically and physically, stalked her, and stated that he could kill her; she was afraid that he would do so; she was stung with a stun-gun and pistol whipped prior to being shot; and defendant left her in her last moments aware of her impending death but unable to do anything about it.

Am Jur 2d, Criminal Law §§ 598, 599.

27. Criminal Law § 1369 (NCI4th Rev.)— capital sentencing—aggravating circumstances—victim's role as witness

There was sufficient evidence in a capital sentencing proceeding to submit the aggravating circumstance that the murder

was committed because of the victim's role as a witness where the State introduced four criminal warrants against defendant which were based on acts of violence against the victim, with the victim listed as the complainant on each warrant. The jury could find from this evidence that the victim had procured warrants against him or that she was waiting to testify against him and that one of the reasons defendant killed her was because she had warrants issued against him. Procuring a warrant and waiting to testify constitute the performance of an official duty of a witness. N.C.G.S. § 15A-2000(e)(8).

Am Jur 2d, Criminal Law §§ 598, 599.

28. Criminal Law § 1369 (NCI4th Rev.)— capital sentencing—aggravating circumstance—disruption of government function—evidence sufficient

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that the murder was committed to disrupt or hinder the lawful exercise of a governmental function where defendant and his wife were engaged in a bitter divorce action; defendant was determined that his wife would get nothing from the marriage; he had liquidated marital property and put the proceeds in his name; and he would not answer interrogatories. The jury could reasonably find that one reason he killed his wife was to stop this action against him. N.C.G.S. § 15A-2000(e)(7).

Am Jur 2d, Criminal Law §§ 598, 599.

29. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—instructions—statutory mitigating circumstances—weight

The trial court did not err in a capital sentencing proceeding by charging the jury as to statutory mitigating circumstances that they had mitigating value but that the weight to give those circumstances is up to the jury. Although defendant contends that the jury should have been told that it must give mitigating circumstances some weight, the instruction given complied with *State v. Fullwood*, 323 N.C. 371, and was not like *State v. Jaynes*, 342 N.C. 249.

Am Jur 2d, Criminal Law §§ 598, 599.

30. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—mitigating circumstance—ability to adjust well and be of service in prison—not submitted—no prejudice

There was no prejudicial error in a capital sentencing proceeding in not submitting as a mitigating circumstance that the defendant has demonstrated an ability to adjust well in prison and could be of service to fellow prisoners by working as a dental assistant where the evidence supporting the proposed mitigating circumstance was tenuous at best, the jury found as a mitigating circumstance that defendant had exhibited good conduct while in jail, and the jury did not find the catch-all mitigating circumstance. The jury was able to consider defendant's evidence under the circumstances submitted; if it did not consider defendant's conduct in jail sufficient to outweigh the aggravating circumstances, it is not likely it would have thought his potential conduct in prison would outweigh the aggravating circumstances.

Am Jur 2d, Criminal Law §§ 598, 599.

31. Criminal Law § 448 (NCI4th Rev.)— capital murder—prosecutor's argument—jury's duty—violent crimes—not grossly improper

A prosecutor's jury argument in a capital first-degree murder prosecution was not so grossly improper as to require intervention *ex mero motu* where the prosecutor argued that the jurors should take seriously the obligation to do something about violent crimes. This was part of the district attorney's general remarks at the opening of his summation which emphasized the duties of the jurors and did not ask the jury to convict defendant because of public sentiment against crime.

Am Jur 2d, Trial §§ 567 et seq.

32. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—age, status, size of defendant—not grossly improper

A prosecutor's jury argument that a first-degree murder defendant's age, status, and size should be considered in determining whether he should receive the death sentence was not so grossly improper as to require intervention *ex mero motu*; the character of the defendant is relevant in determining whether the death penalty should be imposed.

Am Jur 2d, Trial §§ 572, 573.

33. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—defendant's character and status—no gross impropriety

A district attorney's argument in a capital sentencing proceeding was not so grossly improper as to require intervention *ex mero motu* where defendant contended that the district attorney injected arbitrary factors by arguing the defendant's character, including that he had his children lie for him, his privileged status in the community, his love of money, his self-control, and the extent of his remorse. These are matters which bear on defendant's blameworthiness and, during the penalty phase of a capital trial, the emphasis is on the character of defendant and the circumstances of the crime.

Am Jur 2d, Trial §§ 572, 573.

34. Criminal Law § 475 (NCI4th Rev.)— capital sentencing—prosecutor's argument—flight—no error

The trial court did not err in a capital prosecution for first-degree murder by allowing the district attorney to argue flight where the district attorney did not argue that the jury could consider flight as evidence of premeditation and deliberation.

Am Jur 2d, Trial § 609.

35. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—aggravating circumstances—victim as witness in civil and criminal cases

There was no error in a capital sentencing proceeding where the district attorney argued that the victim's status as a witness in civil and criminal cases could be considered as evidence of two aggravating circumstances.

Am Jur 2d, Trial §§ 572, 573.

36. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—nonstatutory mitigating circumstances—weight

There was no error in a capital sentencing proceeding where the district attorney argued that the jury should give no weight to nonstatutory mitigating circumstances.

Am Jur 2d, Trial §§ 572, 573.

37. Criminal Law § 448 (NCI4th Rev.)— capital murder—prosecutor's argument—applying existing law

There was no error in a capital prosecution for first-degree murder where the prosecutor argued that we must live under the laws we have until a time comes when we no longer need laws; he did not request that the jury apply a higher law or imply that the State's case was divinely inspired.

Am Jur 2d, Trial § 643.

38. Criminal Law §§ 1390, 1392 (NCI4th Rev.)— capital sentencing—mitigating circumstances—instructions—confusion corrected—no error

There was no error in a capital sentencing proceeding where the court submitted to the jury the nonstatutory circumstance that defendant led an uneventful, law-abiding life for 42 years and also submitted the statutory mitigating circumstance as to defendant's age, realized the mistake and told the jury that the nonstatutory mitigator had been confused with the statutory age mitigator, asked the jury to strike anything that had been said about the nonstatutory mitigator and correctly charged on it, then charged on the age mitigator without telling the jury not to consider defendant's lifestyle when considering this mitigator. Although defendant argues that the court confused the jury by mixing the nonstatutory mitigator with the statutory age mitigator and not telling the jury not to consider defendant's lifestyle, the court correctly charged the jury and it should have had no trouble applying the law to the evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

39. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—mitigating circumstances—lack of prior criminal activity—no error

The trial court did not err in a capital sentencing proceeding by charging on the mitigating circumstance that defendant has no significant history of prior criminal activity where defendant had no convictions, but there was evidence that he had committed crimes (assaults) against his wife, the murder victim, for which he had been charged. Although defendant said that the charge garbled the burden of proof, the court charged the jury that it must find the facts beyond a reasonable doubt and the only facts to which the court could have been referring involved the crimi-

nal charges. The court charged the jury that if one or more jurors found the mitigating circumstance to exist, the foreman could write yes in the space provided; this was not an incorrect placing of the burden of proof. Furthermore, the court should have resolved any question the jury might have had in the subsequent charge; the jury was bound to have known that it must find the circumstance if it did not find the assaults. Although defendant argues that the jury was never told that the State had the burden of proving the assaults or that defendant was presumed to be innocent, these considerations were covered when the jury was told it had to be satisfied beyond a reasonable doubt in order to find the assaults. Finally, although defendant says that the references were to unspecified assaults, there was evidence of several assaults during the guilt-innocence phase of the trial and the jury's decision not to find this circumstance is supported by its reliance on one or more of them.

Am Jur 2d, Criminal Law §§ 598, 599.

40. Criminal Law § 1370 (NCI4th Rev.)— capital sentencing—especially heinous, atrocious, or cruel aggravating circumstance—not unconstitutionally vague

The aggravating circumstance that a murder was especially heinous, atrocious, or cruel is not unconstitutionally vague and overbroad as developed in North Carolina and applied in this case.

Am Jur 2d, Criminal Law §§ 598, 599.

41. Jury § 141 (NCI4th)— capital murder—jury selection—questions concerning parole eligibility

The trial court did not err during jury selection for a first-degree murder prosecution by not allowing defendant to question prospective jurors about their conceptions of parole eligibility for a person sentenced to life in prison.

Am Jur 2d, Jury §§ 206-208.

42. Jury § 262 (NCI4th)— capital murder—jury selection—peremptory challenges—reservations concerning death penalty

There was no error in a capital prosecution for first-degree murder in allowing the district attorney to exercise peremptory

challenges against prospective jurors who had reservations about the death penalty.

Am Jur 2d, Jury §§ 234 et seq.

43. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A sentence of death was not disproportionate where the evidence supports the aggravating and mitigating circumstances, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, this case is distinguishable from the seven cases in which a death penalty was found disproportionate because only two of those cases involved multiple aggravating circumstances and in none were three or more found; in only two was the especially heinous, atrocious, or cruel circumstance found by the jury and this case resembles neither because the defendant here was an adult, the jury specifically rejected the mitigating circumstance of impaired capacity, defendant did not try to aid the victim, he did not confess, and the transcript reflects numerous motives. While witness elimination was not the only reason for this murder, it must be given heavy weight in a proportionality review. As in *State v. Alston*, 341 N.C. 198, defendant intimidated the victim for several months, assaulting her on several occasions, until he shot her to death. The jury considered mitigating circumstances which reflected defendant's life prior to his difficulties with his wife; the penalty is not disproportionate because the jury did not find that these circumstances outweighed the aggravating circumstances. Defendant executed his wife, a person he should have protected, in a callous way. The sentence was proportionate.

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 Wright, J., at the 1 November 1993 Criminal Session of Superior Court, Lenoir County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 8 April 1996.

The evidence showed that the defendant and the victim, his wife, were separated and engaged in a bitter divorce action involving child custody and equitable distribution. There was evidence of numerous assaults on the victim by the defendant prior to their separation and afterwards. The defendant had allegedly sexually

assaulted the victim, choked her to the point of near unconsciousness, and stalked her.

On 24 November 1992, the victim went to the defendant's house to leave their children after they had visited with her. The defendant went outside and got into the victim's Jeep. An eyewitness, who had been jogging on the street in front of the defendant's house, testified that he observed a Jeep in the street. He heard screaming and yelling coming from the Jeep. He saw a woman break from the Jeep and run up the driveway. The man, whom the witness identified as the defendant, also ran from the vehicle. The defendant then tackled the woman and straddled her. The two people were on the ground struggling, with the defendant on top of the victim. The witness stopped and asked what was going on, and the defendant told him to leave. The victim said, "Mister, please don't leave. If you leave, he'll kill me." The jogger then heard a shot, and the defendant ran behind the house.

The victim was shot in the head. She died from this wound. The victim also suffered injuries from a stun-gun and a beating apparently with the butt of a pistol. The defendant contended that the victim was in possession of the stun-gun and that she had attempted to use it on him. The defendant stated that he threw the stun-gun in the bushes. It was subsequently found in the bushes beside the driveway.

The defendant first told police that he knew nothing about the incident and that he was in the bathtub at the time. He later stated that he and the victim were arguing and that the victim began to use a stun-gun on him. They struggled in the driveway, but he was only trying to subdue her so that they could talk about their divorce. After he took the stun-gun from her, he heard a click and looked to see the victim holding a gun. The gun was not yet pointed at the defendant. He pushed the gun away, and it went off.

The jury found the defendant guilty of first-degree murder with premeditation and deliberation. After a capital sentencing hearing, the jury recommended a sentence of death. Judge Wright sentenced the defendant accordingly on 16 December 1993. The defendant appeals to this Court as of right.

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

David G. Belser for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to a statement by the judge. At the opening of court and before the defendant's case was called for trial, the judge instructed the jury as to court procedures. Among the things he told them was the following:

> The Court Reporter to my right is Davette Garvin. She is appointed by Judge Llewellyn, who is your Senior Resident Judge. He is also holding civil court this morning in another courtroom. It's her duty to take down and transcribe everything that's said in the courtroom during the trial and the hearing of motions so that the judge can review, or should it be appealed, any matter to the Supreme Court in Raleigh.

The defendant contends this statement to the jury implied to the jury that this Court would review its decision and correct any errors it might make. The defendant says this would violate the defendant's rights under the Eighth Amendment to the Constitution of the United States by diluting the responsibility of the jury. *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985); *State v. White*, 286 N.C. 395, 211 S.E.2d 445 (1975).

We do not believe that the statement, made by the judge before the case was called for trial, implied to the jury that this Court would correct any errors the jury might make. This case is governed by *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), in which the court said to the jury of the court reporter, "she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County." *Id.* at 8, 372 S.E.2d at 15. We said "that this brief comment—at the outset of the trial and in the context of an explanation of the court reporter's duties—could not have influenced, adversely to defendant, the jury's perception of its responsibility for its decisions." *Id.* at 12, 372 S.E.2d at 17.

This assignment of error is overruled.

The defendant next assigns error to the allowance of challenges for cause to five prospective jurors based on their feelings about capital punishment. The defendant says these five persons were not proved to be unable to impose the death penalty and contends it was error to excuse them for cause. "[A] juror may not be challenged for cause based on his views about capital punishment unless those

views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 420, 83 L. Ed. 2d 841, 849 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)).

[2] The defendant first objects to the use of leading questions by the State at the jury *voir dire*. Leading questions should not in most cases be used when testimony is being offered to a jury. To do so allows the questioner in effect to testify to the jury. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 169 (4th ed. 1993). This consideration does not apply at a jury *voir dire*. It is not error to allow leading questions at that time.

[3] The first venireperson who the defendant says was erroneously removed was Richard Bostic. The State first questioned Mr. Bostic, and he said his feelings about the death penalty would in essence prevent him from considering it. The defendant then questioned him, and he said he could follow the court's instructions in regard to the death penalty. The State then questioned Mr. Bostic again, and he said he did not think his feelings would completely block him from considering the death penalty but that they would hinder him from doing so. He said he would not automatically vote against the death penalty, but he did not think he could come into the courtroom and look the defendant in the eye and say he had voted for the death penalty. The court then asked Mr. Bostic if he was saying he would be unable to render a verdict with respect to the charge in accordance with the law both as to the guilt-innocence and penalty phases. Mr. Bostic answered, "Yes."

The colloquy with Mr. Bostic amply supports a finding by the court that Mr. Bostic's views could substantially impair the performance of his duties as a juror. It was not error to excuse him.

[4] The next venireperson who the defendant says was improperly excused was a Ms. Hines. Ms. Hines was a nurse who said she believed in capital punishment under certain circumstances. She said, however, that her training as a nurse made her lean toward life imprisonment rather than death. She said it would not prevent her from voting for the death penalty, but it would certainly influence her decision. She then said she was not sure she could come into the courtroom and recommend a death sentence. When asked whether this meant that her feelings about the death penalty would impair her in her deliberations, she answered, "Yes." Under questioning by the

defendant's attorney, Ms. Hines said she would vote for the death penalty if the aggravating circumstances required it. Ms. Hines said in answer to a question by the court that she could render a death sentence if, under the law, it should be applied. Under further questioning by the prosecuting attorney, Ms. Hines stated she could not stand up in the courtroom and tell a man she had recommended his life be taken. She said she could not follow the instructions of the court in this regard.

The answers given by Ms. Hines illustrate the United States Supreme Court's conclusion in *Wainwright* that a prospective juror's bias may, in some instances, not be proven with unmistakable clarity. In such cases, we must depend on the trial judge's judgment in determining whether the prospective juror would be able to follow the law impartially. *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Ms. Hines made some contradictory statements. The superior court judge was in the best position to judge the bias of Ms. Hines. There was an ample showing of bias to support his conclusion. We must defer to his judgment.

[5] The next venireperson who the defendant said should not have been excused was James Bryant. When asked about his feelings in regard to the death penalty, Mr. Bryant said he believed in it only for a second offense and that he would not impose it for a first murder. When questioned by the defendant's attorney, he said he would follow the court's instructions, but when he was questioned by the court, he reiterated that he would not impose the death penalty for a first offense of murder. Mr. Bryant's answers clearly support the finding that he could not be unbiased. It was not error to remove him from the jury.

[6] The fourth juror who the defendant says was improperly excused was James Waters. Mr. Waters said he believed in the death penalty but would not vote to impose it on another human being. The fifth juror who the defendant says was improperly excused was James Blizzard. Mr. Blizzard said he would always vote for life in prison and never vote for the death penalty. It was not error to excuse Mr. Waters or Mr. Blizzard.

This assignment of error is overruled.

[7] In his next assignment of error, the defendant contends his constitutional and statutory rights were violated by a court order

requiring the production of documents. On 8 September 1993, approximately six weeks prior to the trial, the district attorney issued subpoenas *duces tecum* to the North Carolina Department of Revenue for (1) a certified copy of defendant's 1991 and 1992 intangibles tax documentation, (2) certified copies of any 1991 and 1992 tax returns by defendant as custodian of his two children, and (3) certified copies of any and all 1991 and 1992 account information pertaining to the two children. A court order was obtained on 16 September 1993 for the production of the same documents from the same source. The court order was procured *ex parte* and without the defendant or his attorney being present.

The defendant contends the granting of the order *ex parte* and without the defendant's being present (1) violated his right to be present at every stage of his trial guaranteed by Article I, Section 23 of the North Carolina Constitution; (2) violated his right to confront the witnesses against him guaranteed by the Sixth Amendment to the Constitution of the United States; (3) violated his right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States by the violation of a statute, N.C.G.S. § 15A-1241 (1988), which gives him the right to a true, complete, and accurate record of all proceedings in his trial; (4) violated his statutory right to a complete recordation of the proceedings at the trial; and (5) deprived him of his right to counsel guaranteed by the United States Constitution and the North Carolina Constitution.

The issuance of the subpoenas *duces tecum* and the issuance of the order were the gathering of evidence for use at the trial and were not stages of the trial which entitled the defendant or his attorney to be present. A defendant does not have the right to be present as the State gathers its evidence.

This assignment of error is overruled.

[8] The defendant next assigns error to the refusal of the court to charge on self-defense. He bases this contention on his testimony that as he and his wife were struggling, he turned to look at the jogger and heard a click. He looked back at his wife and saw that she had a pistol in her hand. He then testified, "my normal reflex and instincts told me to push it away, so with my right hand, I just pushed. The gun discharged when I pushed it away."

Self-defense involves an intentional act. *State v. Blankenship*, 320 N.C. 152, 357 S.E.2d 357 (1987). All the evidence which would

exculpate the defendant showed the shooting was accidental. He was not entitled to an instruction on self-defense.

This assignment of error is overruled.

[9] The next assignment of error by the defendant involves the charge to the jury. The defendant did not object to the charge at the trial but says it constitutes plain error. The court charged the jury on flight as follows:

> The State contends 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 admission or show a consciousness of guilt. However, proof of this circumstance of flight alone is not sufficient in itself to establish the defendant's guilt.

This instruction was taken from N.C.P.I.—Crim. 104.36. It did not include the following instruction which is found in the pattern instruction:

> Further, this circumstance has no bearing on the question of whether defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation and deliberation.

The defendant says that by omitting these words from the charge, the court allowed the evidence of flight to be used as evidence of premeditation and deliberation, which was error. *State v. Bolin*, 281 N.C. 415, 425, 189 S.E.2d 235, 242 (1972). He argues that this error was compounded by an argument of the prosecuting attorney in which he told the jury it could consider evidence of flight as evidence of premeditation and deliberation.

The defendant did not object to this part of the charge when it was given. He is entitled to have this assignment of error reviewed only under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). We have said, " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Id.* at 661, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

In examining this assignment of error, we note that the court did not say the jury could consider evidence of flight as evidence of premeditation and deliberation. It charged the jury that it could consider

it as showing a consciousness of guilt, which is a correct statement of the law. It is speculative as to whether the jury took this to mean it could consider this as evidence of premeditation and deliberation. We cannot hold this was plain error.

This assignment of error is overruled.

[10] In his next assignment of error, the defendant contends the court should not have excluded from evidence a deposit ticket and cash-register tape which he contends were some proof that his wife had purchased a stun-gun. A stun-gun was found a few feet from the victim's body, and a pathologist testified the victim had been shot in the face with a stun-gun. The defendant's theory was that the victim had possession of the stun-gun and attempted to shoot him with it. He was able to get the stun-gun from her, and she then drew a pistol. He attempted to push the pistol away, and it went off, killing his wife.

In an effort to prove his wife first had possession of the stun-gun, the defendant attempted to prove she had purchased it from Pappy's Army/Navy Store. The State objected to the admission of this evidence, and a hearing out of the presence of the jury was held. The manager of the store testified that the stun-gun was of the type sold in the store. He identified a deposit ticket which showed the store had received a check for $212.00 from a person named Gray on 1 October 1992 and a cash-register receipt showing that the purchase was for two items totaling $212.00. The manager testified that he did not know the defendant, and when shown a picture of Mrs. Gray, he said she looked familiar. The court excluded the deposit ticket and the cash-register receipt from evidence.

We hold it was not error to exclude this evidence. We are guided by N.C.G.S. § 8C-1, Rules 401 and 403. Rule 401 defines "relevant evidence" to be "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). Rule 403 allows a judge to exclude relevant evidence where "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).

In order to be admissible, there must be some connection between the proffered evidence and the fact to be proved. There is no

such connection here. The proffered evidence did not show that the sale was made to a woman, that it was made to the victim, or that there was a sale of a stun-gun. There was as much chance of confusion if this evidence had been introduced as there was that any fact would have been proved.

This assignment of error is overruled.

[11] By another assignment of error, the defendant contends it was error to play for the jury a recording of a telephone conversation between the defendant and his wife. The eleven-year-old son of the defendant and the victim had driven the victim's Jeep away from the victim's home. She called the defendant at his home and asked to speak to her son. The defendant would not allow her to do so. Most of the conversation between them consisted of demands by the defendant that the victim return bonds which he contended she had stolen and demands by the victim that she be allowed to speak to her son. The victim said at the end of the conversation, "Considering what you have done to me as far as the physical harm you have done to me I don't have any desire to particularly speak to you."

The State asked the defendant on cross-examination about a telephone conversation in which he asked his wife, "where are the bonds?" The defendant at first denied making such a statement and then said he did not remember it. The court allowed the State to play the recording for the jury when it was putting on its rebuttal evidence.

The defendant argues that the question on cross-examination of the defendant as to whether he had a conversation with the victim in regard to the bonds was designed to elicit impeaching testimony on a collateral matter, and the State was bound by his answer. *State v. Green*, 296 N.C. 183, 250 S.E.2d 197 (1978). He contends it was error to allow the State to introduce the recording, which impeached him by extrinsic evidence.

The difficulty with the defendant's argument is that the playing of the recording was not for impeachment purposes only. It showed his motive for the murder: his determination that his wife have no home, children, possessions, or marital money. Evidence of motive is relevant and competent. *State v. Ruof*, 296 N.C. 623, 630, 252 S.E.2d 720, 725 (1979). The statement by the victim that she had no desire to speak to him after the "physical harm" he had done to her probably should have been excluded. There was, however, substantial other

evidence of harm the defendant had done to his wife. This evidence was cumulative.

This assignment of error is overruled.

[12] The defendant next assigns error to the requirement by the court that he furnish to the State an affidavit made by his son and to the reading of the affidavit by the jury. The defendant called his son as a witness. His son testified that on the day of the incident, he and his sister had been visiting their mother. She drove them to their father's home. His father forced his way into the automobile, and his mother screamed at the defendant to get out of the automobile. The defendant's son and daughter left the automobile and entered the house. He looked out of the house and saw two people on the ground. He then heard a "loud sound."

The defendant's son testified further that a few minutes after he heard the sound, his father called him and his sister into the bathroom and told them their mother had suffered an accident but that no one would believe him. The defendant told his children to tell anyone who asked that their father was in the bathtub at the time the victim was shot.

The defendant's son had made an affidavit in which he said his father was in the bathtub at the time the victim was shot. The defendant's attorney read the affidavit at a bond hearing. After the defendant had rested his case, the prosecuting attorney moved that the defendant be required to produce the affidavit. The court ordered that this be done, and the State had it entered into evidence.

The defendant contends there were two errors committed by the court in regard to the affidavit. He says first that there was a violation of N.C.G.S. § 15A-906, which provides that statements made by defense witnesses are not discoverable. He also says it was error to admit the affidavit into evidence without a limiting instruction.

Assuming the affidavit was not discoverable under N.C.G.S. § 15A-906, the defendant waived his right not to produce the affidavit when his attorney read it at the bond hearing. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

As to the admission of the affidavit into evidence, the defendant says its only use could be to impeach the defendant's son. The defendant says, for this reason, the court should have given an instruction that the affidavit could be considered only as to whether

it impeached the witness. We note that the defendant did not request this instruction.

Again, assuming this was error, it could not have prejudiced the defendant. His son had testified the defendant had told him to lie as to what had happened. The defendant himself testified to the same effect. The introduction of the affidavit could only have been cumulative evidence of what was not in dispute.

This assignment of error is overruled.

[13] In his next assignment of error, the defendant contends the court should have excluded testimony of the jailer as to what the defendant told him as he was being put in his cell. David Heath, the jailer, testified that, as he was putting the defendant in his cell, Heath asked if there was anything else he could do for the defendant, and the defendant said, "No. At least now I can get a good night's sleep." The defendant says that this colloquy came after he had invoked his right to counsel and should have been excluded.

When a defendant invokes his right to counsel, the State may not interrogate him unless he initiates the conversation. *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). In this instance, there was not an interrogation. The question by Mr. Heath as to whether he could do anything else for the defendant was not designed to elicit incriminating evidence. *See State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 794 (1996). The testimony was properly admitted.

This assignment of error is overruled.

[14] The defendant next assigns error to the admission into evidence during the sentencing hearing of four misdemeanor warrants charging him with false imprisonment, assault on a female, communicating threats, and attempted assault with a deadly weapon. The victim had sworn to the warrants, and a magistrate had noted there was probable cause the defendant was guilty. The jackets showing the trial dates were also introduced.

The defendant says the warrants contained hearsay testimony and were not admissible as exceptions to the hearsay rule under N.C.G.S. § 8C-1, Rule 803(6) or (8). N.C.G.S. § 15A-2000(a)(3), which deals with capital sentencing proceedings, provides in part:

> 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).

This statute has been interpreted to mean the Rules of Evidence do not apply in capital sentencing proceedings. If evidence is pertinent and dependable, it should not ordinarily be excluded. *State v. Rose*, 339 N.C. 172, 200, 451 S.E.2d 211, 227 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). In this case, the evidence contained on the warrants that charges were pending against the defendant and that his wife would be a witness against him was probative of the N.C.G.S. § 15A-2000(e)(8) aggravating circumstance that defendant killed a witness against him. The jury was properly instructed to consider it in this way.

This assignment of error is overruled.

[15] The defendant next assigns error to the admission of certain testimony pursuant to N.C.G.S. § 8C-1, Rule 803(3) as a state-of-mind exception to the hearsay rule. The defendant, relying on *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600 (1994), says the testimony of certain witnesses as to what the victim told them merely recited facts and did not show the victim's state of mind. The defendant does not contend that the testimony is not otherwise admissible if the testimony shows the victim's state of mind.

The defendant first objects to the testimony of Sue Gregg Camaioni, an insurance agent and friend of the victim, who testified as to at least six conversations with the victim. She testified that, in February 1992, the victim told her that the defendant's psychological abuse made her feel as if she could no longer cope with the stress and strain of the relationship. In April of the same year, the victim said she was afraid that the defendant was also brainwashing the children. Also in April, the victim told her of an incident of sexual assault and stated that she was scared because of it. The witness also testified that at this point in time, the victim was sleeping in the victim's office. Camaioni testified that the defendant had tried to strangle the victim. She stated that she had observed the victim's bruised neck and injured eye, that the victim had stated that she felt the defendant had tried to kill her, and that the victim stated she was afraid for her life.

The witness further testified to a phone conversation in which she suggested that the victim leave town, and the victim stated that she was scared for her life but that she could not leave without her children. The defendant argues that these recitations of fact are in violation of *Hardy*.

The second witness about whose testimony the defendant complains was Betty Sue Lawson, a friend of the victim. She testified that the victim stated to Lawson that "she feared that he [the defendant] was going to kill her." Lawson said that the victim had told her of various instances of abuse. She further testified that the victim stated to her, "my husband is going to kill me. I know it for a fact. And if the police don't know who did it, I want you to go to them and tell them that he is the one who has killed me."

The defendant also objects to the testimony of Debbie Ryals, the defendant's next-door neighbor. She testified that the victim had told her that she was scared her husband would kill her before she got the children.

Finally, Randy Askew testified that he was a security guard at a mall. He stated that the victim had asked him on numerous occasions to walk her to her car at the mall. She told Askew that she needed an escort because she was in fear for her life from her husband.

We first note that in *Hardy*, relied on by the defendant, we held that diary entries were inadmissible because they contained mere recitation of facts and were totally without emotion. *Hardy*, 339 N.C. at 229, 451 S.E.2d at 612. In that case, we noted that the diary did not have statements such as "I'm frightened." *Id.* The present case is easily distinguished from *Hardy* since it contains such statements. Each of the witnesses testified as to the victim's "state of mind," that she was in fear for her life. The factual circumstances surrounding her statements of emotion serve only to demonstrate the basis for the emotions. Each of the witnesses testified that the victim had stated with specific reason and generally that she was scared of the defendant. Where appropriate, a searching *voir dire* of the witness took place. Moreover, the jury was properly instructed that it was to consider the testimony only for the purpose of showing the victim's state of mind. The evidence was admissible under the state-of-mind exception of Rule 803(3).

[16] The defendant further argues that the prosecutor improperly argued in closing arguments the defendant's acts of violence upon his

wife as substantive evidence. We note that evidence of the choking incident and sexual assault also came in under another hearsay exception during the testimony of the victim's doctor. Evidence concerning the choking incident and the stealing of the victim's Jeep were also testified to by the defendant himself. Therefore, these incidents were not improperly used by the prosecutor.

This assignment of error is overruled.

[17] The defendant next assigns error to the testimony of two witnesses, Aloise Burian and Wanda Winborne, who testified as to statements the victim made to them. Prior to trial, the State gave notice to the defendant of its intention to introduce certain hearsay testimony from these two witnesses pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5), which provides for admission of testimony as an exception to the hearsay rule in certain cases when the testimony does not fit into any other exception to the rule.

At trial, the defendant did not object to the admission of Ms. Burian's testimony. The defendant objected to the testimony of Ms. Winborne, and a hearing was held. At the end of the hearing, the court found facts, as required in *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), and ordered that Ms. Winborne's testimony be admitted.

Ms. Burian testified that the victim had told her the defendant had attempted to rape her in front of her children. The defendant objected to the word "rape," and the court told the jury to use the word "attack" in its place. Ms. Burian also said the deceased told her the defendant had followed her and harassed her and had told her he would kill her.

No objection was made to this testimony, and we must examine it for plain error. We cannot say that the admission of this testimony was a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). It was not plain error to admit this testimony.

[18] Ms. Winborne testified to the increasing fear of the victim in the months preceding her death. She testified that the victim told her that the defendant had forced his way into her apartment, pushed her against the wall, and attempted to force her head into the toilet. The victim displayed a bruise on her hip the size of a doorknob.

Before admitting this testimony, the court made the findings which in *Triplett* we said must be made before admitting testimony as a residual hearsay exception. The defendant attacks five of the findings. He says (1) the statements lacked circumstantial guarantees of trustworthiness, (2) the proffered statements were not evidence of material facts, (3) the evidence was not more probative on the point than any other evidence the State could offer, (4) the statements were covered by another hearsay exception, and (5) the general purposes of the Rules of Evidence and the interests of justice were not best served by admission of these hearsay statements into evidence. We disagree.

We believe the statements had guarantees of trustworthiness. The statement that the defendant had pushed the victim against the wall was corroborated by a bruise on her hip. The alleged action of the defendant was consistent with other evidence. The proffered statements were evidence of the defendant's intent at the time of the killing. This was evidence of a material fact. There was testimony of other witnesses to the attempt to force the victim's head into the toilet but not to his pushing her against the wall. This makes Ms. Winborne's testimony more probative than other evidence on this point. The defendant argues that the testimony was admissible under the state-of-mind exception to the hearsay rule, N.C.G.S. § 8C-1, Rule 803(3) (1992), and cannot be admitted under Rule 804(b)(5). The testimony of Ms. Winborne as to what the victim told her involved principally factual matters. Pursuant to *Hardy*, it would not have been admitted under Rule 803(3). This testimony was relevant to the matters involved in the case, and the interests of justice were served by its admission.

This assignment of error is overruled.

[19] The defendant next assigns error to the admission of testimony of Dr. Marshall Godwin, who was accepted as an expert in the field of obstetrics and gynecology. The defendant did not object to the testimony, and we must examine this issue under the plain error rule.

Dr. Barker had treated the victim for several years. Dr. Barker testified that the victim came to see him at his home and told him the defendant had "tried to choke her to the point of almost passing out and becoming unconscious"; that the defendant had tried to sexually assault her; and that the defendant had said, "I could've killed you if I wanted to," during which time the children were screaming and saying, "Stop Daddy. Don't hurt her." At a subsequent visit to Dr. Barker,

the victim told him that she and the defendant had been seeing a marriage counselor. The victim said the marriage counselor had stopped seeing them because she "was basically frightened of Dr. Gray and his behavior."

Most of this testimony was admissible pursuant to N.C.G.S. § 8C-1, Rule 803(4) as statements made for the purpose of medical treatment. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). The defendant contends the victim's statements to Dr. Barker were not for medical treatment. The defendant says the victim went to Dr. Barker's home rather than his office. He examined her physical condition and suggested she go to the hospital, which the defendant says is not treatment. The fact that she went to Dr. Barker's home rather than his office does not mean she did not go for treatment. Even though Dr. Barker was not in his office, he made a medical recommendation to the victim, which was treatment.

The testimony that the children were screaming and that the marriage counselor had stopped seeing them because she was afraid of the defendant probably should have been excluded if an objection had been made. The admission of this testimony, however, does not rise to the level of plain error.

This assignment of error is overruled.

[20] The defendant next assigns error to the admission into evidence of the testimony of the jogger that the victim said while the defendant was holding her on the ground, "Mister, please don't leave. If you leave, he'll kill me." The defendant concedes this was an excited utterance, N.C.G.S. § 8C-1, Rule 803(2), but he says it is barred by other provisions of the hearsay rule. He says the statement, "If you leave, he'll kill me," should have been excluded by Rule 803(3) as a statement to prove the fact believed.

We have held that evidence which is so intertwined with the evidence of the commission of a crime that it forms an integral and natural part of the account of the crime is admissible. *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990). This statement by the victim was an integral part of the account of the crime. It was admissible into evidence.

This assignment of error is overruled.

[21] In his next assignment of error, the defendant contends the district attorney improperly argued that flight was proof of premedita-

tion and deliberation. The defendant did not object to the argument, but he says it was so egregious the court should have intervened *ex mero motu*. The prosecutor argued:

> The court's going to struggle I suspect on what the meaning—the circumstance of flight means, it means that it can be implied consciousness of guilt, just like concealment of evidence. But that's also a circumstance on premeditation and deliberation. But if you flee, then it could be your statement implied to the world that I am guilty of a criminal offense.

It is not clear that the district attorney was referring to flight when he mentioned premeditation and deliberation. He could have been referring to the concealment of evidence. At any rate, the argument does not rise to the level of gross impropriety.

This assignment of error is overruled.

[22] The defendant next assigns error to the failure of the record to contain the verdict sheet. The verdict sheet was lost in the office of the clerk of superior court. The defendant contends that no valid verdict exists in this case, and no judgment may be imposed. He says that in the absence of a written verdict sheet, there is no way we can determine whether the verdict was properly returned.

N.C.G.S. § 15A-1237 provides in pertinent part:

> (a) The verdict must be in writing, signed by the foreman, and made a part of the record of the case.
>
> (b) The verdict must be unanimous, and must be returned by the jury in open court.

N.C.G.S. § 15A-1237 (1988).

We realize that some of our cases hold that the appellant must perfect the record on appeal including the verdict sheet and the appeal may be dismissed if this is not done. *See State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981); *State v. Hunter*, 245 N.C. 607, 609, 96 S.E.2d 840, 841 (1957) (per curiam); *State v. Currie*, 206 N.C. 598, 599, 174 S.E. 447, 447 (1934) (per curiam). In this case, it is not necessary to enforce this rule.

The transcript reveals that the judge and the clerk examined the verdict sheet after it was taken by the bailiff from the jury. If there had been an irregularity in the verdict they would have found it. The

jury was polled and each juror said he or she found the defendant guilty of first-degree murder. There can be no doubt that the jury found the defendant guilty of first-degree murder and the record shows it. The record is sufficient for us to determine the appeal. Under these circumstances, we will not dismiss it.

This assignment of error is overruled.

[23] The defendant next assigns error to the denial of his motion for a change of venue or for a special venire. N.C.G.S. § 15A-957 provides in part:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

N.C.G.S. § 15A-957 (1988). The purpose of this statute is to ensure that jurors decide cases based on evidence introduced at trial and not on something they have heard outside the courtroom. In some of our cases, we have said it is within the discretion of the trial court whether to remove the case or to order a special venire. If the moving party can make a sufficient showing of prejudice, however, the court must grant the motion. *State v. Abbott*, 320 N.C. 475, 478, 358 S.E.2d 365, 367-68 (1987).

A hearing was held on the defendant's motion prior to the trial. The defendant adduced the testimony of Dr. Tim Britton, who was accepted as an expert in polling. Dr. Britton testified that he conducted two telephone polls in Lenoir County in which two questions were asked of each person polled. The questions were whether the respondent had heard of this case and whether he or she thought the defendant could get a fair trial in Lenoir County. In the first poll, eighty-five percent said they had heard of the case. Fifteen percent of those who had heard of the case thought the defendant could get a fair trial in Lenoir County, seventy-two percent did not think so, and thirteen percent did not know. In the second poll, eighty-six percent had heard of the case. Twenty-one percent of those who had so

heard thought the defendant could get a fair trial in Lenoir County, sixty percent thought he could not, and nineteen percent did not know.

The defendant also introduced newspaper accounts which quoted a detective as saying four witnesses had seen Mrs. Gray running from the Jeep and being tackled by the defendant. This statement was not true. Also, one of defendant's attorneys was accidentally shot by his wife, and this was reported on television with a description of the charges against the defendant. The court found that the defendant had not carried his burden of proving that he could not receive a fair trial in Lenoir County and denied his motion. The defendant says this was error.

The newspaper account, although erroneous, was not prejudicial. The State's evidence showed that the defendant tackled his wife and held her on the ground. The news account did not contain any false information which was prejudicial. As for the television program which reported one of defendant's attorneys had been shot by his wife, we do not see how this could have prejudiced the defendant.

The testimony of Dr. Britton presents a more difficult question. He testified, based on polls which showed that a large majority of the residents of Lenoir County felt the defendant could not get a fair trial in Lenoir County, that in his opinion the defendant could not get a fair trial in the county. In determining this question, we are guided by the rule that the burden of proof is on the defendant to show prejudice. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983). In this case, there was a vigorous cross-examination of Dr. Britton, particularly on the ability of respondents in the two polls to understand the meaning of a "fair trial." The court could have felt that the defendant had not carried his burden. We cannot hold that this was error.

This assignment of error is overruled.

[24] The defendant next assigns error to the denial of his motion to suppress all his statements to law enforcement officers and items gathered in a search of his home. He says first that he was taken into custody without probable cause to arrest him and that his statements to the officers should have been suppressed as the "fruit of a poisonous tree." *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961). He also contends that the entry into his home to arrest him without a search warrant was illegal, thus requiring that his statements to the officers be suppressed. He contends further that he made a request

for counsel when he was in his home and that this request was ignored. This requires the suppression of his statements to the officers, says the defendant. The defendant says further that the consent to search his home was the result of an unlawful arrest. Finally, the defendant says his statements to the officers were not in fact voluntary. None of these arguments have merit.

The evidence at the hearing showed that the court found as facts that when the officers arrived at the scene, they found the victim's body. A neighbor told them the defendant had killed his wife. This gave them probable cause to arrest the defendant. *State v. Perdue*, 320 N.C. 51, 357 S.E.2d 345 (1987). The evidence also showed and the court found as facts that the defendant came to the door armed with a pistol, which was later found to be a toy. This was an exigent circumstance which justified the officers' entering the house without a search warrant to arrest the defendant. *State v. Allison*, 298 N.C. 135, 257 S.E.2d 417 (1979).

As to the defendant's argument that he was not allowed to have an attorney after he requested one, the evidence showed and the court found as facts that Bob D. Worthington, a member of the bar and a neighbor of the defendant, was outside defendant's home as he was being taken to the police headquarters. The defendant requested that Mr. Worthington represent him. An officer notified Mr. Worthington of this request, and Mr. Worthington followed the defendant to police headquarters, where he remained with defendant during the police interrogation.

We have held that the defendant was not unlawfully arrested. The consent to search his home cannot be invalidated for this reason. As to the defendant's contention that his statements to the officers were not in fact voluntary, the court held otherwise. This holding was supported by the evidence. We cannot disturb it. Finally, the defendant's contention that he was not allowed legal representation is without merit.

This assignment of error is overruled.

[25] The defendant next assigns error to the submission of two aggravating circumstances: (1) "Was this murder committed to disrupt or hinder the lawful exercise of a governmental function?" and (2) "Was this murder committed against Roslyn Gray because of the exercise of her official duty as a witness, that is, swearing out under oath before a magistrate four criminal warrants against the

Defendant in her role as a witness in trials scheduled December 8, 1992?" N.C.G.S. § 15A-2000(e)(7), (8) (1988). The defendant says the same evidence was used to support the submission of these two aggravating circumstances.

The same evidence may not be used to support two aggravating circumstances. *State v. Gay*, 334 N.C. 467, 494, 434 S.E.2d 840, 856 (1993); *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979). If the evidence to support one circumstance is not identical but overlaps the evidence to support another circumstance, both circumstances may be submitted. In this case, the evidence to support the two circumstances overlapped.

The (e)(7) circumstance, which dealt with the disruption or hindrance of a governmental function, was supported by evidence that the defendant had been served with a show cause order for an accounting of marital monies in a divorce action. The order was returnable a few days after the murder of the defendant's wife. This evidence did not support the (e)(8) circumstance that the person killed was to be a witness in a criminal case. The evidence supporting the (e)(8) circumstance that the defendant killed a witness in a criminal case was supported by evidence that four criminal warrants had been served on the defendant and that his wife was to be a witness against him. This evidence did not support the circumstance that the murder disrupted a civil proceeding. The evidence supporting the two aggravating circumstances was not identical.

The defendant argues further under this assignment of error that the court did not properly instruct the jury not to use the same evidence to find more than one aggravating circumstance. *Gay*, 334 N.C. at 495, 434 S.E.2d at 856. The court defined the two aggravating circumstances and explained to the jury the evidence that supported each of them. This adequately explained to the jury how to consider the evidence.

This assignment of error is overruled.

[26] The defendant next assigns error to the submission of the especially heinous, atrocious, or cruel aggravator, N.C.G.S. § 15A-2000(e)(9). He argues that the evidence did not support submission of this aggravating circumstance. The defendant cites *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994), and contends that this case does not fall within any of the (e)(9) categories set out in that case.

In *Sexton,* we identified several types of murders which warrant submission of the especially heinous, atrocious, or cruel circumstance. We said:

> "One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd,* 321 N.C. 301, 319, 364 S.E.2d 316, 328[, *sentence vacated on other grounds,* 488 U.S. 807, 102 L. Ed. 2d 18] (1988). A second type includes killings less violent but 'conscienceless, pitiless, or unnecessarily torturous to the victim,' *State v. Brown,* 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), [*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),] including those which leave the victim in her 'last moments aware of but helpless to prevent impending death,' *State v. Hamlet,* 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where 'the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder.' *Brown,* 315 N.C. at 65, 337 S.E.2d at 827."

Sexton, 336 N.C. at 373, 444 S.E.2d at 908 (quoting *State v. Gibbs,* 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993), *cert. denied,* 512 U.S. 1246, 129 L. Ed. 2d 881 (1994)).

The defendant asserts that the evidence showed only that the defendant and victim were involved in a struggle and that the victim requested help from a jogger. He says this evidence does not show that the victim begged for her life.

The State argues and we agree that the case falls into the second *Sexton* category: the murder was "conscienceless" and "pitiless." The defendant abused his wife psychologically and physically. He had stalked her. He had previously stated that he could kill her, and she was afraid he was going to do so. He left her in her last moments aware of her impending death but unable to do anything about it. Furthermore, the evidence showed that prior to being shot, the victim was stung with a stun-gun and "pistol whipped." This evidence clearly establishes the aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This assignment of error is overruled.

[27] The defendant next assigns error to the submission of the (e)(8) aggravating circumstance that the murder was committed because of the victim's role as a witness. The defendant contends there was not sufficient evidence to support this circumstance.

The State introduced four criminal warrants against the defendant which were based on acts of violence against his wife. The victim was listed as the complainant on each warrant. The defendant says that this is not sufficient evidence for the jury to find that the victim was a witness against him or that she was killed because she was a witness. We believe that a jury could find from this evidence that the victim had procured warrants against him or that she was waiting to testify against him. This would make her a witness against the defendant. We also believe a jury could find that one of the reasons the defendant killed his wife was because she had warrants issued against him. The defendant argues further that if the victim did procure the warrants and was waiting to testify, this was not part of her official duty as required by the (e)(8) aggravator. We believe procuring a warrant and waiting to testify constitute the performance of an official duty of a witness. *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

This assignment of error is overruled.

[28] In his next assignment of error, the defendant contends the court should not have submitted the (e)(7) aggravator that the murder was committed to disrupt or hinder the lawful exercise of a governmental function. The defendant and his wife were involved in a divorce action. The defendant had refused to answer interrogatories concerning finances of the parties and had been served with an order to answer the interrogatories or show cause why he should not be held in contempt. The discovery was to have been completed one week after the defendant killed his wife. It is this disruption of the divorce proceedings upon which the State relies.

The defendant says the only evidence that he committed the murder to disrupt the divorce action is that he killed his wife and that this stopped the action. Under the evidence in this case, this is enough. The parties were engaging in a bitter divorce action, and the defendant was determined his wife would get nothing from the marriage. He had liquidated marital property and put the proceeds in his name. He would not answer interrogatories. The jury could reasonably find that one reason he killed his wife was to stop this action against him.

This assignment of error is overruled.

[29] The defendant next assigns error to the court's charge on mitigating circumstances. The court charged the jury as to statutory mitigating circumstances as follows:

> By including specific mitigating circumstances in the death penalty statute, the legislature has determined that those circumstances have mitigating value . . . .
>
> . . . .
>
> Unlike the reminder [sic] of the possible mitigating circumstances, you don't have to enter into consideration[,] does it have mitigating value. The legislature has already made that determination for you. But still, the weight you give to it is up to you.

At several other places in the charge, the court instructed the jury that if it found a statutory mitigating circumstance to exist, that circumstance had mitigating value but the weight to be given to it was entirely up to the jury.

The defendant says that telling the jury that the weight to be given the mitigating circumstance was up to it was error in that the jury was never told it must give some weight to the circumstance. He says the jury should have been told that the weight it gave any statutory mitigating circumstance was up to it but that it "would have to give it some weight."

The challenged jury instruction in this case complies with what we said in *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). The jury was told that if it found a mitigator to exist, it had some mitigating value, but the weight to give it was up to the jury. This case is not like *State v. Jaynes*, 342 N.C. 249, 284, 464 S.E.2d 448, 469 (1995), *cert. denied*, — U.S. —, 135 L. Ed. 2d 1080 (1996), upon which the defendant relies. In *Jaynes*, the jury was told that it must determine whether a statutory mitigating circumstance has mitigating value.

This assignment of error is overruled.

[30] The defendant next assigns error to the refusal of the court to submit as a mitigating circumstance that the "[d]efendant has demonstrated an ability to adjust well in prison and could be of service to fellow prisoners by working as a dental assistant in the North Carolina prison system." The evidence to support this proposed mitigating circumstance consisted of testimony by Ms. Carolyn Lanier, the matron at the Lenoir County jail. Ms. Lanier testified that the defendant was housed in an isolation cell. Ms. Lanier testified that prior to the trial, the defendant had not been inclined to get up, to

change his linen, or to clean up. He only wanted to sleep and became irritated if awakened. Ms. Lanier said the defendant had adjusted well to jail. She testified on cross-examination that when the trial began, the defendant began to eat more and spend more time on his feet. He wrote a great deal.

The evidence to support this proposed mitigating circumstance was tenuous at best. The testimony of Ms. Lanier described a man who was surly while incarcerated in the Lenoir County jail. How probative this would be as to adjustment in the prison system is questionable. Assuming the mitigator should have been submitted, we hold it was harmless error beyond a reasonable doubt not to do so.

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), we held that it was harmless error for the court not to submit as a nonstatutory mitigating circumstance that "in a structured prison environment, Dwight Lamont Robinson is able to conform his behavior to the rules and regulations and performs tasks he is required to perform." *Id.* at 109, 443 S.E.2d at 323. We held that the defendant's evidence in support of this circumstance could be considered in connection with other mitigating circumstances submitted.

In this case, the court submitted as a mitigating circumstance that "[t]he defendant following arrest and for a period of over one (1) year exhibited good conduct while in Lenoir County Jail." The jury found this circumstance. The court also submitted the statutory "catch-all" mitigating circumstance, "Any other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9). The jury did not find this circumstance. Under the circumstances submitted, the jury was able to consider the defendant's evidence. If the jury did not consider the defendant's conduct in jail sufficient to outweigh the aggravating circumstances, it is not likely it would have thought his potential conduct in prison would have outweighed the aggravating circumstances.

This assignment of error is overruled.

[31] The defendant next assigns error to the court's failure to intervene *ex mero motu* and stop the district attorney from making what he contends were seven improper jury arguments. The defendant did not object to these arguments, and in order to obtain relief, he must show the arguments were so grossly improper that it was an abuse of

discretion for the court not to intervene. *State v. Jolly*, 332 N.C. 351, 368, 420 S.E.2d 661, 671 (1992).

The district attorney argued:

> As jurors today, you should take seriously our obligation pursuant to your oath to do something about violent crimes in your neighborhood, in your city, in your county and your community.

This was not an improper argument. It did not, as the defendant contends, ask the jury to convict the defendant, in violation of *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985), because of the public sentiment against crime. It was a part of the district attorney's general remarks at the opening of his summation which emphasized the duties of the jurors. It was certainly not so grossly improper that it required *ex mero motu* intervention by the court.

[32] The defendant next complains that the district attorney argued that the defendant's age, status, and size should be considered in determining whether he should receive the death sentence. The character of the defendant is relevant in determining whether the death penalty should be imposed. N.C.G.S. § 15A-2000(d)(2). This argument was not improper.

[33] The district attorney argued the defendant's character at length, including that the defendant had his children lie for him, that defendant had a privileged status in the community, the defendant's love of money, his self-control, and the extent of his remorse. The defendant contends this injected arbitrary factors into the sentencing proceeding. We disagree. These are matters which bear on the defendant's blameworthiness. During the penalty phase of a capital trial, the emphasis is on the character of the defendant and the circumstances of the crime. *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983). This was a proper argument.

[34] The defendant next argues that the court should not have allowed the district attorney to argue that the jury should consider flight. This argument is based on the premise that the jury should not have been allowed to consider flight as evidence of premeditation and deliberation. We have held it was not error to allow the jury to consider flight. The district attorney did not argue that the jury could consider flight as evidence of premeditation and deliberation.

[35] The defendant also argues that the district attorney should not have been allowed to argue that the victim's status as a witness in the

civil and criminal cases could be considered as evidence of two aggravating circumstances, that the murder was committed to disrupt a governmental function and that the murder was committed to eliminate a witness. We have held that the evidence supported the submission of these two aggravating circumstances. It was not error for the district attorney to argue them.

[36] The defendant next argues that the district attorney should not have been allowed to argue that the jury should give no weight to the non-statutory mitigating circumstances. We have held that it is for the jury to determine what weight to give non-statutory mitigating circumstances. This was a proper argument.

[37] Finally, the defendant contends that the prosecutor improperly argued that the State was divinely inspired and that the jury should apply a "higher law." The prosecutor stated:

> Whatever your decision, that's your decision. I want to encourage you to understand what you're doing; to understand how we are all a part of one another; how our actions affect us all; and how, if you agree, the last vote maybe [sic] the law and whatever the law typifies because the law is inspired by things other than just human events, and considerations for one another's lives. You know it and I know it.
>
> It's there for us in our temporal passion so that we may live with one another. It's an imperfect instruction. In the hope that some day a more perfect instruction will come and we will not need the law. It's up to you to decide.

This argument is not improper. The prosecutor merely explained that until a time comes when we no longer need laws, we must live under the laws that we have. He did not request that the jury apply a higher law or imply that the State's case was divinely inspired.

This assignment of error is overruled.

[38] The defendant next assigns error to the court's charge during the sentencing proceeding. Among the mitigating circumstances submitted to the jury was a nonstatutory circumstance that "[f]or 42 years prior to his separation from Roslyn Gray, Defendant led an uneventful, law-abiding life posing no threat to his family or community." The statutory mitigating circumstance as to the defendant's age, N.C.G.S. § 15A-2000(f)(7), was also submitted.

The court charged on the nonstatutory mitigating circumstance and added that the jury must consider whether the age of the defendant was a mitigating circumstance. The court said further that the jury must consider the defendant's style of life. The judge then realized his mistake and told the jury he had confused the nonstatutory mitigator with the statutory age mitigator. He asked the jury to strike anything he had said about the nonstatutory mitigator and correctly charged on it. The court then charged on the age mitigator but did not tell the jury not to consider the defendant's lifestyle when considering this mitigator. The jury found the nonstatutory mitigator but did not find the statutory age mitigator.

The defendant argues that by mixing the nonstatutory mitigator with the statutory age mitigator and not telling the jury not to consider the lifestyle of the defendant, the court confused the jury. We disagree. The court correctly charged the jury, and it should have had no trouble applying the law to the evidence.

This assignment of error is overruled.

[39] The defendant next assigns error to the charge on the mitigating circumstance that "[t]he defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1). The defendant had no prior conviction of any crime, but there was evidence in this case that he had committed the crimes against his wife with which he had been charged. The court submitted evidence of these crimes as proof of prior criminal activity.

The court charged the jury as follows:

> You would find this mitigating circumstance if you find that an assault on the victim's person, if you find there to have been such an assault; an attempt to immerse her head in the toilet, if you find there was such an attempt to assault her by immersing her head in the toilet; and choking her, if you find that and that this is not a significant history of prior criminal activity.
>
> You must find these acts beyond a reasonable doubt in both—as they were mentioned in the guilt phase of the trial, and if one or more of you finds by a preponderance of the evidence that this circumstance exist [sic], you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the "issues and recommendations form."

The court later reinstructed on this mitigating circumstance and placed the burden on the State to prove beyond a reasonable doubt that defendant had committed the assaults and on the defendant to prove the mitigating circumstance by the preponderance of the evidence.

The defendant says the above-quoted section of the charge garbled the burden of proof. We do not believe it did so. The court charged the jury that it must find the facts beyond a reasonable doubt. The only facts to which the court could have been referring involved the criminal charges. It charged the jury that if one or more jurors found the mitigating circumstance to exist, the foreman would write "yes" in the space provided. This was not an incorrect placing of the burden of proof. In its subsequent charge, the court should have resolved any question the jury might have had.

The defendant also argues that the jury was never told that if it did not find beyond a reasonable doubt that the assaults had been committed, it must find this circumstance. The jury was told that in order not to find this mitigating circumstance, it must find beyond a reasonable doubt that the assaults had been committed. The jury was bound to have known that if it did not find the assaults, it must find the circumstance.

The defendant argues further that in considering the assaults, the jury was never told that the State had the burden of proving them or that the defendant was presumed to be innocent. These considerations were covered when the jury was told it had to be satisfied beyond a reasonable doubt in order to find the assaults.

Finally, the defendant says the references were to unspecified assaults. There was evidence of several assaults during the guilt-innocence phase of the trial, and the defendant says we cannot tell upon which of the assaults the jury relied. The jury's decision not to find this circumstance is supported by its reliance on one or more of them.

This assignment of error is overruled.

[40] In his next assignment of error, the defendant argues that, as developed in North Carolina and as applied in this case, the aggravating circumstance that the murder was especially heinous, atrocious, or cruel is unconstitutional for being overbroad and vague. He recognizes that in *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993), we rejected this

argument. He asks us to reconsider our position. This we decline to do.

This assignment of error is overruled.

[41] The defendant next assigns error to the refusal of the court to allow him to question prospective jurors about their conceptions of parole eligibility for a person sentenced to life in prison. He concedes we have decided this question against his position in *State v. McNeil*, 324 N.C. 33, 44, 375 S.E.2d 909, 916 (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990), but he asks us to reconsider our position. This we decline to do.

This assignment of error is overruled.

[42] In his thirtieth assignment of error, the defendant asks us to change our position as enunciated in *State v. Robbins*, 319 N.C. 465, 494, 356 S.E.2d 279, 297, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987), and hold that it was error for the district attorney to be allowed to exercise peremptory challenges to prospective jurors who had reservations about the death penalty. We decline to do so.

This assignment of error is overruled.

The defendant makes sixteen additional assignments of error in which he concedes the questions have been decided against him. He raises the questions to preserve them for appellate review. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[43] Finding no error in the guilt-innocence and sentencing phases, it is now our duty to determine (1) whether the evidence supports the jury's finding of aggravating and mitigating circumstances; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. N.C.G.S. § 15A-2000(d)(2); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279. An examination of the record reveals the evidence supports the findings of the aggravating and mitigating circumstances. We also hold that the sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our next task is to determine whether the sentence imposed is excessive or disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. The jury found

three aggravating circumstances: (1) that the murder was committed to disrupt or hinder the lawful exercise of a governmental function; (2) that the murder was committed against Roslyn Gray because of the exercise of her official duty as a witness; and (3) that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(7), (8), (9).

Twenty-one mitigating circumstances were submitted to the jury. One or more jurors found thirteen of them, none of which were statutory mitigating circumstances.

This Court gives great deference to a jury's recommendation of a death sentence. *State v. Quesinberry*, 325 N.C. 125, 145, 381 S.E.2d 681, 694 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). In only seven cases have we found a death sentence disproportionate. *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; *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).

However, we find that the instant case is distinguishable from each of these seven cases. We note that in only two of the disproportionate cases were multiple aggravating circumstances found to exist. *Young*, 312 N.C. 669, 325 S.E.2d 181; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. In none of the cases were three or more aggravating circumstances found.

Further, in only two of the cases where this Court has held the death penalty to be disproportionate was the especially heinous, atrocious, or cruel circumstance found by the jury. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. However, the present case is not similar to either *Stokes* or *Bondurant*. In *Stokes*, we found the death penalty disproportionate where the defendant was a teenager, and the jury found the mitigating circumstances of both his age and that his capacity to appreciate the criminality of his conduct was impaired. The defendant in this case was an adult, and his jury specifically rejected the mitigating circumstance of impaired capacity. In *Bondurant*, this Court focused on the fact that the defendant expressed remorse and concern by seeking medical attention for the victim and confessing to police. The Court also

noted that the defendant did not have a motive for killing the victim. The defendant in the present case did not try to help the victim, he did not confess, and the transcript reflects evidence of numerous motives for the murder.

The defendant cites two cases, *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996), and *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), in which witness elimination and the heinous, atrocious, or cruel aggravator were involved and attempts to distinguish them. We do not believe he has done so. In *Maynard*, the witness elimination aggravator was not submitted to the jury, but the evidence showed that was the only reason for the murder. We said this made the death penalty proportionate. Witness elimination was not the only reason for the murder in this case, but *Maynard* illustrates the heavy weight that must be given witness elimination in a proportionality review.

In *Alston*, the jury found witness elimination and heinous, atrocious, or cruel as aggravating circumstances. The defendant says that case is distinguishable because the murder was much more cruel in *Alston*. It was cruel enough in this case. For several months prior to her death, the defendant brutalized his wife until he killed her. She knew all too well that death was impending when the defendant was holding her on the ground and she begged the jogger not to leave her. We believe *Alston* is comparable to this case. In *Alston*, as in this case, the defendant intimidated the victim for several months, assaulting her on several occasions, until he choked her to death. *Alston* and *Maynard* support the imposition of the death penalty in this case.

The defendant says that prior to his difficulties with his wife, he led an exemplary life. This is reflected in the mitigating circumstances found by the jury of the services he had provided to the community and the care given to his children and his mother. The jury considered these mitigating circumstances in reaching its result. We cannot say the penalty is disproportionate because the jury did not find that these mitigating circumstances outweighed the aggravating circumstances.

We are impressed by the callous way in which the defendant executed his wife, a person he should have protected. The sentence imposed was proportionate.

For the reasons stated in this opinion, we find no error in the trial or the sentencing proceeding. We also hold that the death sentence is proportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. WALLACE BRANDON JONES

No. 557A95

(Filed 3 October 1997)

1. Jury § 123 (NCI4th)— voir dire—prosecutor's interested witness question—propriety

The prosecutor's questions to prospective jurors in a first-degree murder and armed robbery trial inquiring into the ability of the jurors to consider the testimony of an interested witness, who testified pursuant to a plea bargain, to follow the court's instructions as to how to view that testimony, and to give it the same weight as the testimony of any other witness if they found the testimony credible did not misinform the jurors about applicable law or constitute an attempt to "stake out" the jurors on the verdict they would render. Therefore, the trial court did not abuse its discretion in failing to intervene *ex mero motu.*

Am Jur 2d, Jury § 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.

2. Evidence and Witnesses § 3081 (NCI4th)— prior inconsistent statement—flight of defendant—impeachment

Where a defense witness denied on cross-examination that she had notified law enforcement authorities of defendant's flight to another state, a deputy sheriff's testimony on rebuttal that the witness had told her that defendant had been taken to Tennessee by a third person was properly admitted for the purpose of impeaching the witness's in-court testimony on the material issue of defendant's flight from authorities.

Am Jur 2d, Witnesses § 938.

3. Evidence and Witnesses § 742 (NCI4th)— hearsay testimony—not prejudicial error

The admission of a deputy's unsolicited and brief hearsay testimony in a murder and robbery trial that a witness told him that she had seen what appeared to be blood in the bathtub in defendant's trailer did not constitute prejudicial error requiring a new trial in light of the extensive evidence of defendant's guilt, including testimony by defendant's girlfriend, an eyewitness, and substantial other evidence corroborating her account of the murder.

Am Jur 2d, Appellate Review §§ 713, 752, 755, 761.

Effect of voluntary statements damaging to accused, not proper subject of testimony, uttered by testifying police or peace officer. 8 ALR2d 1013.

4. Criminal Law § 390 (NCI4th Rev.)— court's direction to witness—not expression of opinion

When defense counsel asked a State's witness on cross-examination about a statement attributed to him in notes prepared by law enforcement authorities, the witness was asked to read the notes, and the witness stated in response to a question by the court that he had not read all of the notes, the trial court's direction to the witness to read all of the notes "because I'm sure he's going to ask you lots of questions on what's in those papers" did not constitute an expression of opinion that defendant's counsel was going to waste time by his forthcoming questions but was a proper admonition to the witness to answer the question he had been asked and to do what was requested.

Am Jur 2d, Trial §§ 299, 302, 304.

5. Criminal Law § 379 (NCI4th Rev.)— court's comment to counsel—not demeaning—no impropriety

The trial court's comment to defense counsel, "you don't ask the witness questions when he's being examined by the State," was within the proper bounds of the court's duty to control the examination of witnesses, was not demeaning to defense counsel, and was not an expression of opinion on the evidence.

Am Jur 2d, Trial §§ 302, 316.

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

6. Criminal Law § 379 (NCI4th Rev.)— court's comment to counsel—not demeaning—no error

The trial court's comment to defense counsel, while sustaining defense counsel's objection to a question by the prosecutor, "You don't have to make speeches. . . . Just file your objections," although inappropriate, cannot reasonably be interpreted as demeaning or belittling counsel before the jury and was not error, either in isolation or in conjunction with other comments by the court.

Am Jur 2d, Trial §§ 302, 316.

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

7. Criminal Law § 386 (NCI4th Rev.)— court's comment to counsel—not demeaning—no impropriety

When told by one defense counsel that the other defense counsel had not finished cross-examining a witness, the trial court's comments that "he thanked him. You don't need to thank a witness for his answer. I'll let him ask some more questions; but, do not thank a witness for his answer. Ask the next questions, and let's move along," were a proper effort to move the proceedings along, did not demean defense counsel, and did not constitute an expression of opinion on the evidence.

Am Jur 2d, Trial §§ 302, 316.

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

8. Criminal Law § 384 (NCI4th Rev.)— court's comment to counsel—prohibition of repetitive questioning—not expression of opinion

The trial court's comment to defense counsel that a witness had "been asked and answered that once" was a proper effort by the trial court to prohibit repetitive questioning and did not constitute an expression of opinion where defense counsel received the answer he sought.

Am Jur 2d, Trial §§ 302, 304.

9. Criminal Law § 384 (NCI4th Rev.)— court's comments—prevention of repetitive questioning—not expression of opinion

The trial court did not express an opinion but was properly attempting to prevent repetitive questioning (1) when defense counsel asked a witness to repeat an answer, the trial court asked why counsel asked the witness to repeat the answer, the jury responded affirmatively when the trial court asked whether the jury had heard the answer, and the court instructed counsel to "ask the next question," and (2) after counsel asked repetitive questions, the court stated that the witness said he didn't observe anything and asked, "How many times does he have to say it?"

Am Jur 2d, Trial §§ 302, 304.

10. Evidence and Witnesses § 173 (NCI4th)— bad dream—emotional state of witness—relevancy

An accomplice's testimony about a bad dream she had immediately after her arrest was relevant in this first-degree murder trial to establish the emotional state underlying the accomplice's reason for recanting in her diary her earlier implication of defendant in the victim's murder where the accomplice claimed that her recantations were based on fear caused by what she had done and of persons who had threatened to kill her if she testified against defendant.

Am Jur 2d, Evidence §§ 556, 558.

11. Appeal and Error § 155 (NCI4th)— objection sustained—absence of motion to strike—waiver of appeal rights

Where a trial court sustains a defendant's objection, and the defendant fails to move to strike the objectionable testimony, defendant waives his right to assert on appeal error arising from the objectionable testimony.

Am Jur 2d, Appellate Review §§ 614, 690.

12. Evidence and Witnesses § 873 (NCI4th)— cellmate's statements—not hearsay—admission not abuse of discretion or plain error

An accomplice's testimony in a murder trial about her cellmate's out-of-court statements was not hearsay where the testimony was not offered to prove the truth of any matter asserted within the statements but rather to explain why the accomplice

had recanted her earlier statements implicating defendant in the murder. Furthermore, the statements would not support an inference that defendant's counsel had improperly attempted to manipulate the accomplice's testimony by communicating with her through the cellmate, and the admission of the statements did not constitute an abuse of discretion under Rule 403 or plain error.

Am Jur 2d, Evidence §§ 661, 666.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Brown (Franklin R.), J., at the 18 September 1995 Criminal Session of Superior Court, Washington County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for robbery with a dangerous weapon was allowed 30 July 1996. Heard in the Supreme Court 14 February 1997.

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

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

LAKE, Justice.

The defendant, Wallace Brandon Jones, was indicted on 9 January 1995 for first-degree murder and on 21 August 1995 for robbery with a dangerous weapon. He was tried capitally to a jury at the 18 September 1995 Criminal Session of Superior Court, Washington County, Judge Franklin R. Brown presiding. The jury found defendant guilty of robbery with a dangerous weapon and of first-degree murder on the basis of malice, premeditation and deliberation and under the felony murder rule. After a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment for the first-degree murder conviction. Judge Brown sentenced defendant to a mandatory term of life imprisonment, plus an additional forty years for the robbery with a dangerous weapon conviction. Defendant appeals to this Court as of right from the first-degree murder conviction, and defendant's motion to bypass the Court of Appeals on the robbery conviction was allowed.

The State's evidence tended to show that on Saturday, 18 December 1993, the victim, William Frank Swain, was seen by a relative carrying approximately one thousand dollars in cash. The victim was known in the area around Plymouth, North Carolina, to be a drug dealer and was referred to as "the crack man." He typically carried a large roll of money and also carried money in a Velcro wallet that he kept in his back pocket. The victim lived in Freeman's Trailer Park on Folly Road in Plymouth.

On the afternoon of 18 December 1993, defendant; defendant's girlfriend, Dana Lynn Maybin; and defendant's friend Leroy Spruill went to the victim's home for the purpose of obtaining drugs. Defendant procured drugs from the victim and returned to a truck where Maybin and Spruill were waiting. The three then proceeded to Big Ed's Bar, a place they frequented often. Upon arrival at Big Ed's, Maybin drank alcoholic beverages and played some pool with friends while defendant and Spruill went toward the dance floor. Witnesses at the bar saw defendant and Spruill walk in and out of the bar together numerous times that night, and they remembered a period in which the two were absent from the bar. One of the bartenders recalled defendant asking her to give him a discount on the purchase of a beer at about 7:00 p.m. because he only had five dollars.

Sometime between 8:00 and 9:00 p.m., Spruill approached Maybin in the bar and asked her if she wanted to go with Spruill and defendant "back to the crack man's house." Maybin said no, but defendant subsequently told her that she was going. On the way to Folly Road, Maybin inquired as to how defendant and Spruill intended to pay for the drugs since they were unemployed. Defendant told Maybin that he was "going to take it."

When the three reached the entrance to Freeman's Trailer Park, the defendant pushed Maybin's head down and told her to stay down because the "crack man" would not sell them drugs if he saw a stranger in the truck. A witness saw the truck approach the victim's trailer and subsequently identified Spruill as the driver of the truck. Maybin testified that the defendant and Spruill got out of the truck. She heard a metallic banging sound in the bed of the truck. Defendant and Spruill then walked toward the victim's trailer. Maybin put her head on the seat beside the steering wheel and cracked the driver's side window in preparation for smoking a cigarette.

Suddenly Maybin heard a noise that sounded like someone being thrown against a wall. Concerned that either defendant or Spruill might be hurt, she left the truck and walked toward the partially opened front door of the trailer. As she pushed the door open and stepped inside, Maybin saw the victim sitting on the floor, with defendant and Spruill standing before him. Blood covered the victim's face, neck and chest. Defendant and Spruill were in the process of handing a Baggie, the type commonly used to hold drugs, between the two of them when they noticed Maybin in the doorway. In that instant, the victim looked at Maybin and tried to lift his hands in a plea for help. Spruill held the victim down, and defendant cut his throat. Blood went everywhere as the victim writhed on the floor. Defendant told Maybin to remove the contents of the victim's pocket. As Spruill held the victim down, Maybin pulled a roll of money and a small Baggie out of the victim's pocket and placed it in defendant's pocket. When she leaned over to get the money, defendant told Maybin that she would meet the same fate if she ever told anyone what had happened.

The three then left the victim's trailer and went to defendant's residence, where defendant got a change of clothes. From there, they went to Spruill's house, where they changed their clothes, cleaned the truck and burned their bloody clothes in a wood heater. They then returned to Big Ed's Bar, entering separately so as not to appear as having been together. The bartender who had seen the three earlier that evening noticed upon their return that defendant was wearing different clothes and that Spruill's hair was wet, which it had not been earlier. Another individual present at the bar testified that defendant returned around 10:30 p.m. wearing different clothes. When the witness danced with defendant, she noticed a blood spot on the back of defendant's pants, which he attributed to a cut he sustained at his apartment. The bartender further testified that defendant and Spruill acted differently upon their return, with Spruill being fidgety and uptight, and defendant appearing high on drugs. Defendant, who had only five dollars earlier, purchased approximately eighteen bottles of beer soon after his return and paid for them with crumpled ten- and twenty-dollar bills he pulled from his pocket. Later, the bartender overheard defendant tell Spruill "he couldn't believe he got away with offing a nigger."

Shortly after 10:00 p.m., residents of the trailer park discovered the victim's lifeless body and called law enforcement authorities. State Bureau of Investigation (SBI) Special Agent Dennis Honeycutt,

the mobile crime lab operator for the Northeastern District of North Carolina, arrived at the scene at approximately 12:30 a.m. on the morning of 19 December 1993. Agent Honeycutt testified that he observed blood on the steps, porch and door on the exterior of the victim's trailer. The victim's body was just inside the front door, and there was a significant amount of blood beneath his head. The trailer was in a general state of disarray. There was blood on and around the couch, on the curtains behind the couch, on the front of the refrigerator and on the kitchen floor and cabinets. A tire iron wrapped in a plastic bag and covered with blood was located in the kitchen. Blood spatters on the refrigerator were consistent with blows struck with a tire iron. Fingerprint and blood samples were inconsistent with defendant's. A search of the victim's pockets revealed approximately $109.00 in his front pockets, but nothing in either rear pocket. No Velcro wallet was found at the scene.

An autopsy of the victim revealed that he had sustained numerous injuries before ultimately dying. The victim suffered a minimum of twelve blunt-impact wounds over the top of his head and over the front of his forehead. These blows were consistent with tire iron impacts. The victim also suffered multiple cutting and stabbing wounds. Of the ten cutting wounds, several were on the hands, indicating a struggle against a knife-wielding assailant. The victim sustained approximately fourteen stab wounds, including numerous wounds to the neck, the back of the head, the base of the skull, and the back and approximately six stab wounds to the chest. The cutting wounds were mainly in the neck area, with the fatal one crossing the victim's windpipe at the level of the voice box. This produced a gaping, open wound from side to side, cutting both of the jugular veins and the carotid artery on the left side. The autopsy report concluded that the stab wounds and blows to the head would have been painful as long as the victim was conscious, and that the victim was still alive when he suffered the stabbing and cutting wounds. The autopsy also revealed that after the victim's throat was cut, the victim could not have lived more than two minutes and likely would not have been conscious. The approximate time of the victim's death was between 8:30 and 9:30 p.m. on 18 December 1993.

Defendant was sought in connection with the killing. Witnesses informed law enforcement that defendant had fled to Tennessee, and on 7 December 1994, authorities were notified that defendant was at his parents' house in Milan, Tennessee. Defendant was located hiding underneath his parents' house when an officer moved a rug covering

a hole in the floor of a utility room. Defendant was arrested and waived extradition to North Carolina.

At trial, defendant presented evidence tending to show that the truck which defendant and his two accomplices were accused of driving on the night of the murder was not in proper working condition due to transmission problems, but was operational if transmission fluid was added, and that the truck had remained in its usual parking location that night. Defendant also presented testimony from friends present at Big Ed's Bar who stated that they did not see defendant leave the bar on the night of the murder.

The jury found defendant guilty of robbery with a dangerous weapon and guilty of first-degree murder. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment for the first-degree murder conviction, and the trial court sentenced defendant accordingly. The trial court then sentenced defendant to an additional forty years for the robbery conviction.

[1] In his first assignment of error, defendant contends the trial court erred by failing to intervene *ex mero motu* to prohibit the State from questioning prospective jurors during jury selection *voir dire* in a manner that misinformed jurors about applicable law and tended to "stake out" the verdict that jurors would render in the present case. The crux of defendant's argument on this issue is that the prosecutor's disputed *voir dire* questions misstated the law regarding the weight to be given interested witness testimony and, as a result, pledged jurors in advance to treat interested witness testimony as having the same weight as any other testimony presented. Defendant argues that by allowing this allegedly improper inquiry, the trial court violated defendant's constitutional and statutory rights to due process of law and to a fair and impartial jury. We hold this contention to be without merit.

A review of the record indicates that after preliminary questioning of the jury venire by the trial court, the prosecutor asked the following question of the panel:

> There may be a witness who will testify in this case pursuant to a plea arrangement, plea bargain, a "deal" if you will, with the State. The mere fact that there is some plea arrangement, some plea bargain, entered into [by] one of the codefendants, would that affect your decision or your verdict in this case, just the fact that there had been some plea arrangement with one of the witnesses?

After jurors responded that it would not, the prosecutor asked:

> To put it another way, could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant; could you listen and follow the court's instructions as to how you were to view that testimony? Anyone that could not do that?

There were no affirmative responses from the jury venire, and the prosecutor further asked:

> After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness? Anyone that could not do that?

Again, there were no affirmative responses. Subsequently, as additional jurors were called, the prosecutor asked virtually identical questions. Defendant never objected to this line of questioning throughout the jury selection *voir dire.*

In *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976), this Court set forth certain limits regarding the permissible inquiry of prospective jurors during *voir dire*:

> On the *voir dire* . . . of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

Id. at 336, 215 S.E.2d at 68; *see also State v. Kandies*, 342 N.C. 419, 467 S.E.2d 67, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996); *State v. Lynch*, 340 N.C. 435, 459 S.E.2d 679 (1995), *cert. denied*, —

U.S. —, 134 L. Ed. 2d 558 (1996); *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995); *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989); *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). Hypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are similarly impermissible. *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. These prohibitions are founded in the constitutional right of a criminal defendant to trial by an impartial jury. However, the right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection *voir dire*. *State v. Price*, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990).

In reviewing any jury *voir dire* questions, this Court examines the entire record of the *voir dire*, rather than isolated questions. *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. It is well established that the right of counsel to inquire into the fitness of prospective jurors is subject to close supervision by the trial court. *Avery*, 315 N.C. at 20, 337 S.E.2d at 796-97. The regulation of the manner and the extent of the inquiry rests largely in the discretion of the trial court. *Id.* at 20, 337 S.E.2d at 797. The exercise of such discretion constitutes reversible error only upon a showing by the defendant of harmful prejudice and clear abuse of discretion by the trial court. *Id.*

An examination of the disputed *voir dire* in this case indicates that the trial court did not abuse its discretion in allowing the prosecutor's questions regarding prospective jurors' abilities to follow the law with respect to interested witness testimony. The prosecutor's questions do not constitute inaccurate or inadequate statements of the law of interested witness testimony. When an accomplice is testifying on behalf of the State, the accomplice is considered an interested witness, and his testimony is subject to careful scrutiny. *State v. Stanfield*, 292 N.C. 357, 364-65, 233 S.E.2d 574, 580 (1977). The jury should analyze such testimony in light of the accomplice's interest in the outcome of the case at hand. *State v. Vick*, 287 N.C. 37, 43, 213 S.E.2d 335, 339, *cert. dismissed*, 423 U.S. 918, 46 L. Ed. 2d 367 (1975). After such scrutiny, if the jury believes the witness has told the truth, the jury "should give [the] testimony the same weight as it would give to any other credible witness." *Id.*; *accord State v. Larrimore*, 340

N.C. 119, 167, 456 S.E.2d 789, 815 (1995). The prosecutor's questions merely inquired into the ability of prospective jurors first to consider the testimony of an interested witness and the instructions of the trial court relative thereto, and then to give it the same weight as the testimony of any other witness if they found the testimony credible. This was proper inquiry, and the questions certainly were not of such a character that the trial court's decision not to intervene *ex mero motu* constitutes an abuse of discretion.

These questions clearly did not seek to predetermine what kind of verdict prospective jurors would render or how they would be inclined to vote. Rather, they were designed only to determine if prospective jurors could follow the law and serve as impartial and unbiased jurors. Thus, the questions were plainly within the bounds of permissible *voir dire* during jury selection.

In *State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996), this Court held as proper a question substantially more direct in relation to the verdict itself. There, the prosecutor inquired whether prospective jurors could "*focus* . . . on whether or not this defendant . . . is guilty or not guilty of killing the child [victim]," in spite of evidence that would be presented showing the child victim had been abused. *Id.* at 286, 461 S.E.2d at 614 (emphasis added). This Court determined that the question was not an improper stakeout of a prospective juror because: (1) the question did not incorrectly or inadequately state the law, (2) the question "was not an impermissible attempt to ascertain how this prospective juror would vote upon a given state of facts," and (3) the question permissibly sought to measure the ability of the prospective juror to be unbiased. *Id.* Precisely the same may be said of the prosecutor's questions in the case *sub judice*. This assignment of error is overruled.

[2] By his next assignment of error, defendant contends the trial court erred by admitting over defendant's objection a hearsay statement made by witness Deputy Sheriff Janice Spruill during the State's rebuttal case. During the presentation of his defense, defendant called as a witness Gail Champ, who testified that defendant had lived on the Champs' property and had taken a trip to Tennessee. During cross-examination, the State sought to establish that Champ had notified law enforcement authorities of defendant's flight to Tennessee, but she denied this and would not so testify. The State, in its rebuttal case, subsequently called Deputy Spruill to refute Champ's testimony. The following exchange occurred:

Q. [Prosecutor] What did [Gail Champ] tell you at that time relative to the defendant in this case, Mr. Robert Solis [alias for Wallace Jones]?

A. [Deputy Spruill] She told me that [defendant] had been taken to Tennessee by Kevin Furlough in Ed Champ's little red car; that they had taken him to some part of Tennessee. She couldn't remember if it was Nashville or Memphis, Tennessee. And, that she didn't think it was right. She also told me that, on one occasion, she had been to [defendant's] trailer and that she had seen what appeared to be blood in the bathtub.

Defendant's subsequent objection and motion to strike were overruled. Defendant argues that all of the above testimony was hearsay, not within a recognized exception to the hearsay rule, and should have been excluded. Defendant further argues that the portion of the testimony regarding blood in defendant's bathtub was highly prejudicial, since the identity of the killer was central to the resolution of this case. Defendant asserts he is entitled to a new trial as a result of the admission of this testimony. We disagree.

When a prior inconsistent statement by a witness relates to material facts in the witness' testimony, the prior statement may be proved by extrinsic evidence. 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 161 (4th ed. 1993). Material facts are those involving matters pertinent and material to the pending inquiry. *Larrimore*, 340 N.C. at 146, 456 S.E.2d at 803. Evidence of a criminal defendant's flight following the commission of a crime is evidence of his guilt or consciousness of guilt. *State v. King*, 343 N.C. 29, 38, 468 S.E.2d 232, 238 (1996). In the present case, the testimony of Deputy Spruill regarding Champ's previous statements about defendant's flight were introduced by the State for the purpose of impeaching Champ's in-court testimony that contradicted her prior assertions. The in-court testimony went to a material issue, defendant's flight from authorities, and therefore his guilt. As such, the extrinsic evidence presented by Deputy Spruill was properly admitted by the trial court for impeachment purposes.

[3] Regarding the statement allegedly made to Deputy Spruill by Champ about blood in the defendant's bathtub, defendant has failed to establish sufficient prejudice to constitute grounds for a new trial. "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a)

(1988). Deputy Spruill's unsolicited aside does not rise to this level and could not have tilted the scales against defendant in light of the State's evidence as a whole. Further, the record reveals that Deputy Spruill's comment was neither belabored nor expounded upon. The prosecutor immediately redirected Deputy Spruill to the prior line of questioning regarding defendant's flight, and the statement was in no way connected to the date or events surrounding the murder. In fact, all of the evidence establishes that defendant and his accomplices cleaned themselves and changed clothes at Leroy Spruill's residence, and that defendant only ran in his trailer for an instant to get a fresh set of clothes.

The primary account of the killing was given through Dana Maybin's testimony, and substantial other evidence corroborated her account of the murder. Maybin's description of the killing was corroborated by Agent Honeycutt's findings upon arrival at the scene of the crime. Maybin's testimony that Maybin, Leroy Spruill and defendant drove Spruill's father's truck was corroborated by a witness who saw Spruill driving his father's truck near the victim's residence. Maybin's testimony that she heard a sound like someone being thrown against a wall was corroborated by findings of a blood smear on the wall of the trailer. Maybin's description of the method of killing was entirely consistent with the autopsy report. Testimony that the three had changed clothes was corroborated by witnesses who noticed that defendant was wearing different clothes upon returning to Big Ed's Bar. Finally, testimony that money was taken was corroborated by witnesses who noted that defendant had no money early that evening but purchased large amounts of alcohol with crumpled ten- and twenty-dollar bills later that evening. In light of the extensive evidence of defendant's guilt, the trial court's allowance of Deputy Spruill's unsolicited and brief comment cannot be said to constitute prejudicial error. This assignment of error is overruled.

Defendant in his next assignment of error asserts the trial court engaged in improper and disrespectful conduct toward defendant's counsel by making insulting and sarcastic comments both in and out of the presence of the jury. Defendant maintains that the trial court's comments violated N.C.G.S. § 15A-1222; N.C.G.S. § 15A-1232; established rules of professional conduct; and defendant's rights to due process of law and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. We find defendant's contentions to be without merit.

N.C.G.S. § 15A-1222 prohibits the trial court from expressing an opinion in the presence of the jury on any question of fact to be decided by the jury. N.C.G.S. § 15A-1222 (1988). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808. "The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, — U.S. —, 133 L. Ed. 2d 436 (1995). In performing this duty, however, the trial court's position as the "standard-bearer of impartiality" requires that "the trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury." *Larrimore*, 340 N.C. at 154-55, 456 S.E.2d at 808. An examination of the comments about which defendant complains reveals that the trial court did not express impermissible opinions about the value of defendant's evidence or the ability of defendant's trial counsel.

[4] The first statement that defendant points to in support of his argument occurred during defendant's cross-examination of State's witness James "Duke" Carter. Counsel inquired about a fact attributed to Carter in some notes taken by law enforcement authorities during a meeting between Carter and those authorities. Carter denied making the statement, whereupon defense counsel stated, "Well, this statement that the district attorney has handed me says, 'Carter states that he then got up and went over to Frank's house at about 7:30 a.m.' " The trial court interrupted, and the following exchange occurred:

> THE COURT: If you're going to examine him about that statement which he says he did not prepare, you're going to have to let him read it and see whether or not that's his statement. He's not responsible for what someone else wrote on a piece of paper unless he has the opportunity to examine it.
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> MR. VOSBURGH [defense counsel]: May I approach the witness and let him examine them?
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> THE COURT: Yes.
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> MR. VOSBURGH: May I ask him, if he would, while we're at it, review both of these statements?
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> THE COURT: Yes, sir.

Q. [Vosburgh] Let me ask you to review those statements, and; after you do, I'll ask you some more questions.

(Witness complies.)

Q. Have you read all the way through those statements?

A. I read right here where it's statin' that—

THE COURT: Answer what he asked. Have you read each of those pages?

A. No, sir, not all of them.

THE COURT: Read the whole thing, because I'm sure he's going to ask you lots of questions on what's in those papers.

Defendant's contention that this exchange expressed to the jury the trial court's opinion that defendant's counsel was going to waste time by his forthcoming questions is misplaced. The trial court's comments were appropriate and legally proper. The statement counsel was reading from was not prepared by the witness, and he was not responsible for it absent a thorough examination. The trial court's directing that the witness read the entire statement in preparation for upcoming questions was nothing more than a proper admonition to the witness to answer the question he was asked and do what was requested. There is no reasonable possibility that the jury could have construed this statement in the manner suggested by defendant.

[5] The next statement about which defendant complains occurred during the State's direct examination of Carter. During examination by the State, the following occurred:

Q. [Prosecutor] Now, also in your statement, who were the white people that he would deal with, that he would sell to?

A. Well, I've seen Steve Jones; his wife—

MR. VOSBURGH: Excuse me. What was the second one?

A. His wife.

MR. VOSBURGH: Whose wife?

A. Steve's wife.

THE COURT: Mr. Vosburgh, you don't ask the witness questions when he's being examined by the State.

MR. VOSBURGH: I'm just trying to get him to speak up, Judge.

THE COURT: Well, you'll have a chance to ask him about that. I don't see any relevance to this, and I think you need to move along. Go ahead and ask him a question.

These comments were well within the proper bounds of the trial court's duty to control the examination of witnesses and were not demeaning to defendant's counsel as defendant contends. The trial court merely instructed defendant's counsel to wait his turn for questioning. The comments regarding relevance and "to move along" clearly were directed not at defendant's counsel, but rather at the prosecutor. Thus, they reflected on the value of the State's case, if anything.

[6] The defendant's next complaint centers on comments made during an objection by defendant's counsel. The allegedly demeaning remarks occurred during the following exchange:

Q. [Prosecutor] Mr. Swain [the victim's cousin], if you would, please, if you would point out to us on the diagram how you get into the place where you live off of Folly Road and U.S. 64.

MR. VOSBURGH: Your Honor, I object to the district attorney at what he's asking the witness to do.

THE COURT: That objection is sustained. You don't have to make speeches, Mr. Vosburgh. Just file your objections.

This comment by the trial court regarding the making of speeches, while unnecessary and inappropriate in this context, cannot reasonably be interpreted as demeaning or belittling counsel before the jury. The trial court sustained defense counsel's objection, thus arguably bolstering his reputation, to the extent such rulings have any effect on the jury. The record reflects that the trial court repeatedly ruled on objections in a crisp manner and prevented both parties from presenting duplicative or unnecessary evidence or comment. This isolated comment is not sufficiently different or weighty to constitute error, either in isolation or in conjunction with defendant's other assertedly erroneous comments.

[7] The defendant's next complaint arises from the following colloquy that occurred during defendant's cross-examination of State's witness SBI Agent Honeycutt:

Q. [Defense counsel] Beyond that list, if you found the right person, you'd be able to make a match.

A. If not those of Mr. Swain [the victim], yes, sir.

MR. SKINNER [Defense counsel]: Thank you.

THE COURT: Anything further, Mr. Norton [prosecutor]?

MR. VOSBURGH: Your Honor, we hadn't finished—

THE COURT: Well, he thanked him. You don't need to thank a witness for his answer. I'll let him ask some more questions; but, do not thank a witness for his answers. Ask the next questions, and let's move along.

The trial court's comments cannot reasonably be construed as anything more than an effort to move the proceedings along. Throughout the trial, the trial court required both parties to meet certain standards aimed at achieving an efficient and focused hearing. Thus, in the overall context, this comment cannot be considered erroneous.

[8] Next, defendant complains of the following exchange involving defense counsel's questioning of Timothy Swain, the victim's cousin:

Q. [Mr. Vosburgh] How long after this incident took place was it that you moved with your grandmother and, I believe, your wife?

THE COURT: He's been asked and answered that once, Mr. Vosburgh.

MR. VOSBURGH: Well, I don't recall his answer.

A. Five months ago.

Q. Five months ago?

A. About five months ago, right.

As the preceding can only be interpreted as an effort by the trial court to prohibit repetitive questioning, and as defendant received the answer he wanted, this exchange clearly does not constitute error.

[9] Finally, defendant contends the trial court expressed improper opinions during two instances in which the trial court prohibited repetitive questioning. In the first, defense counsel asked SBI Agent Honeycutt to "repeat that answer." The trial court interjected, "Why do you want him to repeat it?" and, turning to the jury, asked, "Did the jury hear the answer?" When the jury responded that it had heard the answer, the trial court instructed defendant's counsel to "ask the next question." In the second instance, the following occurred:

Q. [Mr. Skinner, defense counsel] When you observed that tire iron and bag over there, did you notice any fluids under it?

A. [Dr. Harris, pathologist] I didn't pick it up. I don't know.

Q. You didn't notice any fluid under this—?

A. No; I didn't look. I don't move those things.

Q. You didn't walk over and look real closely—?

A. Well, I walked over and looked; but, I didn't move anything.

THE COURT: He said he didn't observe anything, Mr. Skinner. How many times does he have to say it?

In both of the foregoing instances, the trial court was attempting to prevent repetitive questioning, and the remarks at issue explain why the questioning was disallowed. These comments cannot be said to be erroneous, especially in light of the numerous similar remarks made to the State's counsel.

Assuming *arguendo* that any of the above comments by the trial court could be construed to constitute the expression of an opinion, every such impropriety by the trial court does not result in prejudicial error. *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). Whether a trial court's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, and the burden of showing prejudice is upon the defendant. *Id.* Defendant has failed to show such prejudice in this case. A review of the record shows that the trial court was equally stern and equally permissive to both parties in a consistent manner for the purpose of conducting a fair, efficient and controlled trial. Defendant has pointed to no statement by the trial court which, taken either in isolation or together with all other allegedly improper statements, can be said to constitute a prejudicial expression of opinion on an issue of fact or an intimation of a position deleterious to defendant's case. Thus, this assignment of error is overruled.

[10] Defendant next assigns error to the trial court's allowance of certain testimony by accomplice Dana Maybin. Maybin testified that she kept a diary while incarcerated in Beaufort County after her December 1994 arrest. The majority of the testimony regarding the diary related to Maybin's reasons for recanting in her diary her earlier implication of defendant in the victim's murder. The testimony was

received into evidence largely without objection from defendant. However, Maybin was allowed to testify over objection about a dream she had on 16 December 1994, immediately after her arrest. After identifying a portion of her diary, the following exchange occurred between the prosecutor and Maybin:

> Q. What part of the diary is it that you have there?
>
> A. It's mostly about the bad dreams that I'd been having.
>
> Q. What kind of dreams were you having when you were first brought to the Beaufort County Jail?
>
> MR. VOSBURGH: Objection.
>
> THE COURT: Overruled.
>
> A. I dreamed this Indian man got his throat cut, and he fell in my arms. I dreamed—
>
> Q. What day was it that you had that dream?
>
> A. December the 16th.
>
> Q. How many days had you been in jail at that time?
>
> A. One.

The prosecutor then attempted to question Maybin about whether she had a dream on 17 December. The trial court excused the jury in order for the prosecutor to explain the relevance of the testimony. Out of the presence of the jury, the prosecutor stated:

> This case is going to depend, in large part, on Ms. Maybin's credibility, and the State needs to be in the position to explain why these various items were, various letters and various diary entries, were being written.

The trial court sustained defense counsel's objection and prohibited any further questions regarding the bad dreams. Defendant argues that the 16 December dream testimony that was allowed in the jury's presence was irrelevant pursuant to Rule 401 of the Rules of Evidence and, even assuming it was relevant, that it was unduly prejudicial and should have been excluded under Rule 403.

" '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). " 'In criminal

cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible,' and '[t]estimony is relevant if it reasonably tends to establish the probability or improbability of a fact in issue.' " *State v. Pridgen*, 313 N.C. 80, 88, 326 S.E.2d 618, 623 (1985) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 78 (2d ed. 1982)). Furthermore, the evidence need not bear directly on the issue of guilt or innocence. Evidence is competent and relevant if it nevertheless shows a circumstance from which the jury may infer a fact in issue. *Id.*

The testimony regarding the dream of 16 December clearly was relevant. It went to establish the emotional state underlying this witness' reason for her subsequent diary recantations—the fear caused by what she had done and of the Champ family, who had threatened her life if she testified against defendant. The issue then turns on whether the trial court should have excluded the testimony pursuant to Rule 403 on grounds of "unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1, Rule 403 (1992). "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). Whether to exclude evidence pursuant to Rule 403 is a matter left to the sound discretion of the trial court. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). A ruling by the trial court will be reversed for an 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. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

Defendant has not shown such an abuse of discretion. The trial court admitted the relevant testimony from one day's diary entry but then excluded further repetitive references to the bad dreams. Furthermore, the testimony regarding the bad dreams was only one reason given by Maybin for her diary recantations about defendant's role in the murder. Considering all of the other evidence presented through Maybin's implicating defendant in the murder, there is no reasonable possibility that this one reference to a dream, within the context of explaining her motives for recanting, could have been so substantially prejudicial that the trial court's admission of the testimony constitutes an abuse of discretion. This assignment of error is overruled.

In his next assignment of error, defendant maintains the trial court erred by allowing the State to ask a question that assumed facts

not in evidence. Defendant called as a witness Jack Spruill, the owner of the truck that was allegedly used by defendant and his two accomplices to travel to and from the crime scene. Jack Spruill testified that the truck was not used by Leroy Spruill on the day of the murder, and that the truck had transmission problems and was in a mechanical state inconsistent with driving more than short distances. On cross-examination, the following exchange occurred:

> Q. You've kept up with the case, haven't you?
>
> A. Well, since [Leroy Spruill] was charged, I've tried to.
>
> Q. You've seen the copies of the statements that Leroy had given to the officers, haven't you?
>
> A. No, sir.
>
> Q. You've never looked at the statements, specifically, the December 24th, 1993, statement that your son gave about this truck?
>
> MR. VOSBURGH: Objection.
>
> THE COURT: Overruled. He asked whether or not he's looked at it.
>
> A. No, sir. Nobody's come to me other than—Ms. Janice has come about wanting to bring the truck for investigation of it, yeah.
>
> Q. But, you're not aware, even in talking with your son or in looking over the reports —
>
> A. I haven't seen any reports.
>
> Q. —that your son made a statement about this truck, about driving this truck that day?
>
> THE COURT: Well, the objection is sustained as to what his son might have said.

Defendant asserts that this questioning was improper because it assumed facts not in evidence and amounted to testimony by the prosecutor. We disagree.

[11] Defendant has failed to preserve this issue for appeal. The potentially prejudicial statement from defendant's standpoint in the above exchange was the question, "But, you're not aware . . . that your son made a statement about this truck, about driving this truck

that day?" To this question, the trial court sustained objection and excluded as hearsay any further questions regarding what Leroy Spruill might have said. Defendant did not, however, ask that the statement be stricken. Where a trial court sustains a defendant's objection, and the defendant fails to move to strike the objectionable testimony, he waives his right to assert on appeal error arising from the objectionable testimony. *State v. Barton*, 335 N.C. 696, 709-10, 441 S.E.2d 295, 302 (1994). Thus, in light of the facts that defendant's objection was sustained and that no motion to strike was proffered, defendant has failed to preserve this issue for review. This assignment of error is overruled.

[12] Defendant's final assignment of error involves testimony by Maybin regarding out-of-court statements by Nichole Mills, one of Maybin's cellmates at the Beaufort County Jail. Maybin testified that it was on the advice of Mills that she began writing in her diary that she had lied about defendant's involvement in the murder. Mills was never called as a witness. However, the State introduced through Maybin evidence of writing and statements allegedly made by Mills. Defendant's complaints are directed at three particular statements.

The first statement about which defendant complains involves Maybin's familiarity with defendant's counsel, Mr. Vosburgh. During direct examination, Maybin was asked if she had talked with any other attorney besides her own. Maybin responded that she talked with Maynard Harrell and Mr. Vosburgh in early March 1995. When asked whether she was familiar with the two attorneys prior to the March 1995 meeting, Maybin testified over objection that "Nichole [Mills] had said she had been talkin' to Vosburgh." The trial court sustained objections to subsequent attempted questions regarding what Mills might have told Maybin about Mr. Vosburgh.

The second statement to which defendant assigns error relates to a portion of the diary read into evidence by Maybin. Maybin was asked to read from a diary entry dated 24 March 1995, and she read the following:

> I got a letter from Nichole today. She said the rumor is that I've been telling people that Vosburgh is the one who has been telling me to say everything I've said. That's a lie because I was only telling him the truth.

Defendant did not object to this testimony.

The third piece of evidence to which defendant assigns error is the introduction through Maybin of a portion of the actual letter written by Mills to Maybin. The substance of the letter read in relevant part:

> because my concern is not losing contact with you. Vosburgh will also know where I am. He wanted to come see you today or tomorrow; but, Regina [Maybin's counsel] said no. Why? She told Vosburgh that you would burn him; that you had been telling people Vosburgh "told me this. He told me to do and say this." I don't believe it for a moment; but, just to be sure, you watch what you say. Mr. Vosburgh is up in Raleigh for three days, until Saturday. He maybe will get to see you the next time.

Defendant contends the statements, if believed for the truth of the matters asserted, tend to show Mills was visiting with Mr. Vosburgh and then telling Maybin what to write in her diary. This, defendant claims, was highly prejudicial to his case because it led the jury to believe defendant's counsel was manipulating the evidence. Defendant argues that the testimony was impermissible hearsay, irrelevant and unduly prejudicial and that it should have been excluded by the trial court. We find defendant's contentions to be without merit.

Hearsay is defined as an out-of-court declaration offered for the purpose of proving the truth of the information contained in the declaration. N.C.G.S. § 8C-1, Rule 801(c) (1992). When a declaration is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay. *State v. Reid*, 335 N.C. 647, 661, 440 S.E.2d 776, 784 (1994). When offered to explain the subsequent conduct of the person to whom the declaration was made, an out-of-court declaration is not considered hearsay. *Id.*

An examination of the above statements, in light of Maybin's entire testimony, reveals that the statements were not hearsay. In April 1994, Maybin told police officers that defendant confided to her he had killed the victim by cutting his throat, but she did not then reveal her presence at the crime scene. Subsequently, Maybin sent a letter to the Washington County Sheriff's Department in May 1994 renouncing her previous statement and saying she had no knowledge of the murders. In June 1994, the next time she talked with law enforcement, Maybin changed her story again and confessed that she was present at the crime scene and saw defendant kill the victim. Maybin was arrested and placed in custody in the Beaufort County Jail, where one of her cellmates was Nichole Mills. She began

keeping a diary shortly thereafter in which she wrote numerous recantations.

The prosecutor sought to have Maybin explain why she claimed she knew nothing of the murders and why she changed her story so many times. Maybin testified that she wrote the first letter because she "wanted [the case] to go away." She testified she did this for several reasons: (1) she had been having nightmares; (2) defendant had threatened her if she turned him in; (3) she was intimidated by the Champ family, who were friends with defendant; and (4) she did not want to ruin a good relationship she had formed with a gentleman in South Carolina. Maybin further testified that Mills told her to write the diary recantations because it would result in her being "declared an incompetent witness." Another reason, Maybin testified, was that she had spoken with defendant's attorneys and other individuals who told her that the only evidence the State possessed was her testimony.

Viewed within this context, it is clear the statements to which defendant assigns error are not hearsay. The evidence was not admitted to prove the truth of any matter asserted within the statements, but rather to explain why Maybin recanted her earlier statements implicating defendant, and later herself, in the murder of Frank Swain.

Because the statements went to show the reasons for Maybin's recantations, the statements were relevant and well within the broad bounds of N.C.G.S. § 8C-1, Rule 401. Furthermore, the statements were not so unfairly prejudicial, pursuant to N.C.G.S. § 8C-1, Rule 403, as to cause the trial court's admission of them to constitute an abuse of discretion. Regarding the first statement, defendant claims it prejudiced him by intimating to the jury that his counsel had committed wrongdoing by telling Maybin she could weaken the State's case by writing recantations in her diary. No such inference could be reasonably drawn from this statement. The mere fact that Maybin was familiar with Mr. Vosburgh due to her cellmate's discussions cannot reasonably be said to have conveyed the thought to the jury either that Mr. Vosburgh was acting improperly or that any action taken by Maybin was a result of talking with Mr. Vosburgh. It was clear from other evidence that defense counsel interviewed Maybin and others in their investigation of the case. Thus, the trial court did not err by admitting this statement.

Regarding the second and third statements, defendant did not object to this testimony, and he has waived his right to assert error

on appeal arising out of the admission of the evidence. N.C.G.S. § 15A-1446(b) (1988). Defendant is thus precluded from raising this issue on appeal unless plain error occurred. Defendant has failed to establish such error. What defendant's attorneys said to Maybin during their meetings was the subject of extensive inquiry on direct examination. This testimony revealed that defense counsel interviewed Maybin, and many others, in an effort to establish the truth about their client's case. There is little reason to conclude that the statements regarding rumors of what Maybin was telling people could have led the jury to believe defendant's counsel was acting improperly or, in light of the substantial evidence presented of defendant's guilt, that these statements resulted in the jury's reaching a different result at trial. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. TONY MITCHELL SIDDEN

No. 148A95

(Filed 3 October 1997)

1. Jury § 153 (NCI4th)— capital trial—voir dire—consideration of possible punishments—question not improper

It was not error for the prosecutor to ask prospective jurors in a capital murder trial whether their feelings would prevent or substantially impair their ability to perform their duties to consider fairly the possible punishments even if the question called on the jurors to apply a legal standard subjectively.

Am Jur 2d, Jury §§ 206, 207.

2. Jury § 146 (NCI4th)— capital sentencing—instruction—setting aside personal feelings

It was not error for the trial court in a capital murder trial to tell prospective jurors that they must make a recommendation "setting aside personal feelings."

Am Jur 2d, Trial §§ 1653-1655.

3. Jury § 150 (NCI4th)— capital trial—excusal for cause—rehabilitation not permitted

It was within the trial court's discretion to refuse to permit defendant to rehabilitate jurors excused for cause where the answers of all excused jurors revealed that their feelings would prevent or substantially impair the performance of their duties as jurors.

Am Jur 2d, Jury §§ 159, 160.

4. Evidence and Witnesses § 364 (NCI4th Rev.)— murder trial—evidence of another murder—chain of circumstances—admissibility

In a prosecution for the murder of two boys, evidence of the murder of their father was so intertwined with evidence of the murder of the boys that it was admissible to show the circumstances of the charged crimes where the evidence showed that defendant and his stepson kidnapped the two boys, left them in the trunk of an automobile while they murdered the boys' father, and then murdered the boys.

Am Jur 2d, Evidence §§ 301, 404 et seq.

5. Evidence and Witnesses § 3174 (NCI4th)— corroboration—consistency of statements—opinion testimony

The admission of an officer's opinion that the testimony of an eyewitness was basically the same as statements he had made to officers was not plain error where the officer testified to the contents of the prior statements and the trial court instructed the jury on the limited use of this testimony.

Am Jur 2d, Witnesses §§ 1001 et seq.

6. Evidence and Witnesses § 3158 (NCI4th)— number of times informant used—testimony not plain error

The admission of an FBI agent's testimony that the FBI had used information provided to it by a State's witness on twenty different occasions did not permit the agent to promote the credibility of the witness by testimony as to specific instances of conduct in violation of N.C.G.S. § 8C-1, Rule 608(b) and was not plain error.

Am Jur 2d, Witnesses §§ 1027, 1028.

7. Criminal Law § 878 (NCI4th Rev.)— question by jury—propriety of instruction

When the jury asked during deliberations why a person whose name had been mentioned in the evidence did not testify, the trial court properly instructed the jury to decide the case based on the evidence presented; the court was not required to reinstruct the jury to consider arguments of counsel, and the instruction did not tell the jury that the evidence was sufficient to convict defendant.

Am Jur 2d, Trial §§ 1213, 1218, 1315 et seq.

8. Criminal Law § 430 (NCI4th Rev.)— prosecutor's argument—failure to call alibi witness

The prosecutor's jury argument that defendant failed to call his ex-wife to support his alibi that he was with her at the time of the crimes even though she had been present in the courtroom for the entire trial was a proper comment on defendant's failure to produce exculpatory evidence.

Am Jur 2d, Trial §§ 592, 597, 598.

9. Criminal Law § 439 (NCI4th Rev.)— prosecutor's argument—characterization of defendant as devil—no gross impropriety

The prosecutor's jury argument that when you "try the devil, you've got to go to hell to get your witnesses" and that the defendant "qualifies in that respect" was not so egregious that the court should have stricken it *ex mero motu.*

Am Jur 2d, Trial § 291.

10. Criminal Law § 474 (NCI4th Rev.)— prosecutor's argument—use of photographs

The prosecutor could properly use photographs of murder victims during closing argument where the photographs were in evidence.

Am Jur 2d, Evidence §§ 960-970, 1070, 1451; Trial §§ 345, 349.

Admissibility in evidence of colored photographs. 53 ALR2d 1102.

11. Criminal Law § 470 (NCI4th Rev.)— prosecutor's argument—skeletal remains—inference from evidence

The prosecutor could properly argue that defendant had turned the victims into "skeletal remains" where the evidence tended to show that defendant buried the victims in an old well after shooting them and covered their bodies with lime and Drano; their bodies were not discovered for nine years; and only the victims' skeletons were found.

Am Jur 2d, Trial §§ 632-639.

12. Criminal Law § 458 (NCI4th Rev.)— mitigating circumstance—generosity to community—drug and alcohol money—prosecutor's argument

Where the evidence in a murder trial showed that defendant had been involved in the illegal sale of drugs and alcohol for many years, the prosecutor could rebut defendant's argument that the catchall mitigator was supported by his generosity to his community by arguing the inference that the money defendant gave his neighbors came from the drug and liquor sales and by referring to defendant as the "Godfather of Traphill."

Am Jur 2d, Trial § 1291.

13. Criminal Law § 460 (NCI4th Rev.)— prosecutor's argument—death penalty—biblical references—no gross impropriety

The prosecutor's biblical references in urging the jury to return a recommendation of death under the law were not grossly improper and did not require the trial court to intervene *ex mero motu* where the prosecutor did not contend that the state law or its officers were divinely inspired.

Am Jur 2d, Criminal Law §§ 533, 534.

14. Criminal Law § 1392 (NCI4th Rev.)— codefendant received life sentence—not mitigating circumstance

The trial court did not err in refusing to submit to the jury in a capital sentencing proceeding the mitigating circumstance that defendant's codefendant received a life sentence since (1) a codefendant's sentence for the same murder is irrelevant in a sentencing proceeding, and (2) the codefendant was tried noncapitally because he was a juvenile when the murders were committed.

Am Jur 2d, Criminal Law §§ 527, 598, 599.

15. Criminal Law § 1382 (NCI4th Rev.)— murder of victims' father—prior criminal activity—no significant criminal history mitigating circumstance

In a capital sentencing proceeding for the murders of two boys, defendant's murder of the boys' father just prior to the murders of the boys constitutes "prior criminal activity" for purposes of the "no significant history of prior criminal activity" mitigating circumstance even though it was a part of the course of conduct in which the two boys were murdered. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law §§ 527, 598, 599.

16. Criminal Law § 1382 (NCI4th Rev.)— mitigating circumstance—no significant criminal history—submission not required

The trial court did not err by failing to submit the "no significant history of prior criminal activity" mitigating circumstance to the jury in a capital sentencing proceeding for the murders of two young boys where the evidence showed that defendant had been dealing in the illegal sale of alcohol and drugs all of his adult life and that he murdered the boys' father prior to killing the boys.

Am Jur 2d, Criminal Law §§ 527, 598, 599.

17. Criminal Law § 1392 (NCI4th Rev.)— nonstatutory mitigating circumstance—refusal to submit—harmless error

Assuming that evidence offered by defendant would have supported the submission of the requested nonstatutory mitigating circumstance that defendant is likely to adjust well in the future in prison, the trial court's failure to submit this mitigating circumstance was harmless error where other mitigating circumstances were submitted which allowed the jury to consider defendant's evidence, and the jury failed to find any of those circumstances. Since the jury did not find the circumstances submitted, it would not have found a circumstance supported by the same evidence.

Am Jur 2d, Criminal Law §§ 527, 598, 599.

18. Criminal Law § 1375 (NCI4th Rev.)— nonstatutory mitigating circumstance—mitigating value—instruction

The trial court did not err in instructing the jury that one or more jurors would have to believe a submitted nonstatutory mitigating circumstance had mitigating value in order for the jury to

find it and in failing to instruct that the jury must give such circumstance some weight in reaching its decision.

Am Jur 2d, Criminal Law §§ 527, 598, 599.

19. Criminal Law § 1358 (NCI4th Rev.)— death penalty recommendation—binding on trial court

The trial court did not have the authority to set aside the jury's verdict recommending the death penalty.

Am Jur 2d, Criminal Law §§ 609, 628.

20. Criminal Law § 1402 (NCI4th Rev.)— murders of two boys—death sentences proportionate

Sentences of death imposed upon defendant for the first-degree murders of two young boys were not excessive or disproportionate where defendant kidnapped the boys and locked them in the trunk of his car while he robbed and killed their father, and defendant then kept the boys locked in an attic for eight hours until he shot each of them in the head with a pistol.

Am Jur 2d, Criminal Law §§ 627, 628.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Ross, J., at the 20 February 1995 Special Criminal Session of Superior Court, Alexander County, upon jury verdicts of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals as to two additional judgments for kidnapping was allowed 23 July 1996. Heard in the Supreme Court 13 February 1997.

The defendant was tried for the murder and kidnapping of Garry Sidden, Jr. and Galvin Sidden. The testimony of the defendant's cellmate, Jesse Lord, tended to show that on or about 23 or 24 July 1982, the defendant and his fifteen-year-old stepson, Ray Blankenship, decided to rob Garry Sidden, Sr. Garry Sidden, Sr. lived with his two sons, Garry Sidden, Jr., sixteen years old, and Galvin Sidden, ten years old, in a mobile home. Garry Sidden, Sr. also ran a club and country store on his property.

On the evening of the robbery, the two boys came out of the club between 10:30 and 11:30 p.m. and began to walk toward the mobile home. The defendant and his stepson subdued the two boys, bound their arms and legs with tape, and locked them in the trunk of the defendant's car. The defendant and his stepson then went to the mobile home, where they murdered Garry Sidden, Sr. and stole cocaine, money, and marijuana.

The defendant told Lord that he and his stepson next drove the two boys to an old farmhouse, where they kept them locked in the attic for approximately eight hours while they dug a hole. The defendant then took the boys one at a time to the hole and shot each of them in the head with a .38-caliber pistol. The defendant then covered the bodies of the two boys.

The bodies of Garry, Jr. and Galvin Sidden were not found until nine years later when the defendant's stepson led law enforcement officers to the location. The bodies were found in an old well. They had apparently been buried with lime and Drano.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Special Deputy Attorney General, for the State.

Jeffery M. Hedrick for defendant-appellant.

WEBB, Justice.

[1] The defendant first argues error in the process of selecting the jury. He says seven jurors were excused without an adequate inquiry as to their ability to impose the death penalty. He does not argue that the form of the questions and answers did not satisfy the requirements of *Wainwright v. Witt,* 469 U.S. 412, 83 L. Ed. 2d 841 (1985). He argues that the jurors were asked whether their feelings would prevent or substantially impair their ability to perform their duties to consider fairly the possible punishments. He says this called on prospective jurors to apply a legal standard subjectively, which they could not do. He also says the questions presupposed that the prospective jurors understood the complex legal standards outlining the parameters of their duties, which is not so. If the questions called on the prospective jurors to apply a legal standard subjectively, this was not error. The questions were straightforward and easily understood. The jurors should have had no trouble answering them. If the jurors did not understand the legal standards outlining the parameters of their duties, this does not mean they could not properly answer the questions.

[2] The defendant argues that it was wrong for the court to tell the jurors that they must make a recommendation "setting aside personal feelings." This was not error. In determining what sentence to impose, a juror should follow the law and not his personal feelings. Nor can we hold, as urged by the defendant, that the court implied that reservations about capital punishment would disqualify prospective jurors from serving when it said it was the duty of the jury "to fairly consider both possible punishments." This was an admonition to the jury to be fair to both sides.

[3] The defendant also argues under this assignment of error that he should have been allowed to rehabilitate those jurors excused for cause. The defendant at trial asked to rehabilitate only one of the jurors who was excused for cause. The answers of all the excused jurors revealed that their feelings would prevent or substantially impair the performance of their duties as jurors. It was within the discretion of the trial judge whether to allow the rehabilitation of the jurors. *State v. Taylor*, 332 N.C. 372, 390, 420 S.E.2d 414, 425 (1992).

This assignment of error is overruled.

[4] The defendant next assigns error to the admission of evidence in regard to the murder of Garry Sidden, Sr. The State introduced evidence that defendant and his stepson killed Garry Sidden, Sr. This evidence included photographs of the body and crime scene, diagrams, and the testimony of Sabon Johnson, an eyewitness. Evidence of the commission of a crime other than the one for which the defendant is being tried is admissible if such evidence is so intertwined with the evidence of the principal crime that the circumstances of the charged crime cannot be established without such evidence. *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990).

In this case, the evidence showed the defendant and his stepson kidnapped the two boys and put them in the trunk of an automobile. They left the two boys in the trunk while they murdered the boys' father. They then murdered the two boys. Evidence of the murder of the father was so intertwined with evidence of the murder of the boys that in order to show the circumstances of the crime, it was admissible. It was not barred by N.C.G.S. § 8C-1, Rule 404(b). *Id.* at 549, 391 S.E.2d at 175. It was not an abuse of discretion pursuant to N.C.G.S. § 8C-1, Rule 403 for the court to admit this evidence.

This assignment of error is overruled.

[5] The defendant next contends that the trial court committed plain error in allowing the testimony of two State's witnesses. The first witness was SBI Agent Steve Cabe. He testified to contents of prior statements made by Sabon Johnson to him. He then testified that Johnson's testimony at trial had been basically "the same statements as he made initially both to law enforcement and in the first trial [the defendant's trial for the murder of Garry Sidden, Sr.]."

The defendant acknowledges that a witness' prior consistent statements are admissible for the purpose of corroboration. However, he contends that the trial court erred in allowing Agent Cabe to state his opinion that Johnson's testimony was the same as he had made to the officers. The defendant relies on *State v. Norman*, 76 N.C. App. 623, 334 S.E.2d 247, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 863 (1985), in support of his argument.

In *Norman*, the Court of Appeals held that testimony of an officer that a witness' testimony was substantially the same as his prior statements was error. *Id.* at 627, 334 S.E.2d at 250. However, in that case, the Court of Appeals noted that the officer had not testified as to the contents of the previous statement. *Id.* The present case is distinguishable since the officer in this case did testify as to the contents of the previous statement. The jury was able to draw its own conclusion as to whether the statements were the same. Furthermore, the trial court instructed the jury as to the limited use of this testimony. *State v. Jones*, 317 N.C. 487, 496-97, 346 S.E.2d 657, 662 (1986).

[6] The second witness about which defendant complains was FBI Agent James Davis. Agent Davis testified without objection that the FBI had used information provided to it by Jesse Lord on twenty different occasions. Agent Davis testified that, based on his dealings with Lord, he had formed an opinion as to Lord's truthfulness. The court then sustained an objection to this testimony, and the witness did not testify as to his opinion. No curative instruction was given.

The defendant says that Agent Davis was allowed to promote the credibility of State's witness Lord by testifying as to specific instances of conduct, in violation of N.C.G.S. § 8C-1, Rule 608(b). We do not believe that was the purpose of the testimony. Apparently, the witness was laying the foundation for giving his opinion as to Lord's truthfulness. He was stopped from doing so by the sustaining of the objection.

In his colloquy, Agent Davis testified without objection as to the times the FBI had relied on Lord. Davis was not allowed to express his opinion as to Lord's truthfulness. This does not rise to the level of plain error.

This assignment of error is overruled.

[7] In his next assignment of error, the defendant contends the court erred in its response to a question from the jury. During the guilt-phase deliberations, the jury submitted a written question to the court, asking, "Where is Jerry Prevette, and why was he not called to testify?" The court responded:

> In regards to that, Ladies and Gentlemen, I would instruct you that you are to decide this matter based on upon [sic] the evidence that has been presented and you are—it is your duty to recall all of the evidence and to base your decision on the evidence and on the law.

The defendant says this instruction was erroneous because it was incomplete, it failed to remind the jury to consider the arguments of counsel, and it did not address the thrust of the jury's inquiry, which was the obligation of the jury should it have a reasonable doubt. The defendant argues that this instruction misinformed the jury by telling it that the evidence was sufficient to convict the defendant. The defendant says there is a distinct possibility that this instruction stripped him of his presumption of innocence. We disagree.

The jury asked why a person whose name had been mentioned in the evidence did not testify. The court properly instructed the jury to decide the case based on the evidence presented. The court was not required to reinstruct the jury to consider arguments of counsel after it had properly done so in its charge. *State v. Hockett,* 309 N.C. 794, 309 S.E.2d 249 (1983). We do not believe the instruction told the jury the evidence was sufficient to convict the defendant; although, if the evidence was believed by the jury, it was so sufficient. Nor do we believe it could have caused the jury not to hold the State to proof beyond a reasonable doubt.

This assignment of error is overruled.

The defendant next assigns error to the following instructions given by the trial court during the sentencing phase of the trial:

> 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 exist[s].

The defendant argues that the court should have defined preponderance of the evidence as "more probable than not." He also contends that the court erred in using the term "satisfies you," as it is vague and highly subjective.

We have previously considered and rejected this contention. *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995).

This assignment of error is overruled.

In his next assignment of error, the defendant contends that the prosecutor made several improper arguments during both phases of the trial.

[8] The first argument complained of by the defendant is the prosecutor's argument that the defendant failed to call his ex-wife, Brenda Sidden, as a witness to support his alibi, even though she had been present in court for the entire trial. The defendant had contended that he had been with her on the evening of the murders. The prosecutor stated:

> And remember I asked Mr. Ockert, of all the people in these photographs, how many of them are here in this courtroom? And he said, "well, there's me, there's Tony [the defendant] and there's Brenda Sidden back there." Sitting where she is now with the defense witnesses and family and friends back there. Sitting all week that way. Why didn't they call her up here to testify about these pictures? She's sitting right back there with them. . . . If he wants to call her— he didn't call her. He left her sitting back there among the other witnesses.

Jean Ockert testified for the defendant that at the time of the murder, the defendant had been at Ockert's house with Brenda Sidden. The identity of Brenda Sidden and the fact that she was in the courtroom had been brought into evidence during the State's cross-examination of Ockert. The prosecutor asked Ockert to point out Brenda Sidden, both in a photograph and in the courtroom.

The prosecutor was properly commenting on the defendant's failure to produce exculpatory evidence. *State v. Brewer*, 325 N.C. 550, 386 S.E.2d 569 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541

(1990). It is permissible for such comments to note a defendant's failure to produce an alibi witness. *State v. Hunt*, 339 N.C. 622, 641, 457 S.E.2d 276 (1994).

[9] Next, the defendant argues that the trial court should have intervened *ex mero motu* during the following argument by the prosecutor:

> We have been criticized for using Jesse Lord, and you know prison is a place—and we have never been there, but I have heard it said that when you go . . . to try the devil, you've got to go to hell to get your witnesses, and Marion, Illinois qualifies in that respect. The Defendant over here qualifies in that respect.

The defendant, relying on *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992), says it was error for the prosecuting attorney to characterize him as the devil. In *Willis*, the prosecutor argued, "when you try the devil, you have to go to hell to find your witnesses." *Id.* at 171, 420 S.E.2d at 167. We said this did not characterize the defendant as the devil but described the type witness available in that case. *Id.* In this case, the prosecuting attorney in effect said the defendant qualified as the devil.

In the context in which it was said, we do not believe the jury could have thought the prosecutor believed the defendant was the devil. He meant that the defendant was a bad man. The argument was not so egregious that the court should have stricken it *ex mero motu*.

[10] The defendant next contends that the trial court erred in allowing the prosecutor to use photographs of the victims during closing argument. The photographs were in evidence and, therefore, could be properly used in argument by either party.

[11] The defendant also says that the prosecutor should not have been permitted to argue that the defendant had turned the victims into "skeletal remains." The prosecutor said, "I ask you to go by the evidence, not by the falsehoods supplied by the Defendant and find this man guilty of turning these boys from that to this, from that to this," while gesturing toward a photograph of the skeletal remains of the victims.

The prosecutor may draw inferences from the evidence. In the present case, there was ample evidence to support the prosecutor's inference that the defendant had turned the victims into skeletons. The defendant had buried the two boys in an old well and covered their bodies with lime and several bottles of Drano. The bodies were

not located for nine years, and only the victims' skeletons were found.

[12] The defendant also complains that the prosecutor improperly called the defendant "the Godfather of Traphill." The prosecutor argued:

> All that money he was paying out up there. You know where that money came from based on what the evidence is coming out to you. He was the Godfather of Traphill. Giving out money to people. Oh, you need $65 to get your motorcycle back? Well, here, take [$]80. You need $300 for the tombstone of your son. Here's the $300.

The defendant had previously argued that the catchall mitigator was supported by his generosity to his community. He had presented evidence that he had given money to people in his neighborhood.

The prosecutor was properly rebutting the defendant's argument in support of the "catch-all" mitigator by noting that the evidence at trial also showed that the defendant had been involved in the illegal sale of drugs and alcohol for many years. The prosecutor properly drew the inference that the money the defendant gave his neighbors came from illegal drug and liquor sales.

[13] The defendant next says that the prosecutor's biblical references were grossly improper and that the trial court should have intervened *ex mero motu*. During the guilt phase, the prosecutor argued:

> You know, the Bible, Luke 17, Versus [sic] 2, "It were better for him that a millstone were hanged about his neck and he cast into the sea than that he should offend one of these little ones." And that's what we have in this case, Ladies and Gentlemen. It is [an] offense committed against little ones.

The prosecutor also referred to this passage again in the sentencing phase arguments. He stated:

> You know, that's how important this case is. If you can come back and say—look Pat Pruitt right in the eye and say, "Well, I know he murdered your two sons. I know he took them out there after he slaughtered their father when they could either see or hear it. Took them out to Cecile Holder's property and laid them face down there on the ground and shot them in the back of the head. And even though that happened, we think these 17 or 18 mitigat-

> ing circumstances is [sic] appropriate and his family life, whatever, makes up for it; and he ought not to get the death sentence." Well, that is not justice, and when you come back in on the basis of these kind of mitigating—alleged mitigating circumstances and look her in the eye and inform her her sons[] weren't worth anymore than that—it would be better for him that a millstone were hanged about his neck and he cast into the sea than he should offend one of these little ones.
>
> Ladies and Gentlemen, I ask you under the law, what's right and what's just, that you take a millstone and you hang it around his neck and you cast it right into the sea for having offended these little ones.

The prosecutor's argument was not grossly improper. He did not contend that the state law or its officers were divinely inspired. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 794 (1996). The prosecutor urged the jury to return a recommendation of death under the law.

This assignment of error is overruled.

[14] In his next assignment of error, the defendant argues that the trial court erred in refusing to submit to the jury the mitigating circumstances that the defendant's codefendant received a life sentence. He also argues that the trial court should have, alternatively, set aside the jury's recommendation of death for this same reason.

Aside from the fact that we have repeatedly held that a codefendant's sentence for the same murder is irrelevant in the sentencing proceedings, *State v. Bishop*, 343 N.C. 518, 548-49, 472 S.E.2d 842, 858 (1996), *cert. denied*, — U.S. —, 136 L. Ed. 2d 723 (1997); *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981), the codefendant in this case was tried noncapitally pursuant to N.C.G.S. § 14-17 because he was a juvenile when the crimes were committed, *State v. Blankenship*, 337 N.C. 543, 546, 447 S.E.2d 727, 729 (1994). We decline to reconsider this issue.

This assignment of error is overruled.

[15] The defendant next assigns error to the court's failure to submit the (f)(1) mitigator, "[t]he defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1988) (amended 1994). He argues first that the murder of Garry Sidden, Sr. cannot be considered prior criminal conduct for purposes of this mitigating cir-

cumstance because it was a part of the course of conduct in which the two boys were murdered. The defendant relies on *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994), for this argument. We do not believe *Coffey* is helpful to the defendant. It holds that to be considered in regard to this mitigator, the criminal conduct must have occurred before the date of the crime for which the defendant is being tried, rather than the date of the trial. *Id.* at 418, 444 S.E.2d at 434-35. The murder of Garry Sidden, Sr. occurred before the murder of the two boys, which makes it fit within the words of the mitigator as "prior criminal activity." It has to be considered when determining whether to submit this mitigating circumstance.

[16] The evidence showed the defendant had been dealing in the illegal sale of alcohol and drugs all his adult life. This evidence of constant criminal activity culminating in the murder of Garry Sidden, Sr. was such that the jury could not reasonably find that the defendant had no significant history of prior criminal activity. It was not error not to submit this mitigator.

This assignment of error is overruled.

[17] The defendant next assigns error to the failure to submit the nonstatutory mitigating circumstance, "[t]he Defendant is likely to adjust well in the future to prison." In support of this circumstance, the defendant adduced testimony from John F. Warren, a forensic psychologist who testified that the defendant had been treated for major depression while in prison and had responded so well that he was able to stop taking medication. Dr. Warren also testified that while the defendant was incarcerated, he had voluntarily participated in group therapy and benefitted from those involvements. Dr. Warren testified further that some of the defendant's most stable and consistent social and educational experiences occurred during his incarceration. He testified finally that the defendant's work adjustment while incarcerated was exemplary and that there was no indication that the defendant is violence-prone. A deputy sheriff testified that he had handled the defendant on several occasions while the defendant was incarcerated and had never had any disciplinary problems.

In *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986), the United States Supreme Court held that evidence of a defendant's ability to adjust to prison life is relevant to a jury's sentencing recommendation and that a defendant is entitled to present evidence concerning his conduct in custody and his ability to adjust to prison. Assuming this mitigating circumstance should have been submitted,

we hold that the failure to submit it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1996).

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 superior court refused to submit the nonstatutory circumstance that "[i]n a structured prison environment, [the defendant] is able to conform his behavior to the rules and regulations and performs tasks he is required to perform." *Id.* at 109, 443 S.E.2d at 321. An expert witness testified that the defendant functioned well in a prison environment, followed the rules, got along well with other inmates, and was able to live in that environment without disturbing or offending other inmates by his behavior.

We held it was harmless error not to submit the requested mitigating circumstance because the jury was allowed to consider fully this evidence in regard to mitigating circumstances that were submitted. The circumstances that were submitted included (1) that the defendant had a good prison record while at Central Prison, (2) that the defendant had exhibited good behavior while incarcerated at the Guilford County jail in High Point and had volunteered to serve meals to his fellow inmates and to perform other custodial duties such as mop the floor, and (3) any other circumstance or circumstances arising from the evidence which the jury deemed to have mitigating value. The jury did not find any of these mitigating circumstances. We held that if the jury refused to find these circumstances, it would not have found the defendant's requested circumstance, which was supported by the same evidence.

Among the mitigating circumstances that were submitted in this case were the following: (1) the defendant has an exemplary work record in prison, (2) the defendant has not given local authorities problems in his care and housing and has behaved appropriately while in custody, and (3) any other circumstance or circumstances arising out of the evidence that one or more of the jurors deem to have mitigating value. The jury did not find any of these mitigating circumstances. Following the rationale of *Robinson*, we hold that mitigating circumstances were submitted to the jury which allowed it to consider the defendant's evidence. If the jury did not find the circumstances submitted, we can conclude it would not have found one that was not submitted. Any error in not submitting the circumstance was harmless.

This assignment of error is overruled.

[18] The defendant next says the court committed error in its charge on nonstatutory mitigating circumstances. The court charged the jury that one or more jurors would have to believe a submitted nonstatutory mitigating circumstance had mitigating value in order for the jury to find it. The defendant argues that the jury should have been told that it must give such circumstances some weight in reaching its decision.

The defendant concedes that we have rejected his argument in *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), and *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). He says these cases have been overruled by *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), and *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989). We disagree. *McKoy* dealt with our requirement that the jury must be unanimous before it can find a mitigating circumstance. The United States Supreme Court held this prevented the jury from considering mitigating evidence. We do not have that problem in this case. *Penry* dealt with Texas' method of imposing the death sentence. The United States Supreme Court held that the issues submitted to the jury did not allow it to give adequate consideration to mitigating evidence. In this case, the jury was able to fully consider the defendant's mitigating evidence. The jury rejected this evidence, which was its prerogative.

This assignment of error is overruled.

[19] In his final assignment of error, the defendant contends the court should have set aside the jury's verdict recommending the death penalty. He bases this argument on the jury's failure to find any of the submitted mitigating circumstances, including the nonstatutory circumstances for which the court gave peremptory instructions. The defendant says it is obvious that the jury ignored the court's instructions.

The superior court did not have the authority to set aside the verdict. *State v. Holden*, 321 N.C. 125, 164, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Furthermore, nonstatutory mitigating circumstances do not have mitigating value as a matter of law. It is for the jury to make this decision. *State v. Miller*, 339 N.C. 663, 690, 455 S.E.2d 137, 152, *cert. denied*, — U.S. —, 133 L. Ed. 2d 169 (1995). The jury was not required to find these mitigating circumstances.

This assignment of error is overruled.

In regard to our statutory duties required by N.C.G.S. § 15A-2000(d)(2), we find that the record supports the jury's findings of the aggravating circumstances upon which the sentence of death was based. We also find that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

[20] In determining whether the death sentence was excessive or disproportionate, we note first that in *State v. Maynard*, 311 N.C. 1, 35, 316 S.E.2d 197, 215, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), we held that the death penalty is proportionate when the only purpose for a murder is to eliminate a witness. Even if *Maynard* is not controlling, we have no difficulty finding the sentence proportionate because we have never found a death sentence disproportionate in a double-murder case. *State v. Conner*, 345 N.C. 319, 338, 480 S.E.2d 626, 635 (1997). This case involves a triple murder. It is hard to find a case to compare with this one. The facts in this case demonstrate a wanton cruelty which is beyond comparison. The defendant kidnapped two young boys and kept them locked first in the trunk of his automobile while he murdered their father and then in an attic before killing them. We can only imagine the terror the two boys felt as they awaited their fate. The torture endured by these two children removes any doubt that the sentence of death in this case is proportionate.

In the defendant's trial, we find

NO ERROR.

STATE OF NORTH CAROLINA v. RUSSELL WILLIAM TUCKER

No. 113A96

(Filed 3 October 1997)

1. Criminal Law § 498 (NCI4th Rev.)— capital murder—police vehicle—jury view—no abuse of discretion

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by allowing the jury to view a police vehicle into which defendant had fired while fleeing the

murder. Although defendant contended that the jury view was cumulative, defendant's intent when he fired the shots into the vehicle was at issue and the condition of the damaged vehicle is indicative of such intent. The trial court's decision to allow the jury view was well within its discretion.

Am Jur 2d, Trial §§ 258, 259, 264.

2. Criminal Law § 188 (NCI4th Rev.)— capital murder—capacity to stand trial—sufficiency of evidence

There was sufficient competent evidence in a capital prosecution for first-degree murder to support the trial court's finding that defendant had the capacity to proceed to trial where defendant was examined at Dorothea Dix Hospital; the forensic psychiatrist who prepared a discharge summary diagnosed him as having antisocial personality disorder but thought he was malingering; defendant was referred to a staff psychologist at Dix who found that defendant was not psychotic but appeared to be malingering and attempting to fake psychosis; another expert opined that defendant was not competent to stand trial but that it was possible he was malingering; defendant was so disruptive with religious outbursts during a pretrial motions hearing that he had to be restrained; and the forensic psychologist testified that defendant was competent to stand trial and was malingering, based on the eight-day examination of defendant at Dix, a review of jail records, a review of the transcript from a hearing, a review of psychological information from tests, observations of defendant on the date the capacity hearing began, and her interview with defendant.

Am Jur 2d, Criminal Law §§ 124-128.

Modern status of test of criminal responsibility—federal cases. 56 ALR Fed. 326.

3. Homicide § 262 (NCI4th)— felony murder—felony after murder

The trial court did not err by not dismissing a felony murder charge where defendant left a K-Mart wearing clothes for which he had not paid; shot and killed a security guard who followed him into a parking lot; ran approximately four hundred feet; and fired into a police vehicle which approached him, striking both officers inside. The evidence tended to show that defendant stole merchandise from the Super K-Mart Center, shot at two

employees of K-Mart in an effort to avoid apprehension, fatally wounding one, and at two law enforcement officers, and that the entire incident consumed less than two minutes.

Am Jur 2d, Homicide § 442.

4. Criminal Law § 564 (NCI4th Rev.)— capital murder—reference to previous murder—mistrial denied

The trial court did not err by denying defendant's motion for a mistrial in a capital prosecution for first-degree murder where defendant admitted on cross-examination by the State to having fired the gun used here several times and to having pled guilty to second-degree murder in another case; the State asked defendant whether he had fired the gun in that case; defense counsel objected and the court sustained the objection; defendant moved for a mistrial out of the presence of the jury; the trial court reviewed the law at length with counsel; the court overruled defendant's objection and denied defendant's motion for mistrial at one point; by the end of the court's consideration, the prosecutor stated that the State could live with sustaining the objection and would not pursue that line of inquiry; the court stated to the jury that the objection was sustained; and, when it became clear that the issue of whether the question was permitted was mooted, defendant specifically requested that curative instructions not be given. Whether a mistrial should be granted rests in the sound discretion of the trial court; the trial court here was well within its discretion in concluding that this was not a situation in which an impropriety made it impossible for defendant to attain a fair and impartial verdict under the law.

Am Jur 2d, Trial § 626.

5. Criminal Law § 101 (NCI4th Rev.)— capital murder—defendant's statement at scene—State's good faith failure to discover—statement admitted—no abuse of discretion

The trial court did not err in the capital first-degree murder prosecution of a defendant who shot a K-Mart security guard who had followed him into a parking lot by denying defendant's renewal of his motion *in limine* to exclude defendant's statement "Come here, I've got something for you" immediately prior to the shooting. A witness informed the State that he recalled the statement the day before jury selection began on 5 February 1996; the State claims that it informed defense counsel of the rec-

ollection within half an hour of learning of it; the witness testified at trial that he first told law enforcement officers of his recollection on 7 December 1995; defendant asked the court to reconsider its ruling; and the witness was again questioned and testified that he first told the State about his recollection on 5 February and that he had gotten confused during his earlier testimony. Defendant made no argument that the State failed to comply with the rules of discovery and contended that good faith by the State does not relieve it of responsibility for finding facts which can be found with reasonable diligence. However, the choice of sanctions, if any, rests in the discretion of the trial court and defendant failed to make any showing of abuse of discretion.

Am Jur 2d, Evidence §§ 710, 723; Trial § 1359.

6. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A death sentence was not disproportionate where the record fully supports the jury's finding of aggravating circumstances; there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; this case is distinguishable from the seven in which the death penalty was found disproportionate in that this defendant was convicted of murder by premeditation and deliberation which indicates a more cold-blooded and calculated crime; defendant was found guilty of felony murder based on several underlying felonies; and there were two statutory aggravating factors which are among the four held sufficient to sustain a death sentence standing alone. This case is more similar to cases in which the sentence was found proportionate than to those in which it was found disproportionate or those in which juries have returned recommendations of life imprisonment.

Am Jur 2d, Criminal Law § 628.

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Martin (Jerry Cash), J., on 21 February 1996 in Superior Court, Forsyth County, upon a jury ver-

dict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed 25 February 1997. Heard in the Supreme Court 10 September 1997.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Richard D. Ramsey and Thomas G. Taylor for defendant-appellant.

WHICHARD, Justice.

On 31 July 1995 defendant was indicted for the first-degree murder of Maurice Travone Williams, assault with a deadly weapon with intent to kill inflicting serious injury to S.E. Spencer, and assault with a deadly weapon with intent to kill inflicting serious injury to H.M. Bryant, all occurring on 8 December 1994. Defendant was tried capitally, and the jury returned a verdict finding him guilty of first-degree murder on the theory of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. The trial court sentenced defendant accordingly. Subsequent to the sentencing on the murder charge, the State dismissed the two assault charges. 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.

The evidence presented at trial tended to show that at approximately 10:00 p.m. on 8 December 1994, defendant walked out of the Super K-Mart Center on University Parkway in Winston-Salem, North Carolina, wearing a coat and a pair of boots for which he had not paid. He was followed by Assistant Loss Control Manager William Maki. Travis Church, a K-Mart employee, and Maurice Travone Williams, a security guard, followed shortly behind Maki. Maki asked defendant for a receipt, and according to Maki, defendant responded, "Come on, I've got something for you."

Defendant then removed a Lorcin .380-caliber semiautomatic pistol from his knapsack with his right hand and fired at Maki's face from a distance of approximately six feet. Maki was not struck by the shot but received gunpowder burns on his face. Williams and Church began running back toward the store, and defendant switched the gun from his right to his left hand. Defendant then shot and killed

Williams with one shot that penetrated his aorta and both lungs. Five to ten seconds elapsed between defendant's attempt to shoot Maki and the second shot at Williams.

Defendant had run approximately four hundred feet to an area in the parking lot of the Super K-Mart Center when he was approached by a police vehicle. Winston-Salem Police Officer S.E. Spencer was operating the marked police vehicle, and Winston-Salem Police Officer H.M. Bryant was a passenger. As defendant slowed to a walk, he turned and fired five shots into the vehicle, striking both Spencer and Bryant. The time between the shooting of Williams and the shooting of Spencer and Bryant was described as being between forty-five seconds and a couple of minutes.

Defendant then fled up an embankment and into some woods. He was apprehended by police officers forty-five minutes to one hour later.

[1] Defendant first contends that the trial court abused its discretion by allowing the jury to view the police vehicle he shot during the incident. Defendant argues that the jury view was cumulative because the State published pictures of the vehicle to the jury, and several witnesses testified about the shots fired into the vehicle.

N.C.G.S. § 15A-1229(a) provides in pertinent part: "The trial judge in his discretion may permit a jury view." A decision to allow a jury view will not be disturbed absent an abuse of discretion. *See State v. Simpson*, 327 N.C. 178, 193, 393 S.E.2d 771, 780 (1990). "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. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

The trial court here considered arguments and evidence presented by both the State and defendant before allowing the jury view. Defendant made substantially the same argument at trial that he makes here. The State argued that the jury view was necessary to rebut defendant's claim that he fired the pistol while in a panicked, confused, and disoriented state. The State contended that the jury's seeing the vehicle was an important means of proving that defendant intended to kill when he fired toward it. The State further argued that the jury view would not be cumulative because the jury did not have a picture of a bullet which was lodged in the vehicle's steering column near the driver's chest.

After considering these arguments, the trial court stated, "The court is of the view that the police vehicle view would be helpful to an understanding of this matter by the jurors." The court further ruled that the evidence was relevant pursuant to N.C. R. Evid. 401 and that its probative value outweighed any danger of unfair prejudice under N.C. R. Evid. 403.

Because defendant's intent when he fired shots into the vehicle was at issue and because the condition of the damaged vehicle is indicative of such intent, the trial court's decision to allow the jury view was well within its discretion. Accordingly, this assignment of error is overruled.

[2] Defendant next contends that the trial court erred in finding that defendant had the capacity to proceed to trial. He concedes the court followed the proper procedures but argues that there was insufficient competent evidence to support the finding.

The test for determining a defendant's capacity to stand trial is whether, at the time of trial, the defendant has "the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." *State v. McCoy*, 303 N.C. 1, 18, 277 S.E.2d 515, 528 (1981). After defendant raised the issue, he was examined, pursuant to court order, at Dorothea Dix Hospital from 10-18 August 1995. His attending physician, Dr. Nicole Wolfe, a forensic psychiatrist, prepared a discharge summary when defendant was released, diagnosing him as having antisocial personality disorder; she also thought he was malingering. On 11 August 1995 Wolfe referred defendant to Edwin D. Munt, a staff psychologist at Dorothea Dix. Munt found that defendant did not appear psychotic; rather, he appeared to be malingering his mental illness and attempting to fake psychosis. Dr. Sam Manoogian, an expert in clinical psychology, examined defendant on four occasions between 18 November 1995 and 7 December 1995. He opined that defendant was not competent to stand trial but that it was possible that he was malingering. Manoogian recommended a month-long course of medication and observation.

During a pretrial motions hearing, defendant was so disruptive with outbursts of a religious nature that he had to be physically restrained. Wolfe testified that defendant was competent to stand trial and was malingering. She specifically testified that defendant

understood the court action, understood the proceedings and his role in them, and could assist with his defense. Her opinion was based on the eight-day examination at Dorothea Dix, a review of jail records, a review of the transcript from a hearing on 17 November 1995, a review of psychological information from MMPI and Rorschach tests, her observations of defendant on 7 December 1995 (the date the capacity hearing began), and her interview with defendant.

"When the trial court, without a jury, determines a defendant's capacity to proceed to trial, it is the court's duty to resolve conflicts in the evidence; the court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary." *State v. Heptinstall*, 309 N.C. 231, 234, 306 S.E.2d 109, 111 (1983). There is sufficient competent evidence here supporting the trial court's finding that defendant had the capacity to proceed to trial. This assignment of error is therefore overruled.

[3] Defendant argues next that the trial court erred by not dismissing the charge of first-degree murder brought under the felony murder theory. Defendant contends that the sequence of events connecting the killing of Williams with the assaults on Maki and Officers Spencer and Bryant was not sufficiently related to be considered a "continuous transaction."

The statute governing felony murder provides in pertinent part: "A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." N.C.G.S. § 14-17 (Supp. 1996). In *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981), this Court stated:

> A killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

We have held further that "[t]he temporal order of the killing and the felony is immaterial where there is a continuous transaction, and it is immaterial whether the intent to commit the felony was formed before or after the killing, provided that the felony and the killing are aspects of a single transaction." *State v. Roseborough*, 344 N.C. 121, 127, 472 S.E.2d 763, 767 (1996).

"In passing upon a defendant's motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference." *State v. Aikens*, 342 N.C. 567, 573, 467 S.E.2d 99, 103 (1996). The State's evidence tended to show that defendant stole merchandise from the Super K-Mart Center, and in an effort to avoid apprehension, he shot at two employees of K-Mart, fatally wounding one, and at two law enforcement officers. The entire incident consumed less than two minutes. Ample evidence supported the trial court's finding of a continuous chain of events linking the killing of Williams with the other assaults. The trial court's denial of defendant's motion to dismiss was proper, and this assignment of error is therefore overruled.

[4] Defendant next contends that the trial court committed reversible error by denying defendant's motion for a mistrial when the State inquired into a previous crime defendant committed. On cross-examination by the State, defendant admitted to having fired the gun used here several times before. Defendant also admitted to having pled guilty to second-degree murder in another case. The State then asked defendant, "You fired the gun in that other case, didn't you?" Before defendant could answer, defense counsel objected, and the trial court sustained the objection. The court excused the jury, and out of its presence defendant moved for a mistrial based on this question. The trial court reviewed the law on these matters at length with counsel for the State and the defense. At one point the court overruled defendant's objection to the State's question and denied defendant's motion for a mistrial. By the end of the court's consideration, however, the prosecutor stated, "The State will live with the court['s] sustaining objection to the last question the State asked and will not pursue that line of inquiry." When the jury was again present, the court stated, "The objection to the last question is sustained."

The issue was whether the State's question was permitted under N.C. R. Evid. 404(b) and 403. Before the court made its final ruling, the issue was mooted by the State's agreement to the court's sustaining of the objection. Further, when it became clear that the issue was moot, defendant specifically requested that curative instructions not be given.

The issue here, then, is whether the question was so prejudicial that the trial court should have granted a mistrial. Our statute provides in pertinent part:

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

N.C.G.S. § 15A-1061 (1988). Whether a mistrial should be granted rests in the sound discretion of the trial court, and the exercise of its discretion will not be reversed on appeal absent an abuse of discretion. *State v. Craig*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). "A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985).

Here the State asked a question seeking information that conceivably should have been excluded. Defendant never answered the question. He objected, and the court sustained the objection in the presence of the jury. Defendant specifically asked that curative instructions not be given. The trial court was well within its discretion in concluding that this was not a situation in which an impropriety made it impossible for defendant to attain a fair and impartial verdict under the law. This assignment of error is without merit.

[5] Defendant next argues that the trial court committed reversible error when it denied defendant's renewal of his motion *in limine*. According to the State, on 5 February 1996, the day before jury selection began, Maki, K-Mart's Assistant Loss Control Manager, informed the State that he recalled hearing defendant say, "Come here, I've got something for you," immediately prior to shooting at Maki and then fatally shooting Williams. The State claims that it informed defense counsel of Maki's recollection within half an hour of learning of it. Defendant moved *in limine* to exclude Maki's testimony regarding his recollection because of its prejudicial nature and the late notice to defendant. The trial court ruled that the statement was relevant under N.C. R. Evid. 401, that its probative value outweighed any prejudice to defendant under N.C. R. Evid. 403, and that the State had supplemented its responses and complied with the discovery requirements of our statutes. The court therefore denied the motion.

At trial Maki testified that he first told law enforcement officers of his recollection on 7 December 1995. As a result of this testimony,

defendant asked the court to reconsider its ruling on the motion *in limine.* After hearing from both the State and defendant outside the presence of the jury, the court adhered to its prior ruling. Maki was again questioned regarding when he first told the State about his recollection. He testified that he first reported it to the State on 5 February 1996 and that he had gotten confused during his earlier testimony.

Defendant has made no argument that the State failed to comply with the rules of discovery. Rather, he contends that "good faith on the part of the State should not relieve it of the responsibility of finding facts which are there to be found with the exercise of reasonable diligence." In matters of discovery, "[t]he choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion." *State v. Gladden,* 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied,* 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Defendant has failed to make any showing of abuse of discretion. This assignment of error is overruled.

[6] 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 circumstances found by the jury; (2) whether passion, prejudice, or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (Supp. 1996).

The jury found four aggravating circumstances. Pursuant to N.C.G.S. § 15A-2000(e)(3), it found that "[t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person." It found this twice, once based on a previous conviction for second-degree murder and once based on a previous conviction for felony armed robbery. Pursuant to N.C.G.S. § 15A-2000(e)(6), the jury found that "[t]he capital felony was committed for pecuniary gain." Finally, pursuant to N.C.G.S. § 15A-2000(e)(11), the jury found that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons."

We conclude that the record fully supports the jury's finding of these aggravating circumstances. 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.

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, the jury found defendant guilty under the felony murder rule based on the commission of several underlying felonies. Finally, there are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain a sentence of death; the (e)(3) and (e)(11) circumstances, which the jury found here, are among them. *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995).

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. We conclude that the sentence of death is not disproportionate and hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

ROSIE J., ON HER OWN BEHALF, AND ON BEHALF OF ALL WOMEN SIMILARLY SITUATED, RALEIGH WOMEN'S HEALTH ORGANIZATION, AND JOHN MARKS, M.D. v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, C. ROBIN BRITT, SR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, AND JAMES HUNT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NORTH CAROLINA

No. 232PA96

(Filed 3 October 1997)

1. Abortion; Prenatal or Birth-Related Injuries and Offenses § 3 (NCI4th)— State Abortion Fund restrictions—use of Medical Assistance Fund not required

When the General Assembly restricted the use of the State Abortion Fund to eliminate payments for medically necessary abortions, the State was not obligated to fund such abortions using the State's contribution to the Medical Assistance Fund.

Am Jur 2d, Abortion and Birth Control §§ 3, 61, 62, 64.

2. Abortion; Prenatal or Birth-Related Injuries and Offenses § 3 (NCI4th)— medically necessary abortions—restrictions on State funding—indigent women—not suspect class—not deprivation of fundamental right

Indigent women who need medically necessary abortions are not members of a suspect class and are not being deprived of a fundamental right by the refusal of the State to fund abortions for them. Therefore, the State's refusal to fund medically necessary abortions is not subject to strict scrutiny, and the State does not have to show a compelling State interest to justify its action.

Am Jur 2d, Abortion and Birth Control §§ 3, 61, 62, 64.

3. Abortion; Prenatal or Birth-Related Injuries and Offenses § 3 (NCI4th)— medically necessary abortions—restrictions on State funding—test for determining constitutionality

The test that must be applied to determine whether restrictions placed by the General Assembly on State funding of medically necessary abortions for indigent women violate the North Carolina Constitution is whether the restrictions bear any rational relation to a legitimate governmental interest.

Am Jur 2d, Abortion and Birth Control §§ 3, 61, 62, 64.

4. Abortion; Prenatal or Birth-Related Injuries and Offenses § 3 (NCI4th)— medically necessary abortions—restrictions on State funding—constitutionality

Restrictions placed by the General Assembly on State funding of medically necessary abortions for indigent women is rationally related to the legitimate governmental objective of encouraging childbirth; the restrictions are thus valid and do not violate Art. I, § 1, Art. I, § 19, or Art. XI, § 4 of the North Carolina Constitution.

Am Jur 2d, Abortion and Birth Control §§ 3, 61, 62, 64.

Justice PARKER dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order entered by Hight, J., at the 12 February 1996 Nonjury Civil Session of Superior Court, Durham County. Heard in the Supreme Court 12 December 1996.

This case brings to the Court the question of whether restrictions placed by the General Assembly on the funding of medically necessary abortions for indigent women violate the Constitution of North Carolina. In 1965, the General Assembly provided for the creation of the State Fund for Medical Assistance. This was done to allow the State to coordinate State action with the federal government's action to establish a Medicaid program. The federal and state governments as well as the counties of the state contribute to the Medical Assistance Fund. In *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147 (1973), the United States Supreme Court held that a woman has a constitutional right to an abortion. Following that decision, the State made payments for abortions for indigent women from the State Fund for Medical Assistance.

In 1977, Congress adopted the Hyde Amendment, which prohibited the use of any federal funds contributed to the Medicaid program for abortions except when the pregnant woman's life would be endangered if she were to carry the pregnancy to term. As a result of this loss of federal funds, in 1978 the General Assembly established the State Abortion Fund, from which payments were made for abortions for eligible women. In 1995, the General Assembly drastically reduced payments for abortions by the adoption of the following provision:

> (b) Eligibility for services of the State Abortion Fund shall be limited to women whose income is below the federal poverty level, as revised annually, and who are not eligible for Medicaid. The State Abortion Fund shall be used to fund abortions only to terminate pregnancies resulting from cases of rape or incest, or to terminate pregnancies that, in the written opinion of one doctor licensed to practice medicine in North Carolina, endanger the life of the mother.

Act of June 26, 1995, ch. 324, sec. 23.27, 1995 N.C. Sess. Laws 660, 751, *as clarified by* Act of July 28, 1995, ch. 507, sec. 23.8A, 1995 N.C. Sess. Laws 1525, 1661. Because of this action by the General Assembly, payment by the State for an abortion when the pregnancy is not the result of rape or incest or when the woman's life is not in danger has been virtually eliminated.

The plaintiffs brought this action to challenge what the State has done. The plaintiffs allege that the action of the State violates (1) Article I, Section 1 of the North Carolina Constitution, which provides that all persons are endowed with certain inalienable rights, including "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness," N.C. Const. art. I, § 1; (2) Article I, Section 19 of the North Carolina Constitution, which provides that no person shall be "deprived of his life, liberty, or property, but by the law of the land" and that "[n]o person shall be denied the equal protection of the laws," N.C. Const. art. I, § 19; and (3) Article XI, Section 4 of the North Carolina Constitution, which provides that "[b]eneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare," N.C. Const. art. XI, § 4.

On 19 February 1996, the superior court dismissed the plaintiffs' case pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

The plaintiffs appealed, and we allowed discretionary review prior to a determination by the Court of Appeals.

Center for Reproductive Law & Policy, by Eve C. Gartner; and Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, by Thomas M. Stern, for plaintiff-appellants.

Michael F. Easley, Attorney General, by Belinda A. Smith, Assistant Attorney General, for defendant-appellees.

Moore & Van Allen, PLLC, by Jonathan D. Sasser, on behalf of The American Civil Liberties Union of North Carolina Legal Foundation, The South Mountain Women's Health Alliance, NC Equity, and The National Association of Social Workers on Behalf of Its North Carolina Chapter, amici curiae.

Stam, Fordham & Danchi, P.A., by Paul Stam, Jr., on behalf of North Carolina Right to Life, Inc., amicus curiae.

WEBB, Justice.

[1] The plaintiffs first argue that when the General Assembly restricted the use of the State Abortion Fund to eliminate payments for medically necessary abortions, the defendants were obligated to fund such abortions using the State's contribution to the Medical Assistance Fund. Assuming the defendants could have used the Medical Assistance Fund in this way, we do not believe this was the intent of the General Assembly. We cannot believe the General Assembly intended for the defendants to pay for abortions from another source when it had so radically restricted payments from the Abortion Fund. The question is whether this action of the General Assembly is constitutional.

The plaintiffs next say that it was error to grant the motion to dismiss because the allegations of the complaint raised factual issues. They say that they can introduce evidence that without the abortion funding, eighteen to twenty-three percent of Medicaid-eligible women will carry unwanted pregnancies to term. They also say they can show the dramatic effect on the health and well-being of those indigent women who are deprived of medically necessary abortions.

Whether a woman should carry a pregnancy to term and the asserted dire consequences of the State's refusal to fund abortions are not determinative of the issues in this case. No person has the constitutional right to have the State pay for medical care. The ques-

tion in this case is whether the State has violated Rosie J.'s constitutional rights by paying for medical services for some, including childbirth expenses, while refusing to pay for an abortion for Rosie J. This is a legal and not a factual question.

[2] In passing on the claim of the plaintiffs, we must first determine whether indigent women who need medically necessary abortions are members of a suspect class or are being deprived of a fundamental right by the refusal of the State to fund abortions for them. If either condition exists, the actions of the State would be subject to strict scrutiny, and the State would have to show a compelling State interest to justify its action. *Texfi Industries, Inc. v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980).

Indigent women are not a suspect class. They have not been subjected to a history of purposeful unequal treatment so as to command extraordinary protection from the democratic political process. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16 (1973), the United States Supreme Court held that to be a fundamental right, the right must be explicitly or implicitly guaranteed by the Constitution. To have the State pay for an abortion is not a right protected by the North Carolina Constitution and is not a fundamental right.

[3],[4] The test we must apply to determine the constitutionality of the State's action is whether it bears any rational relation to a legitimate governmental objective. *State ex rel. Util. Comm'n v. Carolina Util. Cust. Ass'n*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994). The encouragement of childbirth is a legitimate governmental objective. *Stam v. State*, 47 N.C. App. 209, 219, 267 S.E.2d 335, 342-43 (1980), *aff'd in part, rev'd in part on other grounds*, 302 N.C. 357, 275 S.E.2d 439 (1981). The State may encourage childbirth by refusing to fund abortions.

The plaintiffs contend that there is not a rational relation between the restrictions on abortions and the Medical Assistance Program, which provides that medical care be provided to indigent persons when it is essential to the health and welfare of such persons. N.C.G.S. § 108A-55(a) (1994). The plaintiffs also say the restriction on abortions does not bear a rational relation to the basic goal of the Department of Human Resources, which is to "assist all citizens—as individuals, families, and communities—to achieve and maintain an adequate level of health, social and economic well-being, and dignity." N.C.G.S. § 143B-137 (1993).

It is not necessary that State action be rationally related to all State objectives. It is enough that it is related to some legitimate State objective. That is the case here.

We have held here that the action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women is valid. It follows that this action does not violate Article I, Section 1; Article I, Section 19; or Article XI, Section 4 of the Constitution of North Carolina.

We have not relied on any federal court cases because the plaintiffs based their argument on the Constitution of North Carolina. The federal cases are consistent with this opinion. *See Harris v. McRae*, 448 U.S. 297, 65 L. Ed. 2d 784 (1980); *Maher v. Roe*, 432 U.S. 464, 53 L. Ed. 2d 484 (1977); *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147.

The judgment of the Superior Court is affirmed for the reasons stated in this opinion.

AFFIRMED.

Justice PARKER dissenting.

I respectfully dissent. In my view the determinative question in this case is not whether there is a fundamental right to have the State fund an abortion. Clearly, no such right exists. The determinative question is whether the State's policy of refusing to fund medically necessary abortions for Medicaid eligible women while funding all other medically necessary treatments incident to the pregnancy of Medicaid eligible women impermissibly interferes with a pregnant woman's right to choose abortion without unduly burdensome governmental interference. *See Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147 (1973). Plaintiffs argue, and I agree, that the allegations of the complaint, if proved, would support a constitutional challenge under Article I, Section 19 of the North Carolina Constitution.

Accordingly, I would reverse the trial court's order allowing defendants' Rule 12(b)(6) motion and remand to the trial court.

STATE OF NORTH CAROLINA v. BENJAMIN EDWARD PETERSON

No. 246A95-2

(Filed 3 October 1997)

Evidence and Witnesses § 1345 (NCI4th)— first-degree murder—defendant's statements—warnings given in prior interrogation on another charge—findings that rights not invoked or waived—evidence sufficient

Statements made by a first-degree murder defendant at an interrogation on 4 November 1992 were properly admitted as evidence where the court properly found that defendant waived his Fifth Amendment rights prior to making statements at the 4 November interrogation. The victim of the murder was found at his store on 19 September 1992; officers interviewed defendant on unrelated rape charges on 21 September; they notified him of his right to remain silent and of his right to an attorney and testified that defendant stated his willingness to speak to them without an attorney present; defendant testified that he requested that his mother and a lawyer be present during questioning; officers interviewed defendant about this murder on 4 November, while he was in jail on the rape charge; they notified defendant of his right to remain silent and of his right to an attorney; defendant initially waived his right to an attorney and stated his willingness to speak to officers; defendant made several inculpatory statements and then requested an attorney; and the officers ceased their interview when defendant requested an attorney. Although defendant contends that the evidence was not sufficient to support the finding that he waived his right to counsel on 21 September and that this request preserved his right to have counsel present at all future interrogations, even on different charges, the record contains substantial competent evidence to support the trial court's findings that defendant never invoked his Fifth Amendment rights at the 21 September interrogation and that statements made on 4 November were made after defendant had voluntarily waived such rights. Those findings are binding on appeal.

Am Jur 2d, Evidence § 723.

Comment Note: Constitutional aspects of procedure for determining voluntariness of pretrial confession. 1 ALR3d 1251.

On appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Llewellyn, J., at the 7 November 1994 Criminal Session of Superior Court, New Hanover County, upon a verdict finding defendant guilty of first-degree murder, this Court remanded in part for specific findings of fact. *State v. Peterson*, 344 N.C. 172, 472 S.E.2d 730 (1996). At a hearing on 17 October 1996, Llewellyn, J., made findings of fact to support the original conclusions of law. Reheard in the Supreme Court 10 September 1997.

Michael F. Easley, Attorney General, by Hal F. Askins, Special Deputy Attorney General, and Jeffrey R. Edwards, Associate Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

WHICHARD, Justice.

In a capital trial the jury found defendant guilty of the first-degree murder of Charles Mitchell Oakley and recommended a sentence of life imprisonment. The trial court sentenced defendant accordingly. This Court found no error in part but remanded the case for a hearing to determine whether defendant had waived his Fifth Amendment right to counsel before making inculpatory statements to the police. *State v. Peterson*, 344 N.C. 172, 177-78, 472 S.E.2d 730, 733 (1996). The trial court accordingly held a hearing and found facts to support a conclusion that defendant had waived his Fifth Amendment right to counsel. Defendant appeals from that order.

On 19 September 1992 customers of the victim's store found the victim, Charles Mitchell Oakley, incoherent and bleeding from a blow to his head that ultimately proved fatal. The customers notified the police.

On 21 September 1992 Wilmington police officers interviewed defendant on unrelated rape charges. They notified defendant of his right to remain silent and of his right to an attorney. They testified that defendant stated his willingness to speak to them without an attorney present. Defendant testified that he requested that his mother and a lawyer be present during questioning.

On 4 November 1992, while defendant was in jail on a charge of rape, Wilmington officers interviewed him about the murder in this case. They notified defendant of his right to remain silent and of his right to an attorney. Initially, defendant waived his right to an attor-

ney and stated his willingness to speak to the officers. Defendant made several inculpatory statements and then requested an attorney. The officers ceased their interview when defendant requested an attorney. The trial court admitted statements from the 4 November 1992 interrogation in the murder trial.

Defendant contends that the evidence was insufficient to support the trial court's finding that he waived his right to counsel on 21 September 1992. Defendant asserts that he invoked his Fifth Amendment right to counsel on that date and that this request preserved his right to have counsel present at all future interrogations, even those relating to different charges. Thus, defendant argues that the trial court erred in admitting his statements of 4 November 1992 because they were solicited after he invoked his right to an attorney and should have been excluded as a violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We disagree.

The United States Supreme Court and this Court have held that once a defendant requests an attorney, law enforcement officers may no longer initiate questioning. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981); *State v. Lang*, 309 N.C. 512, 521, 308 S.E.2d 317, 321-22 (1983). The trial court makes the initial determination as to whether an accused has waived his right to counsel. Its findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). "Conclusions of law that are correct in light of the findings are also binding on appeal." *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996).

The record contains substantial competent evidence to support the trial court's finding that defendant never invoked his Fifth Amendment rights at the 21 September 1992 interrogation and that statements defendant made on 4 November 1992 were made after defendant had voluntarily waived such rights. Investigating officers testified as follows:

Detective Bryan Pettus testified that he stayed in the interrogation room the entire time defendant was questioned on 21 September 1992. He testified:

> Q. When you talked to [defendant] on September the 21st, 1992, with Detective Hayes, he never invoked his right to an attorney at that time, did he?

A. No, sir, he did not.

Detective A.S. Hayes testified that he read defendant his rights prior to the 21 September questioning. He informed defendant of his right to remain silent and to an attorney. Defendant indicated that he understood those rights, and defendant waived those rights. Hayes testified further:

Q. Did [defendant] at any time ask you or Detective Pettus on that day, September the 21st, for an attorney?

A. No.

. . . .

Q. Did he indicate to you that he was willing to talk to you without an attorney being present?

A. Yes.

Detective Jeff Allsbrook testified that he read defendant his rights prior to the 4 November 1992 questioning. He testified:

Q. Did [defendant] ask you for an attorney after you read him the rights form?

A. Right after I read his rights, no, sir.

Q. He did not?

A. No, sir.

Q. He indicated he was willing to talk to you?

A. Yes, sir.

Q. Never asked that you call him an attorney?

A. No.

Allsbrook testified that defendant requested an attorney for the first time after defendant made several inculpatory statements. He explained that as soon as defendant said "lawyer," Allsbrook stopped questioning defendant.

The foregoing testimony supports findings that defendant was informed of his right to an attorney on both 21 September 1992 and on 4 November 1992, that he never requested an attorney on 21 September 1992, and that he requested an attorney on 4 November 1992 only after making several inculpatory statements. The record

thus contains substantial competent evidence to support the trial court's findings that defendant never invoked his Fifth Amendment rights before or during the 21 September questioning. The findings are binding on this Court. *Eason*, 336 N.C. at 745, 445 S.E.2d at 926. Because the trial court properly found that defendant waived his Fifth Amendment rights prior to making statements to the police at the 4 November 1992 interrogation, those statements were properly admitted as evidence at trial.

AFFIRMED.

TIERNEY v. GARRARD

[347 N.C. 258 (1997)]

JOHN T. TIERNEY, W.R. ARMSTRONG, JR., DIANNE JUBY, W.W. BECK, JR., JAMES C. HEDGECOCK, JACQUE HEDGECOCK, ROBERT DOWNING, STEVEN COHEN, TIMOTHY J. DENAULT, SUSAN P.A. DENAULT, DENNIS HALL, CAROL HALL, CAREY BERG, CONNALLY BRANCH, AND SUBSCRIBERS OF FIRST CONSUMERS STATE BANK, SOUTHERN PINES (PROPOSED) v. ROBERT M. GARRARD

No. 496PA96

(Filed 3 October 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. 415, 477 S.E.2d 73 (1996), affirming orders entered on 5 June 1995 and 24 July 1995 by Webb, J., in Superior Court, Moore County. Heard in the Supreme Court 8 September 1997.

Britt & Britt, by William S. Britt, for plaintiff-appellants.

Bugg & Wolf, P.A., by John E. Bugg and William J. Wolf, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DEAN BRINSON

No. 147A97

(Filed 3 October 1997)

Appeal by defendant 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. 744, 483 S.E.2d 746 (1997), finding no error in defendant's trial resulting in a verdict of guilty of second-degree murder and a judgment of not less than 270 and not more than 333 months' imprisonment entered by Brown, J., on 3 June 1996 in Superior Court, Edgecombe County. Heard in the Supreme Court 9 September 1997.

Michael F. Easley, Attorney General, by Harriet F. Worley, Assistant Attorney General, for the State.

Edward B. Simmons for defendant-appellant.

PER CURIAM.

AFFIRMED.

MICHAEL D. HOLT v. SARA LEE CORPORATION, D/B/A SARA LEE KNIT PRODUCTS, AND DAVID GELLY

No. 31PA97

(Filed 3 October 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 124 N.C. App. 666, 478 S.E.2d 674 (1996), dismissing defendants' appeal from an order entered by Tillett, J., on 25 January 1996 in Superior Court, Lee County. Heard in the Supreme Court 11 September 1997.

Staton, Perkinson, Doster, Post, Silverman, Adcock & Boone, by Norman C. Post, Jr., for plaintiff-appellee.

Kilpatrick Stockton LLP, by Susan H. Boyles and James H. Kelly, Jr., for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. TONY ORLANDO SLOAN

No. 11A97

(Filed 3 October 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. 672, 478 S.E.2d 677 (1996), affirming a sentence imposed on the defendant on 8 September 1995 in Superior Court, Mecklenburg County. Heard in the Supreme Court 8 September 1997.

Michael F. Easley, Attorney General, by Don Wright, Assistant Attorney General, for the State.

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

PER CURIAM.

AFFIRMED.

RANDOLPH H. TRULL v. CENTRAL CAROLINA BANK & TRUST; RICHARD H. CRONK, JR.; PLAYER I, A NORTH CAROLINA GENERAL PARTNERSHIP AND KITTY PLAYER BECK

No. 524A96

(Filed 3 October 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, 124 N.C. App. 486, 478 S.E.2d 39 (1996), affirming an order entered by Cashwell, J., on 31 July 1995 in Superior Court, Wake County. On 6 March 1997 this Court allowed plaintiff's petition for discretionary review as to an additional issue. Heard in the Supreme Court 9 September 1997.

Burns, Day & Presnell, P.A., by Lacy M. Presnell III and Susan F. Vick, for plaintiff-appellant.

H. Spencer Barrow and George B. Currin for defendant-appellee Central Carolina Bank & Trust.

PER CURIAM.

The decision of the Court of Appeals is affirmed for the reasons stated in the majority opinion by Judge Eagles. We hold that plaintiff's petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

ABELS v. RENFRO CORPORATION

No. 397P97

Case below: 126 N.C.App. 800

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

BECK v. ROWAN COUNTY

No. 359P97

Case below: 126 N.C.App. 634

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

BETHANIA TOWN LOT COMMITTEE v. CITY OF WINSTON-SALEM

No. 402PA97

Case below: 126 N.C.App. 783

Notice of appeal by plaintiffs pursuant to G.S. 7A-30 (substantial constitutional question) retained 2 October 1997. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 2 October 1997.

BIOXY, INC. v. CRAFT

No. 368P97

Case below: 126 N.C.App. 634

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

BRADY v. N.C. BD. OF DENTAL EXAMINERS

No. 398A97

Case below: 126 N.C.App. 829

Petition by petitioner (Brady) 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 2 October 1997.

BROWN v. HEIGHT

No. 415P97

Case below: 126 N.C.App. 632

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

CARROLL v. KOONTZ

No. 409P97

Case below: 127 N.C.App. 208

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

CARROLL v. KOONTZ

No. 410P97

Case below: 127 N.C.App. 208

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

COOK v. WATTS

No. 357P97

Case below: 126 N.C.App. 829

Petition by defendant (Melissa Cook) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1997.

CRISP v. CRISP

No. 323A97

Case below: 126 N.C.App. 625

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 2 October.

DKH CORP. v. RANKIN-PATTERSON OIL CO.

No. 353PA97

Case below: 126 N.C.App. 634

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 October 1997.

DRYE v. NATIONWIDE MUT. INS. CO.

No. 432P97

Case below: 126 N.C.App. 811

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

EDWARDS v. N.C. FARM BUREAU MUT. INS. CO.

No. 360P97

Case below: 126 N.C.App. 634

Petition by defendant and third-party plaintiff (NC Farm Bureau) for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997. Motion by third-party defendant (Danny Boone) to strike portion of petition for discretionary review pursuant to Rule 37 allowed 2 October 1997.

ELLIOTT v. N.C. PSYCHOLOGY BD.

No. 340PA97

Case below: 126 N.C.App. 453

Petition by appellant for discretionary review pursuant to G.S. 7A-31 allowed 2 October 1997.

EUBANKS v. STATE FARM FIRE AND CASUALTY CO.

No. 327P97

Case below: 126 N.C.App. 483

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

GRIFFIN v. WOODARD

No. 364P97

Case below: 126 N.C.App. 649

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

GROVER v. NORRIS

No. 389P97

Case below: 126 N.C.App. 829

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

GUIN v. GUIN

No. 352P97

Case below: 126 N.C.App. 829

Petition by defendant (The Atlanta Casualty Companies) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1997.

HANTON v. GILBERT

No. 366P97

Case below: 126 N.C.App. 561

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

HENKE v. FIRST COLONY BUILDERS, INC.

No. 419P97

Case below: 126 N.C.App. 703

Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 2 October 1997. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1996.

HOLTERMAN v. HOLTERMAN

No. 401P97

Case below: 127 N.C.App. 109

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1996.

HOPKINS v. TUTTLE

No. 365P97

Case below: 126 N.C.App. 635

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1996.

HOWARD v. ROBBINS ENTERPRISES, INC.

No. 394P97

Case below: 126 N.C.App. 829

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 2 October 1997. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

JACKSON v. HOWELL'S MOTOR FREIGHT, INC.

No. 345P97

Case below: 126 N.C.App. 476

Petition by appellant (City of Fayetteville) for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997. Petition by defendant (Howell's Motor Freight) for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

KOLBINSKY v. PARAMOUNT HOMES, INC.

No. 333P97

Case below: 126 N.C.App. 533

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

MAYNOR v. ONSLOW COUNTY

No. 422A97

Case below: 127 N.C.App. 102

Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 2 October 1997.

MILNER v. LITTLEJOHN

No. 307P97

Case below: 126 N.C.App. 184

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

MURRAY v. WISTERIA BUILDER

No. 317P97

Case below: 126 N.C.App. 437

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

MUSE v. BRITT

No. 373P97

Case below: 344 N.C. 632
123 N.C.App. 357

Petition by petitioner (Muse) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1997.

NASH COUNTY DEPT. OF SOCIAL SERVICES v. BEAMON

No. 346P97

Case below: 126 N.C.App. 536

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

NEW HANOVER COUNTY v. JACKSON

No. 320P97

Case below: 126 N.C.App. 435

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

PAYNE v. STATE OF N.C., DEPT. OF HUMAN RESOURCES

No. 367P97

Case below: 126 N.C.App. 672

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

PFOUTS v. BUCKNER

No. 377P97

Case below: N.C. Judicial Standards Comm.

Petition by plaintiff for writ of certiorari to review the order of the N.C. Judicial Standards Comm. dismissed 2 October 1997.

PRIDGEN v. HUGHES

No. 427P97

Case below: 127 N.C.App. —— (19 August 1997)

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

RICHARDSON v. McCRACKEN ENTERPRISES

No. 341A97

Case below: 126 N.C.App. 506

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 2 October 1997.

ROBBINS v. FREEMAN

No. 416PA97

Case below: 127 N.C.App. 162

Petition by defendant-appellees for discretionary review pursuant to G.S. 7A-31 allowed 2 October 1997. Petition by defendant-appellees for writ of supersedeas allowed 2 October 1997.

ROBERTS v. SWAIN

No. 412P97

Case below: 126 N.C.App. 712

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1997.

ROBINSON v. POWELL

No. 334PA97

Case below: 125 N.C.App. 743

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 2 October 1997.

SHUMAKER v. HAMILTON

No. 363P97

Case below: 126 N.C.App. 635

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 October 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

SIMEON v. HARDIN

No. 386P97

Case below: 126 N.C.App. 831

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

SMITH v. CITY OF WINSTON-SALEM

No. 399P97

Case below: 126 N.C. 831

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE v. ALLEN

No. 358P97

Case below: 126 N.C.App. 831

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1997.

STATE v. CATHEY

No. 406P97

Case below: 127 N.C.App. 395

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE v. CLARK

No. 393P97

Case below: 126 N.C.App. 831

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 17 September 1997. Motion by the Attorney General to dismiss defendant's petition for discretionary review dismissed 17 September 1997. Motion by defendant for temporary stay denied 17 September 1997.

STATE v. COOPER

No. 325P97

Case below: 126 N.C.App. 226

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE v. DANIELS

No. 506A90-2

Case below: Mecklenburg County Superior Court

Motion by Attorney General to dismiss petition for writ of certiorari denied 3 October 1997.

STATE v. DOUTHIT

No. 380P97

Case below: 124 N.C.App. 667

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1997.

STATE v. FLOWERS

No. 553A94

Case below: Rowan County Superior Court

Motion by defendant (Flowers) to withdraw request to dismiss counsel and drop appeal allowed 24 September 1997 and court's order of remand for an evidentiary hearing withdrawn. Motion by defendant (Flowers) to stay mandate and vacate opinion denied 24 September 1997.

STATE v. GIBBS

No. 384P97

Case below: 126 N.C.App. 831

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 October 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE v. HOWARD

No. 285P97

Case below: 122 N.C.App. 754

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 October 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE v. JONES

No. 395A91-3

Case below: 343 N.C. 755

Motion by defendant to reconsider the denial of first post-conviction petition for certiorari/supersedeas on 7/30/96 dismissed 2 October 1997.

STATE v. MEDLEY

No. 460P97

Case below: 127 N.C.App. —— (2 September 1997)

Motion by defendant for temporary stay allowed 17 September 1997.

STATE v. MILLER

No. 413P97

Case below: 126 N.C.App. 832

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE v. RICK

No. 369P97

Case below: 126 N.C.App. 612

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 October 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE v. STOKES

No. 383P97

Case below: 126 N.C.App. 832

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

TUCKER v. RAND

No. 403P97

Case below: 126 N.C.App. 833

Motion by plaintiff for court to sanction defendant denied 2 October 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

WARD v. JORGENSON

No. 292P97

Case below: 126 N.C.App. 436

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

W. E. GARRISON CO. v. LEE PAVING CO.

No. 404P97

Case below: 126 N.C.App. 833

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

WOODFIELD ASSN., INC. v. ACKERMAN

No. 395P97

Case below: 833

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 October 1997.

STATE OF NORTH CAROLINA v. JERRY DALE HILL

No. 535A95

(Filed 7 November 1997)

1. Criminal Law § 78 (NCI4th Rev.)— capital first-degree murder—motion for change of venue—pretrial publicity—defendant's jailhouse interview

The trial court did not err by denying a change of venue for a defendant in a capital prosecution for first-degree murder, arson, felonious breaking and entering, first-degree rape, and first-degree sexual offense where defendant offered into evidence television news coverage and newspaper articles which contained incriminating statements made by defendant in a jailhouse interview with a reporter and testimony from four local attorneys that defendant could not receive a fair trial in Harnett County. While a number of jurors indicated they had read or heard of the crime, each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based on the evidence presented at trial. The issue on appeal was whether the trial court erred by refusing to grant defendant's motion for a change of venue, not allowing a reporter access to an incarcerated defendant without counsel being present (which is disapproved). Finally, the totality of the circumstances does not reveal a county infected with prejudice against defendant, as in *State v. Jerrett*, 309 N.C. 239.

Am Jur 2d, Criminal Law §§ 372-397; Homicide § 204; Venue §§ 62-64.

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

2. Jury § 227 (NCI4th)— capital murder—jury selection—ambivalence concerning death penalty—juror excused for cause

The trial judge did not abuse its discretion in a capital prosecution for first-degree murder and other crimes by excusing a prospective juror for cause where the juror responded unequivocally and affirmatively to the trial court's initial inquiry concerning her ability to impose the death penalty despite her opposition to the death penalty; during the State's questioning, she indicated

that she would hold the State to a higher burden of proof than the law required; the court then intervened and explained to the juror the State's burden; the State then resumed questioning and the juror answered affirmatively when asked whether she was saying that she would have to be convinced beyond all doubt; defense counsel resumed questioning and the juror stated that she could follow the trial court's instructions and apply the reasonable doubt standard; the court further examined the juror; and she replied that she could not impose the death penalty.

Am Jur 2d, Criminal Law § 685; Jury § 279.

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

3. Jury § 153 (NCI4th)— jury selection—capital murder—question by court—whether juror could stand and recommend death

The trial court did not abuse its discretion during jury selection in a capital prosecution for first-degree murder by asking a prospective juror whether she could personally stand up and recommend the death penalty. As in *State v. White,* 343 N.C. 378, the trial court sought to clarify the juror's position on the death penalty because of her equivocal responses concerning the death penalty.

Am Jur 2d, Jury § 196.

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

4. Jury § 226 (NCI4th)— jury selection—capital murder—rehabilitation—denied

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by refusing defendant the opportunity to rehabilitate a juror. The trial court did not refuse because it believed it was required to do so as a matter of law; the transcript supports the court's findings concerning the juror's views; and defendant failed to show that further questioning would have resulted in her rehabilitation.

Am Jur 2d, Jury § 202.

5. Evidence and Witnesses § 264 (NCI4th)— first-degree murder—16-year-old-victim—prior marriage and pregnancy—excluded

The trial court did not err in a capital prosecution for first-degree murder, arson, felonious breaking and entering, first-degree rape, and first-degree sexual offense by allowing the State's motion *in limine* to exclude from the guilt and penalty phases evidence of the 16-year-old victim's previous marriage and pregnancy. Although defendant argued that the evidence was relevant to prevent the State "from misleading the jury by pretending that the victim was a naive, immature girl," and is a circumstance surrounding one of the parties, the question has no bearing on defendant's guilt. An SBI agent mentioned the marriage during the State's direct examination, but defense counsel never objected to the evidence and never attempted to have evidence admitted based on the testimony. Finally, the transcript of the sentencing hearing does not reveal any instance where defendant attempted to have the evidence admitted. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence §§ 496-506.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters. 63 ALR3d 311.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

6. Evidence and Witnesses § 264 (NCI4th)— capital murder—victim's prior marriage and pregnancy—excluded—reason for exclusion—irrelevant if ruling correct

The trial court did not err in a capital prosecution for first-degree murder and other crimes by excluding evidence of the 16-year-old victim's prior marriage and pregnancy; although defendant contended that the evidence was improperly excluded under N.C.G.S. § 8C-1, Rule 412, it does not matter whether the court gave the correct or best reason for excluding the evidence so long as its ruling was correct.

Am Jur 2d, Trial § 397.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

7. Criminal Law § 568 (NCI4th Rev.)— capital murder—elicitation of hearsay—mistrial—denied

The trial court did not err in a capital prosecution for first-degree murder and other crimes by denying defendant's motion for a mistrial based on the repeated elicitation of the hearsay statement concerning a comment defendant had made about the victim. A review of the record reveals that the witness's testimony concerning the hearsay statement was inadvertent and that the witness was confused concerning what he could testify to; this isolated instance hardly represents prosecutorial misconduct and the record makes clear that the trial court attempted to rectify the situation. The inadvertent hearsay did not result in substantial and irreparable prejudice to defendant's case.

Am Jur 2d, Trial § 249; Witnesses § 859.

8. Criminal Law § 553 (NCI4th Rev.)— capital murder—closing argument—hyperbolic language—mistrial denied

The trial court did not err by not granting a mistrial *ex mero motu* based on alleged prosecutorial misconduct during closing arguments in the guilt and sentencing phases of a prosecution for capital murder and other crimes where the prosecutor referred to the crime as perhaps the most atrocious that has occurred in Harnett County. Hyperbolic language is acceptable in jury argument so long as it is not inflammatory or grossly improper and similar language has been allowed in previous cases.

Am Jur 2d, Trial § 496.

9. Criminal Law § 553 (NCI4th Rev.)— capital murder—prosecutor's argument—two people acting together—previous disavowal of acting in concert

The trial court did not err by not granting a mistrial *ex mero motu* in a capital prosecution for first-degree murder and other crimes where the prosecutor argued that defendant was guilty even if someone else was with him because "two people acting together can commit a crime" even though the State had previously declined to rely on an acting-in-concert theory. The remark was made in a nontechnical way that required no understanding about the law of acting in concert or aiding and abetting. Viewed

contextually, the argument merely reflected that defendant is not absolved of his own actions even if someone else was present at the scene.

Am Jur 2d, New Trial § 167.

10. Criminal Law § 553 (NCI4th Rev.)— capital murder—prosecutor's argument—mistrial denied

The trial court did not err by not intervening *ex mero motu* or declaring a mistrial in a capital prosecution for first-degree murder and other crimes where the prosecutor in the sentencing phase routinely referred to the 16-year-old victim by her married name (introduction of her prior marriage and pregnancy had been disputed); argued that the victim's being shot in the head multiple times at point blank range renders this killing especially heinous, atrocious, or cruel; argued that the brutality here exceeded that normally present in any killing; characterized the mitigating circumstances as excuses; and argued that defendant bore the burden of proving the mitigating circumstances, even though the State had already stipulated to the existence of one of the statutory mitigating circumstances.

Am Jur 2d, New Trial §§ 162, 163.

11. Criminal Law § 553 (NCI4th Rev.)— capital murder—prosecutor's argument—defense experts—mistrial denied

The trial court did not err in a capital prosecution for first-degree murder and other crimes by not declaring a mistrial *ex mero motu* where the prosecutor argued that many of the submitted mitigating circumstances were developed by defense experts who testify around the state for capital defendants at rates from $75 to $125 per hour. Assuming that the prosecutor's statements were improper, they do not entitle defendant to a new sentencing hearing.

Am Jur 2d, New Trial § 195.

12. Criminal Law § 1384 (NCI4th Rev.)— capital sentencing—mitigating circumstance—mental or emotional disturbance—not submitted

The trial court did not err in a capital sentencing hearing by not submitting the statutory mitigating circumstance that the murder was committed while defendant was under the influence of a mental or emotional disturbance. Testimony indicated that

defendant's IQ was within the low average range, a clinical forensic psychologist testifying for the defense concluded that the primary personality characteristics exhibited by defendant were emotional and social alienation and that she found no evidence of psychosis, and she also testified that she had found mild depression, which could result from his recent incarceration; defendant's expert witnesses did not provide a nexus between his personality characteristics and the crimes he committed; and the manner of the killing and his subsequent actions indicate that he was not under the influence of a mental or emotional disturbance at the time of the killing. N.C.G.S. § 15A-2000(f)(2).

Am Jur 2d, Homicide § 515.

Comment note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

Test of insanity in federal criminal trial. 1 ALR Fed. 965.

13. Criminal Law § 1388 (NCI4th Rev.)— capital sentencing—mitigating circumstances—impaired capacity—not submitted

The trial court did not err during a capital sentencing hearing by not submitting the statutory mitigating circumstance of impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law where the testimony did not establish that his personality characteristics affected his ability to understand and control his actions. In fact, both of defendant's experts testified to the contrary. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Homicide § 516.

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

Comment note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

14. Criminal Law § 693 (NCI4th Rev.)— capital sentencing—mitigating circumstances—no significant criminal history—directed verdict

There was no plain error in a capital sentencing hearing by not directing a verdict on the statutory mitigating circumstance that defendant had no significant history of prior criminal activ-

ity where the State had agreed to stipulate to the fact. The trial court directed the jurors to affirmatively answer as to the mitigating circumstance of no significant history of criminal activity and further stated that they were required to find the existence of at least one mitigating circumstance in Issue Two. These instructions did not allow the jury to answer no to the existence of the statutory (f)(1) mitigator. Although the trial court did not completely eliminate all remarks that might allow the jurors discretion in finding the circumstance, the trial court in fact directed a verdict on this circumstance.

Am Jur 2d, Trial § 1760.

15. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A death sentence for first-degree murder was not disproportionate where the evidence supports each aggravating circumstance found, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, this case is distinguishable from each of the seven cases found disproportionate, and the present case is more similar to certain cases in which a death sentence was found proportionate than to those in which the sentence found disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

Am Jur 2d, Criminal Law § 628.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was 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 Gore, J., on 31 October 1995 in Superior Court, Harnett County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional convictions and judgments was allowed 3 February 1997. Heard in the Supreme Court 9 September 1997.

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

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

ORR, Justice.

This case arises out of the rape and murder of Angie Porter Godwin. On 10 July 1995, defendant was indicted for first-degree murder, arson, felonious breaking and entering, first-degree rape, and first-degree sexual offense. Defendant was tried capitally before a jury, and on 25 October 1995, 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 premeditation and deliberation and the felony murder rule; the trial court also sentenced defendant to consecutive sentences of life imprisonment for the first-degree rape conviction, twelve years for the second-degree arson conviction, three years for the felonious breaking and entering conviction, and life imprisonment for the first-degree sexual offense 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. For the reasons set forth below, we affirm his convictions and sentences.

At trial, the State's evidence tended to show the following: On 19 February 1994, James Dandran was driving by Bob Porter's home in Broadway, North Carolina, when he noticed smoke coming from the residence. He immediately drove to a nearby store owned by Rex Johnson and asked Johnson to notify the fire department. Dandran then returned to the Porter home to check on Angie Porter Godwin, who had been visiting her father, Bob Porter. When he arrived, he went around to the side door, where he observed blood on the steps. No one answered when he called into the house, so he returned to Johnson's store and asked him to notify the police.

The chief of the Benhaven Fire Department, Ronnie Johnson, was the first to arrive at the scene, followed shortly thereafter by Deputy John Holly of the Harnett County Sheriff's Department. They attempted to enter the house through the front door, but the heat and smoke were too intense, and they were forced to turn back.

Once the fire was extinguished, Sheriff Larry Knott secured the area to prevent any evidence from being disturbed. The sheriff then

went to the side entrance of the house and observed a continuous trail of blood from the door down the steps and into the yard. It appeared that something had been dragged through the yard and into the woods behind the house. Approximately one hundred to two hundred yards away from the house, officers found the body of the victim. Sheriff Knott testified that leaves and pine straw had been raked up, piled around her body, and set on fire. The victim was lying on her back, nude, with her panties lying on her chest.

Chief Johnson identified the body as that of Angie Porter Godwin. He testified that her hair was burned off and that "one of her arms was just about burned off completely." Chief Johnson further stated that "[i]t was one of the most horrible things [he] had ever seen."

During the investigation of the Porter residence, officers found a shell casing in the hallway in front of the victim's bedroom door. They also found four .22-caliber shell casings in the woods where the victim's body was discovered. Agent Kim Heffney, an arson investigator with the SBI, took various samples from the house and the area where the body was discovered. Several of the samples revealed the presence of accelerants, either residual gasoline or residual kerosene, or a combination of the two.

Dr. John Butts, the chief medical examiner for the State of North Carolina, performed the autopsy on the victim on 20 February 1994. Dr. Butts noted that there was a considerable degree of burning on her body. He stated that the victim had four gunshot wounds to the head and scratches consistent with drag marks on the back of her body. In Dr. Butts' opinion, the victim died from the gunshot wounds to the head. Further, according to Dr. Butts, there was no evidence that the victim was alive at the time her body was set on fire.

Dr. Butts also collected specimens for evidentiary purposes, including swabs from the victim's vaginal and rectal region. These specimens were sent to the SBI laboratory in Raleigh for testing. Microscopic examination of these swabs indicated the presence of sperm in both the vaginal and rectal specimens. At the conclusion of these examinations, the swabs were preserved for further analysis, specifically DNA analysis. Mark Boodee, an expert in the field of DNA forensic analysis, testified that the DNA analysis revealed a match with defendant with respect to the sperm from both the vaginal and rectal specimens.

During an interview with SBI Agent Michael East, defendant initially denied any involvement in the crimes being investigated. Later the next night, however, defendant admitted being involved in the crimes and gave a detailed confession to East. In his confession, defendant stated that he and an accomplice entered the house through the front door, then walked straight through the hallway and to the bedrooms located in the back of the house. As they neared the victim's bedroom, a squeaky floorboard awakened the victim. When she opened the door, defendant stated that his accomplice shot her twice in the head. Defendant then stated that his accomplice grabbed the victim's feet and dragged her through the living room, out the side door, and down a path into the woods. Once they reached the woods, defendant stated that he and his accomplice both had sex with the victim. Afterwards, they poured kerosene over the victim's body and inside the house and set both places on fire. They then left the Porter residence and drove to defendant's home, where they changed clothes. Next, they drove to a pond, where they discarded the murder weapon. Pursuant to specific directions from defendant, officers recovered a .22-caliber semiautomatic pistol from a pond in Sanford on 25 February 1994.

Defendant signed a written statement concerning his involvement, and the statement was introduced into evidence. Police efforts to confirm the existence of an accomplice were unsuccessful. Defendant also made several other incriminating statements to fellow inmates at the Harnett County jail which were introduced into evidence.

I.

[1] Defendant first assigns as error the trial court's denial of his motion for a change of venue. Defendant argues that he could not obtain a fair and impartial jury because of pretrial publicity and that the denial of this motion violated his constitutional and statutory rights. We disagree.

The test for determining whether a change of venue should be granted is "whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial." *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983). The burden is on the defendant to show a reasonable likelihood that the prospective jurors will base their decision in the case upon pretrial information rather than the evidence presented at trial and will be unable to remove from their minds any preconceived impressions they might

have formed. *Id.* at 255, 307 S.E.2d at 347. "The determination of whether defendant has shown that pretrial publicity prevented him from receiving a fair trial rests within the sound discretion of the trial court and will not be overturned absent a showing of an abuse of discretion." *State v. Gregory*, 340 N.C. 365, 384, 459 S.E.2d 638, 649 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 478 (1996).

In the present case, a hearing was held on 17 August 1995 on defendant's motion for change of venue. At the hearing, defendant offered into evidence a videotape of television news coverage concerning the case and newspaper articles about the case from the *Dunn Daily Record* and the *Harnett County News*. The publicity included articles containing incriminating statements defendant made to a reporter during a jailhouse interview. Defendant also offered the testimony of four local attorneys who were of the opinion defendant could not receive a fair trial in Harnett County. In ruling on the motion for change of venue, the trial court made the following findings of fact and conclusions of law:

> The court finds that the majority, if not all, of the publicity generated in the case, particularly in the local newspapers since the initial occurrence of the offense and the reporting of the arrest of the defendant, has been generated by the defendant himself.
>
> There has been no evidence that persons having heard about the case or about the defendant or who have, indeed, read, listened to, or watched any news accounts of the arrest of the defendant and investigation of the case would not be capable of laying aside those impressions or opinions and rendering a verdict based on the evidence presented in court.
>
> . . . .
>
> The court is not convinced that the testimony of defense attorneys as to word of mouth publicity or, quote, private talk, close quote, is sufficient in and of itself to predict that a jury cannot be assembled from Harnett County citizens and the court finds, based on the totality of the circumstances in this case, that the defendant has not proven that there is a reasonable likelihood that he could not be afforded a fair trial in Harnett County.

Defendant renewed his motion for a change of venue on 3 October 1995. At the hearing, defendant offered into evidence articles from the *Daily Record* published on 2 and 3 October 1995. In ruling

on the motion, Judge Gore found the articles to be essentially factual and stated that they were merely "a brief review of previous facts related in earlier editions of the paper." Because there was no other evidence presented in support of the renewed motion, Judge Gore once again denied defendant's motion for change of venue.

"N.C.G.S. § 15A-957 provides that if there is so great a prejudice against a defendant in the county in which he is charged that he cannot receive a fair trial, the court must transfer the case to another county or order a special venire from another county." *State v. Best*, 342 N.C. 502, 510, 467 S.E.2d 45, 50, *cert. denied*, — U.S. —, 136 L. Ed. 2d 139 (1996). Under this statute, the burden is on the moving party to show that " 'it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed.' " *State v. Gardner*, 311 N.C. 489, 497, 319 S.E.2d 591, 597-98 (1984) (quoting *Jerrett*, 309 N.C. at 255, 307 S.E.2d at 347), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). "The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process." *State v. Madric*, 328 N.C. 223, 228, 400 S.E.2d 31, 34 (1991).

Here, while a number of the prospective jurors questioned in this case indicated they had read or heard of the crime, each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based on the evidence presented at trial. During oral arguments, defendant focused on the newspaper articles published in the local papers as support for the motion for change of venue. Defense counsel noted that officials granted a reporter access to defendant in jail after the appointment of counsel and without counsel's knowledge. In his brief, defendant argued that this resulted in several highly prejudicial articles concerning the case which extensively quoted him. While we disapprove of officials allowing a reporter access to an incarcerated defendant without counsel being present, this issue is not before us. We are to determine whether the trial court erred by refusing to grant defendant's motion for change of venue. Having reviewed the transcript of the jury selection process, we are not persuaded that these newspaper articles prevented defendant from receiving a fair trial in Harnett County. As noted above, each juror who was seated indicated that he or she could

decide the case based on the evidence presented at trial. As this Court stated in *State v. Barnes*, 345 N.C. 184, 207, 481 S.E.2d 44, 56 (1997), "[w]e presume that jurors will tell the truth; our court system simply could not function without the ability to rely on such presumptions."

However, as we indicated in *Jerrett*, there is one more step to our analysis. In *Jerrett*, we held that where the totality of the circumstances reveals that a county's population is "infected" with prejudice against a defendant, we will find that the defendant has met his burden of showing that he could not receive a fair trial in that county. *Jerrett*, 309 N.C. at 258, 307 S.E.2d at 349. The notable features in *Jerrett* were that the crime occurred in a county with a population of 9,587 people; that the *voir dire* indicated that approximately one-third of the prospective jurors knew the victim, some member of the victim's family, or any of several witnesses for the State; and that the jury was examined collectively on *voir dire.*

However, the present case is distinguishable from *Jerrett.* Here, Harnett County's population at the time of the crime was 67,822. *North Carolina Manual 1993-1994*, at 874 (Lisa A. Marcus ed.). Further, the level of familiarity that the *Jerrett* jurors had with the victim, victim's family, and witnesses is not present in this case. Finally, although the *voir dire* was conducted collectively, it cannot be shown that it unduly prejudiced the prospective jurors. During *voir dire*, prospective jurors were frequently removed from the courtroom and taken to the jury deliberation room to allow for closer scrutiny of a prospective juror without tainting the others. Further, the trial court repeatedly warned the prospective jurors to avoid media coverage and discussions with others concerning the case. In viewing the totality of the circumstances, we conclude that there is not a reasonable likelihood that pretrial publicity prevented defendant from receiving a fair trial in Harnett County. Accordingly, the trial court did not err by refusing to grant defendant's motion for a change of venue.

II.

[2] Next, defendant contends that the trial court erred by excusing a prospective juror for cause who was fit to serve. Defendant argues that the lengthy questioning of prospective juror Williams caused her to "giv[e] in to the prosecutor and the court," resulting in a violation of defendant's constitutional and statutory rights.

The standard for determining whether a prospective juror may 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). "The granting of a challenge for cause where the juror's fitness or unfitness is arguable is a matter within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994). This Court has recognized that a prospective juror's bias may not always be provable with unmistakable clarity and that, in such cases, reviewing courts must defer to the trial court's judgment concerning the prospective juror's ability to follow the law. *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990).

In the present case, the transcript reveals that Williams responded unequivocally and affirmatively to the trial court's initial inquiry concerning her ability to impose the death penalty despite her opposition to the death penalty. However, during the State's questioning of Williams, she indicated that she would hold the State to a higher burden of proof than the law required before she could sentence defendant to death. The trial court then intervened and explained to Williams that the State has the burden of proving the evidence beyond a reasonable doubt and defined reasonable doubt as "doubt that is based on reason and common sense arising out of some or all of the evidence that has been presented in a case or from the lack of the evidence as the case may be." The trial court then allowed the State to continue with its questioning of Williams.

The State subsequently submitted the following question to Williams:

> [THE PROSECUTOR]: Even though all the law requires before a jury can sentence a defendant convicted of first degree murder to death is that the State or the prosecution has proven to the jury beyond a reasonable doubt that under the facts and under the law death was appropriate, are you telling us that you would have to be convinced beyond all doubt that under the facts and under the law death was the appropriate verdict?
>
> JUROR WILLIAMS: Yeah.

The trial court then allowed defense counsel to question Williams. Contrary to her previous answers, Williams stated that she could

follow the trial court's instructions concerning the burden of proof and apply the "beyond a reasonable doubt" standard required by the law.

Because of the equivocal answers given by Williams, the trial court attempted to clarify her position on the death penalty:

> THE COURT: Okay, ma'am. What troubles me is that you essentially have given what I will call equivocal answers because you answered the district attorney's question in one way and it appears to me that you've answered the defense attorney's question in a way that's not in keeping with what you said to the district attorney. . . . And all I want you to do is tell me, can you fairly, fairly, consider both possible punishments if you should be asked to do that and come back with either one of them that you felt like was appropriate, or do you feel like because of your personal opposition to the death penalty you would not be able to do that?
>
> JUROR WILLIAMS: No.
>
> THE COURT: No, ma'am, what?
>
> JUROR WILLIAMS: No, I couldn't.
>
> . . . .
>
> THE COURT: You could not impose the death penalty?
>
> JUROR WILLIAMS: No, I couldn't.

Prospective juror Williams was subsequently excused for cause by the trial court.

"[Williams'] equivocal yet conflicting responses exemplify the situation anticipated by the United States Supreme Court in *Wainwright.*" *State v. Syriani*, 333 N.C. 350, 371, 428 S.E.2d 118, 129, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). A review of the transcript reveals that during *voir dire*, Williams stated, among other things, that she was "against capital punishment," that she considered capital punishment to be murder by the State, and that she was against the death penalty totally. At the conclusion of *voir dire*, Williams admitted that her personal beliefs interfered with her ability to impose the death penalty. Defendant's assertion that Williams was "browbeaten into giving in to the prosecutor and the court" and that Williams "ultimately relented to the pressure she felt" has no merit. A review of the record indicates that the thorough questioning by the

State and the trial court, as well as defense counsel, was necessary in light of the equivocal responses given by Williams. The trial court recognized the conflicting nature of Williams' answers and sought to clarify her position. Thus, the trial court did not abuse its discretion by excusing prospective juror Williams for cause. Accordingly, this assignment of error is overruled.

III.

[3] Defendant next contends that the trial court erred by excusing a prospective juror for cause based upon her views concerning the death penalty. Defendant argues that the trial court erred "in two distinct respects" concerning the excusal of prospective juror Thorpe. First, defendant contends that the trial court erred by asking Thorpe whether she could personally stand up and recommend the death penalty, which defendant suggests caused her to change her answers as to the death penalty. Second, defendant contends the trial court erred by denying him the opportunity to rehabilitate prospective juror Thorpe. We disagree.

We will first address defendant's contention that the trial court erred by suggesting that Thorpe would have to personally come into the courtroom, stand up, and say "death." During *voir dire,* Thorpe expressed hesitancy in her ability to impose the death penalty and eventually indicated that she could not recommend death. Subsequently, the following exchange occurred:

> THE COURT: Okay. And again, ma'am, could you in an appropriate case after hearing all the evidence and the law being instructed by the Court go back, talk with the other jurors, and come back and recommend life in prison if you thought that was the appropriate punishment in this case?
>
> JUROR THORPE: Yes.
>
> THE COURT: And, on the other hand, if after hearing all the evidence and being instructed by the Court as to the law that you would have to apply to the evidence, deliberating with your fellow jurors, if you thought that death was the appropriate punishment, would you be able to come back and stand there and recommend death in this case for this man?
>
> JUROR THORPE: I'm going to say no because I just couldn't sentence [anyone] to death. . . .

THE COURT: You personally could not do it?

JUROR THORPE: No.

During a subsequent hearing, defense counsel asked the trial court about its statement that the jurors were required to "stand[] there and say[] death." The trial court then informed defense counsel that the jurors are "required to come in here and stand there and answer the clerk's questions to what their verdict is and if it's death they're required to assent to that here in open court." Defendant contends that the law does not require jurors to stand up and say "death" and that such a requirement would "be a tremendous burden on jurors."

In *State v. White*, 343 N.C. 378, 471 S.E.2d 593, *cert. denied*, — U.S. —, 136 L. Ed. 2d 229 (1996), this Court addressed a similar issue. In *White*, the defendant claimed that the prosecutor improperly asked a prospective juror whether he could, if the State met its burden of proof, "come back into the courtroom, given [his] religious beliefs, and stand up in front of this man and say, 'I sentence you to be executed?' " *Id.* at 386, 471 S.E.2d at 598. This Court did not find an abuse of discretion and stated, "[t]he question, although overstating the juror's actual role in the sentencing process, was fairly aimed at determining the extent of [the juror's] reservations about imposing the death penalty." *Id.* at 387, 471 S.E.2d at 598. Similarly, in the present case, the trial court sought to clarify Thorpe's position on the death penalty because of her equivocal responses concerning the death penalty. We do not find the trial court's question to be an abuse of discretion.

[4] Defendant also claims that the trial court erred by refusing to allow him the opportunity to rehabilitate Thorpe. Defendant relies on *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993), as support for this proposition. "In *Brogden* this Court found error where the record clearly showed (i) repeated denials by the trial court of requests to rehabilitate under the mistaken belief that such requests are to be denied as a matter of law and (ii) excusal by the trial court of a prospective juror likely qualified to be seated." *State v. Gibbs*, 335 N.C. 1, 35, 436 S.E.2d 321, 340 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994).

Here, the trial court did not refuse to allow defense counsel the opportunity to rehabilitate because the trial court believed it was required to do so as a matter of law. Further, the trial court found,

among other things, "that [Thorpe's] views concerning the death penalty would prevent or substantially impair the performance of this juror in her duties as a juror in accordance with the instructions and her oath." As this Court has previously stated, "[t]he trial court is charged with supervising the examination of potential jurors and has broad discretion to control the extent and manner of *voir dire*." *White*, 343 N.C. at 387, 471 S.E.2d at 598. A review of the transcript supports the trial court's findings concerning Thorpe's views, and defendant has failed to show that further questioning would have resulted in her rehabilitation.

Because the trial court did not abuse its discretion in its questioning of Thorpe or in its refusal to allow the defense to rehabilitate Thorpe, we hold that defendant has failed to demonstrate error. Accordingly, this assignment of error is without merit.

IV.

[5] Defendant also contends that the trial court erred in allowing the State's motion *in limine* to exclude evidence of the victim's previous marriage and pregnancy. Defendant argues that the defense sought the introduction of this evidence "to preclude the State from misleading the jury by pretending that the victim was a naive, immature girl." Defendant contends that the trial court erred by excluding this evidence in both the guilt phase and the sentencing proceeding and that this error resulted in a violation of his statutory and constitutional rights.

In the present case, the State made a motion *in limine* to prohibit defense counsel or witnesses from referring to the fact that the sixteen-year-old victim had been previously married and pregnant at some time prior to her murder. The State argued that these facts were irrelevant to the issues presented at trial. The defense objected to the motion and argued the evidence was relevant. The trial court then asked the State to give its reasons for the exclusion of the evidence. The State argued that the fact that the victim was only sixteen and "the fact that she was married and pregnant at such a young age could prejudice her image in the eyes of the jury and it's simply not relevant and . . . I submit it's not admissible under Rule 412."

In ruling on the motion *in limine*, the trial court stated the following:

> At this point the motion *in limine* is allowed. Now, if counsel believe that at any point specific questions need to be asked on

> this point or if you have independent evidence for the defense[] which would cause some of this information necessarily to be brought before the jury, I'll be glad to hear you, [and] make a ruling as to whether it's of probative value at the time upon request of the defense. But I'm ordering that the defense not mention this matter in opening statements. Not ask questions tending to state these facts in the questions on cross examination without first clearing the court. That does not mean that you may not do it at any time during the trial, but I'd like a chance to rule on what you propose to do before you do it, please.

As this Court has previously stated, "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995). "Rulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.' " *T&T Dev. Co. v. Southern Nat'l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49 (quoting *Conaway*, 339 N.C. at 521, 453 S.E.2d at 845-46), *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). "A party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted)." *Id.*

During cross-examination of the victim's mother, Phyllis Cooper, defendant attempted to offer evidence concerning the victim's previous marriage and pregnancy. Defendant requested that the trial court reconsider its motion *in limine* and establish that the victim had been married and become pregnant at some point. The State once again objected to the admission of this evidence and argued, among other things, that the evidence was "totally irrelevant." The trial court then stated that its ruling on the motion *in limine* would remain intact.

On appeal, we must determine whether the trial court was correct in refusing to admit evidence concerning the victim's previous marriage and pregnancy. Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). We have 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 " '[i]t 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) (quoting *Bank of Union v. Stack*, 179 N.C. 514, 516, 103 S.E. 6, 7 (1920)).

In *State v. Larry*, 345 N.C. 497, 481 S.E.2d 907, *cert. denied*, — U.S. —, — L. Ed. 2d —, 66 U.S.L.W. 3281 (1997), the defendant argued that the trial court erred in allowing the State to present evidence that the decedent was a police officer because the evidence was not relevant and was unfairly prejudicial to the defendant. This Court held that the evidence was relevant and that the trial court did not abuse its discretion by allowing it to come in. This Court stated that "[t]he victim's status as a police officer led him to pursue defendant, which led to defendant shooting him." *Id.* at 520, 481 S.E.2d at 920. Thus, the evidence concerned a circumstance surrounding one of the parties and was "necessary to be known to properly understand their conduct or motives." *Stanley*, 310 N.C. at 365, 312 S.E.2d at 490. Furthermore, the question on appeal in *Larry* was whether the trial court erred in admitting the evidence. In the case *sub judice*, it is whether the trial court should have allowed the evidence to come in.

Here, however, while the fact that the victim had been previously married and pregnant is a circumstance surrounding one of the parties, it is not necessary to properly understand their conduct or motives or to weigh the reasonableness of their contentions. The fact that the victim had been married and pregnant is not relevant to the jury's determination of defendant's guilt in these crimes. Further, there was no evidence that the victim's prior marriage and pregnancy had anything to do with the murder. Defendant's argument that the evidence was relevant to prevent the State "from misleading the jury by pretending that the victim was a naive, immature girl" is without merit. Whether the victim is a naive, immature girl has no bearing on defendant's guilt, and the evidence was properly excluded by the trial court at the guilt phase.

The only other instance involving the disputed evidence occurred during the State's direct examination of SBI Agent Michael East. East testified concerning a statement made to him by David Arnold. During this testimony, East mentioned that, according to the statement, defendant told Arnold that the victim had been married. The prosecutor interrupted East briefly, then he continued with his testimony. Defense counsel never objected to the evidence and never attempted to have the evidence admitted based on East's testimony. Thus, defendant has failed to demonstrate error in the trial court's ruling.

Defendant argues strenuously in his brief that the evidence should have been admitted during the sentencing phase of the trial. However, having reviewed the transcript of the sentencing proceeding, we find no instance where defendant attempted to have this evidence admitted. Accordingly, defendant has once again failed to demonstrate error in the trial court's ruling.

[6] Finally, it is not necessary for us to address defendant's contention that the trial court improperly excluded the evidence under Rule 412 of the North Carolina Rules of Evidence. As this Court has previously noted, it does not matter whether the trial court gave the correct or best reason for excluding the evidence so long as its ruling was correct. *See State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). Accordingly, this assignment of error is overruled.

V.

[7] Defendant next contends that the trial court erred in denying his motion for mistrial based on the repeated elicitation of a hearsay statement. Defendant argues that this alleged error resulted in a violation of his constitutional and statutory rights. We do not agree.

During the guilt phase of the trial, the State called Rex Johnson as a witness. While testifying on direct examination, Johnson was asked, "On the night of the 18th, did you ever have a chance to hear a conversation that the defendant [may] have had with anyone?" Johnson replied, "That night he asked his daddy, he said, what'd you carry that damn thing home for" (referring to the victim). Defense counsel objected and moved to strike the testimony. Outside the presence of the jury, defendant argued that he had not received notice of this statement during the discovery process. Upon inquiry by the trial court, the State agreed that it had an obligation to provide defense

counsel with any statement about which it had knowledge, but stated that it did not have knowledge of this statement.

After some discussion, the trial court was able to ascertain that the State was unaware of this statement and, further, that it was actually defendant's father who had informed Johnson of defendant's statement, not defendant. Thus, the statement was inadmissible because it was hearsay. The trial court then appropriately allowed defense counsel's motion to strike. When the jurors returned to the courtroom, the trial court instructed them to strike the statement "from [their] mind[s] and memor[ies]" and informed them that the statement was not admissible for any purpose at this point in the trial. The State then proceeded with its questioning of Johnson.

Eventually, Johnson was once again asked, "Did you, yourself, ever hear any statements from the defendant on that night?" Johnson replied, "Nothing. Only he asked his daddy what did you carry her home for." Defense counsel again objected and moved to strike the testimony. Outside the presence of the jury, the trial court explained the following to the witness:

> THE COURT: Okay. Let me make this clear to you, sir. When they ask you a question, you need to listen to the question and answer the question. They didn't ask you what you may have heard the father say. They asked you what, if anything else, you heard the defendant say. And if you didn't hear him say those words, then you shouldn't have said that, you understand?

The witness indicated that he understood, and the trial court subsequently denied defense counsel's motion for mistrial and motion to strike all of the witness' testimony. The trial court further found that the witness did not understand the question and that he did not hear the defendant say, "what'd you carry that damn thing home for." The trial court once again instructed the jury as follows:

> THE COURT: All right. Ladies and gentlemen, again, I repeat the earlier instruction I gave you that this statement is not admissible. This witness did not hear the defendant make any such statement. It is therefore hearsay, it's inadmissible, you are to strike it completely from your minds and memory, not consider it for any purpose at all or relate it to this trial. The State may proceed.

The trial court is required to declare a mistrial upon a defendant's motion "if there occurs during the trial . . . conduct inside or outside

the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988). It is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable. *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992).

A review of the record reveals that the witness' testimony concerning the hearsay statement was inadvertent. This isolated instance hardly represents prosecutorial misconduct as defendant contends. The record makes clear that the witness was confused concerning what he could testify to and that the trial court attempted to rectify the situation. Even had the improper testimony been prejudicial, the trial court's curative instructions ordinarily would have dispelled any prejudice. *See 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). "Jurors are presumed to follow the court's instructions when they are told not to consider testimony." *State v. Cox*, 344 N.C. 184, 189, 472 S.E.2d 760, 763 (1996).

Here, the inadvertent hearsay statement did not result in substantial and irreparable prejudice to defendant's case. Accordingly, the trial court did not err by refusing to grant defendant's motion for a mistrial. This assignment of error is overruled.

VI.

[8] Next, defendant assigns as error the trial court's failure to grant a mistrial based on alleged prosecutorial misconduct during closing arguments in both the guilt and sentencing phases of the trial. Defendant argues that the trial court's failure to grant a mistrial violated both his statutory and constitutional rights. Because defendant made no motion for a mistrial based on closing arguments, we must determine whether the trial court erred by failing to grant a mistrial *ex mero motu*.

As noted previously, it is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable. *Williamson*, 333 N.C. 128, 423 S.E.2d 766. This is particularly true where, as here, defendant did not move for a mistrial at either phase of the trial as a result of allegedly improper closing arguments.

Generally, counsel is allowed wide latitude in the scope of jury arguments. *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, 346 S.E.2d 405 (1986). N.C.G.S. § 15A-1230 limits closing arguments by prohibiting an attorney from "inject[ing] his personal experiences, express[ing] his personal belief . . . , or mak[ing] arguments on the basis of matters outside the record." N.C.G.S. § 15A-1230 (1988).

Based on the principles set out above, we will address defendant's contentions accordingly. First, defendant complains of a statement made by the prosecutor during his closing argument at the guilt phase of the trial, to which no objection was made. The prosecutor's remark was as follows: "As I stated in my opening statement, this may be the most atrocious crime that has occurred here in Harnett County." Defendant argues that this statement amounts to "prosecutorial expertise" and should not have been allowed. However, this Court has held that hyperbolic language is acceptable in jury argument so long as it is not inflammatory or grossly improper. *See Frye*, 341 N.C. at 499, 461 S.E.2d at 679. Similar language has been allowed by this Court in previous cases. *See, e.g., State v. Elliott*, 344 N.C. 242, 281-82, 475 S.E.2d 202, 220-21 (1996) (prosecutor's statement that the killing was the "worst of the worst" allowed), *cert. denied*, — U.S. —, 137 L. Ed. 2d 312 (1997); *State v. Fullwood*, 343 N.C. 725, 739-41, 472 S.E.2d 883, 890-91 (1996) (prosecutor's comment that the murder being tried was one of the worst in the sixty-year history of the Buncombe County courthouse allowed), *cert. denied*, — U.S. —, 137 L. Ed. 2d 339 (1997). Thus, the trial court did not err by failing to grant a mistrial *ex mero motu*.

Defendant further assigns as error the prosecutor's argument during the sentencing proceeding that "this is probably one of the most atrocious crimes that has occurred here in Harnett County." Defendant did object to this argument. However, as noted above, this Court has upheld similar statements by prosecutors, and defendant has again failed to show that the trial court erred by failing to grant a mistrial *ex mero motu*.

[9] Next, defendant assigns as error the prosecutor's argument that even if someone else was with defendant and that defendant was an accomplice, defendant is nevertheless guilty of the charged offenses because "two people acting together can commit a crime. I think you

understand that." Defendant argues that because the State had previously declined to rely on an acting-in-concert theory, the prosecutor should not have referenced it in his closing argument. However, the remark was made in a nontechnical way that required no understanding about the law of acting in concert or aiding and abetting. When viewed contextually, the argument merely reflected that even if someone else were present at the crime scene, it does not absolve defendant of his own actions. Once again, defendant did not object to this argument at trial, and we fail to see how the trial court committed error in failing to declare a mistrial based on this remark.

[10] Defendant also points to several statements made by the prosecutor during the sentencing phase of the trial to which he did not object. Defendant specifically assigns as error the following: (1) the fact that the State routinely referred to the victim, Angie Godwin, as Angie Porter, her maiden name; (2) the prosecutor's argument that the victim's being shot in the head multiple times at point-blank range rendered this killing especially heinous, atrocious, or cruel; (3) the prosecutor's argument that the brutality here exceeded that normally present in any killing; (4) the characterization of mitigating circumstances as excuses; and (5) the prosecutor's argument that defendant bore the burden of proving the mitigating circumstances, even though the State had already stipulated to the existence of one of the statutory mitigating circumstances. After reviewing the prosecutor's arguments contextually, we conclude that none of them were so grossly improper as to require the trial court to intervene *ex mero motu* or to declare a mistrial.

[11] Finally, defendant argues that the prosecutor impugned the character of an expert witness who testified on behalf of the defense, arguing to jurors that many of the submitted mitigating circumstances "were developed skillfully by the defense experts who go around this State testifying for defendants in capital cases, selling their services and opinions at rates from $75 to $125 an hour." Defendant's objections to this argument were overruled. Defendant argues that this was an improper and fallacious statement. Therefore, defendant contends the trial court should have intervened and declared a mistrial *ex mero motu*.

In *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 63 (1995), the prosecutor made a similar argument to the jury. This Court, while assuming the prosecutor's statements were improper, determined that the argument did

not entail such error as to entitle the defendant to a new sentencing proceeding. *Id.* at 651-52, 452 S.E.2d at 300-01. Similarly, here, assuming *arguendo* that the prosecutor's statements were improper, they do not entitle defendant to a new sentencing proceeding. Thus, the trial court did not err by failing to grant a mistrial *ex mero motu.*

We have carefully reviewed the record, and although we disapprove of one of the statements made by the prosecutor, we fail to see how that statement alone resulted in denying defendant his right to a fair trial. Accordingly, we do not believe that the trial court abused its discretion in failing to declare a mistrial *ex mero motu* based on the prosecutor's closing arguments. This assignment of error is without merit.

VII.

[12] Defendant also assigns as error the trial court's refusal to submit two statutory mitigating circumstances. Specifically, defendant contends that the trial court erred by refusing to submit the statutory mitigating circumstance that defendant committed the murder while under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (Supp. 1996), and 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 substantial evidence was introduced during the sentencing proceeding to support the statutory mitigating circumstances requested and that the trial court's refusal to submit them violated his statutory and constitutional rights.

"A trial court must submit only those mitigating circumstances which are supported by substantial evidence." *State v. Strickland,* 346 N.C. 443, 463, 488 S.E.2d 194, 206 (1997). Further, defendant bears the burden of producing "substantial evidence" tending to show the existence of a mitigating circumstance before that circumstance will be submitted. *State v. Rouse,* 339 N.C. 59, 100, 451 S.E.2d 543, 566 (1994), *cert. denied,* — U.S. —, 133 L. Ed. 2d 60 (1995). In *State v. Earnhardt,* 307 N.C. 62, 296 S.E.2d 649 (1982), this Court discussed the principles involved in determining what constitutes "substantial evidence" and stated:

> The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. *State v. Stephens,* 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). Substantial

> evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Earnhardt, 307 N.C. at 66, 296 S.E.2d at 652.

First, we must determine whether substantial evidence existed to support the submission of 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). A defendant's mental or emotional disturbance does not warrant submission of the (f)(2) circumstance unless the disturbance existed at the time of the murder. *State v. McKoy*, 323 N.C. 1, 28-29, 372 S.E.2d 12, 27 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

Defendant contends that the evidence presented in *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), is comparable to the evidence presented in the present case. In *Stokes*, the defendant presented evidence indicating that he had an IQ of 63 and a long history of psychiatric treatment for mental disorders. *Id.* at 654, 304 S.E.2d at 196. Further, the defendant in *Stokes* had been diagnosed as having an antisocial personality disorder and as being mildly mentally retarded. *Id.* This Court held that the evidence was sufficient to warrant submission of the (f)(2) mitigating circumstance. *Id.* at 655, 304 S.E.2d at 196.

Here, however, we do not believe the evidence was sufficient to require the trial court to submit the (f)(2) mitigating circumstance. Testimony indicated that defendant's verbal IQ was 78, while his performance IQ was 90. Thus, defendant's IQ was within the low average range. Dr. Claudia Coleman, a clinical forensic psychologist testifying for the defense, concluded that the primary personality characteristics exhibited by defendant were emotional and social alienation. Dr. Coleman further stated that she found no evidence of psychosis in defendant. She did state that defendant appeared to suffer from mild depression, but she stated that part of the depression could be the result of defendant's recent incarceration.

Further, the testimony given by defendant's expert witnesses did not provide a nexus between defendant's personality characteristics

and the crimes he committed. Indeed, the manner of the killing and defendant's subsequent actions indicate that he was not under the influence of a mental or emotional disturbance at the time of the killing. The evidence showed that defendant raped the victim and deliberately set her body on fire in order to destroy the evidence. Defendant also returned to the house where he had attacked the victim and set the house on fire. Subsequently, defendant drove to a pond, where he threw the gun used in the murder into the water. "The events before, during, and after the killing suggested deliberation, not the frenzied behavior of an emotionally disturbed person." *State v. Noland*, 312 N.C. 1, 23, 320 S.E.2d 642, 655-56 (1984). Accordingly, the trial court did not err in refusing to submit the (f)(2) circumstance.

[13] Next, we must determine whether the trial court erred in refusing to submit the (f)(6) statutory mitigating circumstance. Defendant contends that poor impulse control and subaverage intelligence established that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. In discussing the (f)(6) statutory mitigating circumstance, this Court has noted that

> this circumstance has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions.

Syriani, 333 N.C. at 395, 428 S.E.2d at 142-43.

Although expert testimony was presented in the present case, the testimony did not establish that defendant's personality characteristics affected his ability to understand and control his actions. In fact, both of defendant's expert witnesses testified to the contrary. The prosecutor asked Mr. Dennis, defendant's expert in the field of social work, "based upon your own observations and conversations with this defendant, [he] clearly understands the difference between right and wrong, [doesn't] he?" to which Mr. Dennis replied, "Certainly." Further, Dr. Coleman, defendant's expert in the field of clinical forensic psychology, testified on cross-examination as follows:

> Q. And, Dr. Coleman, you also would agree, would you not, that the defendant has the capacity to distinguish between right and wrong?

A. I think that he certainly knows what's legal and illegal.

. . . .

Q. Well, Doctor, the defendant certainly has the capacity to understand that killing another human being is wrong, does he not?

A. He understands it's illegal and that society considers it wrong, yes, sir.

Q. Well, does he not also understand himself that it's wrong?

A. I think that he does. I have seen remorse in this past year or last year when I saw him, over the period, yes, I think he believes that it's wrong.

Q. And would you not also agree that the defendant has the capacity to understand that rape is wrong?

A. Yes, sir.

Q. Would you not also agree that he has the capacity to understand that sodomizing another person without that person's consent is wrong?

A. Yes, sir.

This testimony clearly demonstrates that the trial court did not err by refusing to submit the (f)(6) statutory mitigating circumstance. Defendant's experts not only testified that defendant had the ability to understand right from wrong, but also testified that defendant had the capacity to understand that killing another human being is illegal. Further, there was no testimony or evidence suggesting that at the time of the murder, defendant's capacity to understand right from wrong or to conform his conduct to the requirements of the law was impaired as required by the (f)(6) mitigator. Accordingly, the trial court did not err by refusing to submit this mitigating circumstance to the jury.

VIII.

[14] In defendant's next assignment of error, he contends that the trial court erred by failing to direct a verdict on the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). Defendant argues that this omission resulted in a violation of his constitutional rights.

During the sentencing proceeding, defendant sought submission of the statutory mitigating circumstance that the defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). After some discussion, the State eventually agreed to stipulate to the fact that defendant had no significant history of prior criminal activity. Defendant contends the trial court's failure to require the jurors to find and consider the statutory mitigating circumstance entitles him to a new capital sentencing proceeding. We disagree.

Because defendant did not object to the form of the instruction at trial, defendant must show plain error. "[T]he term 'plain error' does not simply mean obvious or apparent error." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "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. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 862, *cert. denied*, — U.S. —, 133 L. Ed. 2d 436 (1995).

The effect of the stipulation was to "remov[e] a question of fact from the jury's consideration. . . . Because both parties stipulated to the existence of the statutory mitigating circumstance, whether defendant had a significant history of prior criminal activity was not a factual matter for the jury to determine." *State v. Flippen*, 344 N.C. 689, 701, 477 S.E.2d 158, 165 (1996). Here, the trial court instructed the jury on the (f)(1) mitigating circumstance as follows:

> First, consider whether the defendant has no significant history of prior criminal activity before the date of the murder. All of the evidence, ladies and gentlemen, shows the defendant has no significant history of prior criminal activity. It has been stipulated by the State that the defendant has no criminal convictions and that there is no significant history of prior criminal activity by the defendant. Therefore, as to this mitigating circumstance you will have your foreman write yes in the space provided after this mitigating circumstance on the Issues and Recommendation form.

Subsequently, after instructing on all the mitigating circumstances submitted, the trial court further instructed:

> Let me remind you, ladies and gentlemen, that as to mitigating circumstance No. 1, the defendant has no significant history of prior criminal activity, I have directed that you will answer that

> issue, yes. And because you answer that issue, yes, you must find that there is at least that one [mitigating circumstance]. Of course you may certainly find other mitigating circumstances . . . [b]ut because you must answer that issue yes, then you must answer Issue No. 2, yes.

Thus, the trial court directed the jurors to answer affirmatively as to the mitigating circumstance that defendant has no significant history of prior criminal activity and further stated that they were required to find the existence of at least one mitigating circumstance in Issue Two. The jurors must, therefore, under proper instructions, weigh this mitigating circumstance in Issue Three. Unlike in *Flippen,* relied on by defendant, these instructions did not allow the jury to answer "no" to the existence of the statutory (f)(1) mitigator.

We note that the trial court in the present case did not completely eliminate all remarks that might allow the jurors discretion in finding the (f)(1) mitigating circumstance. For example, the trial court stated, "Now, in the event you do not find the existence of any mitigating circumstances, you would still answer this issue." However, the trial court thereafter stated, "[A]s I have instructed you, because you will find at least one mitigating circumstance in this case, you must answer this issue." As this Court has previously stated, "If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *State v. Terry,* 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994).

We conclude that the trial court, in fact, directed a verdict on this circumstance and that defendant has failed to show any error, much less plain error, in the trial court's instructions regarding the (f)(1) statutory mitigating circumstance. Accordingly, this assignment of error is without merit.

PRESERVATION ISSUES

Defendant raises three additional issues which he concedes have been decided contrary to his position previously by this Court: (1) the trial court erred in instructing the jury on the statutory aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), in violation of the United States Constitution; (2) the trial court erred in requiring jurors to find that nonstatutory mitigating circumstances had mitigating value before considering the evidence offered in support of the mitigating circum-

stances, in violation of both the North Carolina and the United States Constitutions; and (3) the trial court erred in instructing that each juror was allowed, rather than required, to consider mitigating circumstances he or she found at Issue Two when weighing the aggravating circumstances against the mitigating circumstances, in violation of both the North Carolina and the United States Constitutions.

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 argument on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[15] Having found no error in either the guilt or sentencing phase, we must determine whether: (1) the evidence supports the aggravating circumstances found by the jury; (2) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (3) the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

In the present case, defendant was convicted of 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 while defendant was engaged in the commission of arson, N.C.G.S. § 15A-2000(e)(5); that the murder was committed while defendant was engaged in the commission of rape, N.C.G.S. § 15A-2000(e)(5); that the murder was committed while defendant was engaged in the commission of a sexual offense, N.C.G.S. § 15A-2000(e)(5); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). 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." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

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 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, — U.S. —, — L. Ed. 2d —, 66 U.S.L.W. 3262 (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).

However, we find the present case distinguishable from each of these seven cases. In three of those cases, *Benson*, 323 N.C. 318, 372 S.E.2d 517; *Stokes*, 319 N.C. 1, 352 S.E.2d 653; and *Jackson*, 309 N.C. 26, 305 S.E.2d 703, 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 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).

Further, of the cases in which this Court has found the death penalty disproportionate, only two involved the especially heinous,

atrocious, or cruel aggravating circumstance. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. Neither *Stokes* nor *Bondurant* is similar to this case. In *Stokes*, the defendant was convicted under a theory of felony murder, and there was virtually no evidence of premeditation and deliberation. As noted above, in the present case, defendant was convicted upon a theory of premeditation and deliberation as well as under the felony murder rule. Further, in *Stokes*, the victim was killed at his place of business. In the present case, the victim was killed in what was the equivalent of her home—her father's home. A murder in one's home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

Bondurant is also distinguishable from the present case. In *Bondurant*, the defendant exhibited remorse and concern for the victim's life by immediately seeking medical help for the victim. In the present case, by contrast, after shooting the victim in the head several times, defendant set the victim's body on fire in an attempt to cover up the crime and insure the victim's death.

Finally, the sexual assault of the sixteen-year-old victim as well as the mutilation of her body render this murder particularly dehumanizing. 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, *cert. denied*, — U.S. —, — L. Ed. 2d —, 66 U.S.L.W. 3256 (1997); *State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995); *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).

We recognize that juries may have imposed sentences of life imprisonment in cases which are similar to the present case. However, this fact "does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. This Court has long rejected a mechanical or empirical approach to comparing cases that are superficially similar. *State v. Robinson*, 336 N.C. 78, 139, 443 S.E.2d 306, 337 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

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 of death disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

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 defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. LESLEY EUGENE WARREN

No. 562A96

(Filed 7 November 1997)

1. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—photographs of prior victim—admissibility to illustrate testimony and show aggravating circumstance

Postmortem photographs of a woman defendant previously murdered in South Carolina were properly admitted in defendant's capital sentencing proceeding to illustrate an officer's testimony and to support the existence of the (e)(3) aggravating circumstance that defendant had previously been convicted of a felony involving violence to a person. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Trial §§ 1759, 1760.

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

2. Criminal Law § 1335 (NCI4th Rev.)— capital sentencing—victim's disinterment—admissibility of videotape

A videotape of the disinterment of the murder victim's body was properly admitted in a capital sentencing proceeding to illustrate an officer's testimony regarding defendant's treatment and

concealment of the body and to show defendant's intent to kill, malice, premeditation, and deliberation.

Am Jur 2d, Evidence §§ 979-985.

3. Evidence and Witnesses § 2171 (NCI4th)— capital sentencing—cross-examination of defendant's expert—defendant's prior bad acts—door opened—basis for diagnosis

The trial court properly permitted the State to cross-examine defendant's expert witness in a capital sentencing proceeding about bad acts defendant committed prior to the murder in this case since (1) defendant opened the door by eliciting testimony about these bad acts on direct examination, and (2) the cross-examination was proper to explore the basis for the expert's opinion and diagnosis where the expert had testified on direct examination that prior bad acts, including defendant's acts of theft, vandalism, and distributing threatening letters, formed the basis for various diagnoses over the years. Furthermore, the State's cross-examination of defendant's expert about defendant's prior bad acts did not violate defendant's plea agreement because that agreement specifically permitted the State to offer evidence of defendant's prior crimes if such evidence became relevant to cross-examination of a defense witness.

Am Jur 2d, Evidence §§ 404 et seq.

4. Criminal Law § 466 (NCI4th Rev.)— capital sentencing—life sentence in South Carolina—parole eligibility—irrelevancy

The trial court did not err when it refused to allow defendant to inform the jury in a capital sentencing proceeding that he had received a life sentence for first-degree murder in South Carolina under which he is parole-eligible after serving twenty years because evidence about parole eligibility does not reveal anything about defendant's character or record or about circumstances of the offense. The case of *Simmons v. South Carolina*, 512 U.S. 154, is inapposite because defendant will be eligible for parole after serving twenty years of his life sentence in South Carolina and would have been eligible for parole after serving twenty years had he received a life sentence in this case.

Am Jur 2d, Trial § 1661.

5. Criminal Law § 1364 (NCI4th Rev.)— capital sentencing—(e)(3) aggravating circumstance—meaning of "previously convicted"

The "previously convicted" language in the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance includes criminal activity conducted prior to the events out of which the charge of murder arose, even when the conviction came after those events, provided the conviction occurs before the capital sentencing proceeding in which it is used as the basis of the (e)(3) aggravator. Therefore, the trial court properly submitted defendant's conviction for first-degree murder in South Carolina for consideration under the (e)(3) aggravating circumstance where defendant committed the South Carolina murder before he committed the murder in this case and was convicted of it prior to this capital sentencing proceeding, even though his South Carolina conviction did not precede the murder at issue. Contrary language in *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 is disavowed.

Am Jur 2d, Trial §§ 1759, 1760.

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

6. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstance—age—peremptory instruction not required

Although defendant was only twenty-two and a half years old when he murdered the victim, his mental and physical maturity, experience, and prior criminal history supported the trial court's denial of defendant's request for a peremptory instruction in this capital sentencing proceeding on the (f)(7) mitigating circumstance of age. N.C.G.S. § 15A-2000(f)(7).

Am Jur 2d, Trial §§ 1759, 1760.

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

7. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstance—failure to give peremptory instruction—harmless error

The trial court erred in the denial of defendant's request for a peremptory instruction on the nonstatutory mitigating circumstance that he had graduated from a truck-driving school because the evidence on this circumstance was uncontroverted and the State stipulated to this fact; however, this error was harmless beyond a reasonable doubt where the jury knew that it was uncontroverted that defendant had graduated from truck-driving school; this fact was listed as a nonstatutory mitigator on the Issues and Recommendation as to Punishment form; the prosecutor stated during closing argument that the State had stipulated to this fact; and a peremptory instruction would thus not have altered the jury's conclusion regarding defendant's sentence.

Am Jur 2d, Trial §§ 1759, 1760.

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

8. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's jury argument—value of statutory mitigating circumstances—no gross impropriety

The prosecutor's jury argument in a capital sentencing proceeding that, if the jury found statutory mitigating circumstances to exist, "then you should consider them in whatever way you might want to use them," while somewhat misleading as to the value the jury must accord to statutory mitigating circumstances, was not so grossly improper as to require the trial court to intervene *ex mero motu* and was not reversible error where the trial court correctly instructed the jurors on the law regarding statutory and nonstatutory mitigating circumstances, and the court also instructed that the jurors must apply the law as the court gave it to them, not as the attorneys gave it to them or as they might like it to be.

Am Jur 2d, Trial §§ 1759, 1760.

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

9. Criminal Law § 115 (NCI4th Rev.)— report of defendant's nontestifying psychologist—no constitutional or statutory right to discovery

The State had no constitutional or statutory right to discover the report of a clinical psychologist who had examined defendant, at defendant's request, in preparation for his murder trial where defendant did not intend to introduce the report at trial and did not call the psychologist to testify. N.C.G.S. §§ 15A-905(b).

Am Jur 2d, Depositions and Discovery §§ 50, 51, 56, 65.

10. Criminal Law § 98 (NCI4th Rev.)— compelling discovery—inherent authority of trial court

The trial court possesses inherent authority to compel discovery in certain instances in the interest of justice when no statute has placed a limitation on the trial court's authority.

Am Jur 2d, Depositions and Discovery §§ 5, 7.

11. Criminal Law § 115 (NCI4th Rev.)— nontestifying psychologist's report—denial of pretrial discovery

Under the limitation set forth in N.C.G.S. § 15A-906, the trial court properly declined to compel defendant to disclose his nontestifying psychologist's report when the State requested such disclosure prior to trial.

Am Jur 2d, Depositions and Discovery §§ 50, 51, 56, 65.

12. Criminal Law § 98 (NCI4th Rev.)— pretrial discovery—limiting statute—discovery at later stage—inherent authority of court

Even when statutes limit the trial court's authority to compel pretrial discovery, the court may retain inherent authority to compel discovery of the same documents at a later stage of the proceedings.

Am Jur 2d, Depositions and Discovery §§ 5, 7.

13. Criminal Law § 115 (NCI4th Rev.)— discovery—report of nontestifying psychologist—use for cross-examining expert

The trial court had the inherent authority to compel defendant to disclose to the State a nontestifying psychologist's report after defendant admitted guilt of first-degree murder and after the capital sentencing proceeding was underway where defendant's mental health expert testified that he had studied every mental health report in defendant's medical history, and the State sought to discover the nontestifying psychologist's report for use during its cross-examination of defendant's expert. Assuming that the trial court erred in compelling such discovery, the error was harmless beyond a reasonable doubt where nothing in the record suggests that the State's cross-examination of defendant's expert would not have been equally effective without the use of the report.

Am Jur 2d, Depositions and Discovery §§ 93 et seq., 260, 263.

14. Jury § 226 (NCI4th)— excusal for cause—death penalty views—rehabilitation denied

The trial court did not abuse its discretion in denying defendant's requests to rehabilitate five jurors excused for cause based upon their death penalty views where each of the jurors clearly demonstrated that he or she would have been unable to vote for the death penalty under any circumstances; the court asked clarifying questions of the first four to assure their opposition to the death penalty; and the last juror's statements were so clear that the court did not need to ask further questions before excusing him.

Am Jur 2d, Jury §§ 205, 206, 279.

15. Criminal Law § 1402 (NCI4th Rev.)— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder is not excessive or disproportionate where the jury found as an aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and defendant had previously been convicted of another first-degree murder.

Am Jur 2d, Criminal Law §§ 625-628.

Appeal 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., at the 18 September 1995 Criminal Session of Superior Court, Buncombe County, upon defendant's plea of guilty of first-degree murder. Heard in the Supreme Court 15 October 1997.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

Anthony Lynch for defendant-appellant.

WHICHARD, Justice.

In February 1995 defendant, Lesley Eugene Warren, pled guilty to the first-degree murder of Jayme Denise Hurley. After a capital sentencing proceeding, the jury recommended a sentence of death. Defendant now appeals from this sentence. We find no prejudicial error and hold that defendant received a fair capital sentencing proceeding and that the sentence of death is not disproportionate.

The State's evidence tended to show that on 24 May 1990, defendant visited the home of Jayme Hurley, defendant's former juvenile counselor. Defendant told Hurley he needed help, and Hurley agreed to let defendant sleep on her couch for the night. Late in the evening, defendant strangled Hurley to death.

Defendant took Hurley's dead, naked body to a rocky and remote area of the Pisgah National Forest, 210 feet from a paved road, and buried the body in a shallow grave covered with rocks and an engine part. He placed Hurley's clothes under a log a short distance away. Police did not find the body until 18 July 1990.

Upon questioning, defendant admitted that he had killed Hurley. Defendant pled guilty to first-degree murder. During his capital sentencing proceeding, defendant stipulated that he had been convicted of the first-degree murder of another woman, Velma Faye Gray, in South Carolina, for which he was sentenced to life in prison.

Defendant first contends the trial court erred by allowing into evidence, over defendant's objection, postmortem photographs of the woman he murdered in South Carolina and a videotape of the disinterment of the victim in this case. He asserts that these images unduly prejudiced the jury against him and lacked relevance to any issue in sentencing. We disagree.

During a sentencing proceeding, the trial court may admit any evidence it " 'deems relevant to sentenc[ing].' " *State v. Heatwole*, 344 N.C. 1, 25, 473 S.E.2d 310, 322 (1996) (quoting *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)), *cert. denied*, — U.S. —, 137 L. Ed. 2d 339 (1997). "[T]he State must be permitted to present any competent evidence supporting the imposition of the death penalty," *id.*, including photographs of the victim. The State may introduce photographs and videotapes to illustrate the testimony of a witness regarding the manner of a killing. *State v. Kandies*, 342 N.C. 419, 444, 467 S.E.2d 67, 80, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996). Further, the State may present evidence of the circumstances surrounding a defendant's prior felony, notwithstanding the defendant's stipulation to the record of conviction, to support the existence of aggravating circumstances. *Heatwole*, 344 N.C. at 19, 473 S.E.2d at 319. If the felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. *Id.*

[1],[2] Here, the postmortem photographs of Gray, defendant's victim in South Carolina, illustrated the testimony of Sergeant Michael Ennis and supported the existence of the (e)(3) aggravating circumstance, that defendant had been previously convicted of a felony involving the use of violence to a person. *See* N.C.G.S. § 15A-2000(e)(3) (Supp. 1996). The videotape of the disinterment of Hurley, defendant's victim in this case, properly illustrated the testimony of Captain Ross Robinson regarding defendant's treatment and concealment of the body. This evidence was competent and relevant circumstantial evidence regarding defendant's intent to kill, malice, premeditation, and deliberation. *See Kandies*, 342 N.C. at 444, 467 S.E.2d at 81.

Whether photographic evidence is more probative than prejudicial is within the trial court's discretion. *Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322; *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Here, defendant has failed to show that the trial court abused its discretion by admitting photographs of defendant's prior murder victim or by admitting a videotape of the disinterment of the victim in this case. This assignment of error is overruled.

[3] Defendant next argues that the trial court improperly permitted the State to cross-examine defendant's expert witness, Dr. Bruce Welch, about bad acts defendant committed prior to the murder in this case. Defendant contends that this cross-examination violated

his plea agreement and the Rules of Evidence. This contention lacks merit for several reasons.

First, defendant opened the door by eliciting testimony about these acts on direct examination. Welch testified that defendant was referred to the Blue Ridge Community Mental Health Center in 1982 because defendant "wrote letters that were strange enough, bizarre and frightening enough to people that he was referred for treatment and evaluation." Welch also testified that defendant had "broken all kinds of rules . . . vandalized things . . . stolen things."

After defendant elicited this testimony, the State notified the trial court that it intended on cross-examination to inquire into details of defendant's threatening letters and acts of vandalism and theft. The trial court heard arguments and considered *voir dire* testimony before allowing limited inquiry into the matters brought out on direct examination. During this cross-examination before the jury, the State questioned Welch about defendant's threatening letters, theft, and vandalism, and highlighted inconsistencies between Welch's testimony and the report from Blue Ridge Community Mental Health Center. This was proper. The law "wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

The cross-examination was also proper to explore the basis for the expert's opinion and diagnoses. Defendant's expert had testified on direct examination that prior bad acts, including defendant's acts of theft, vandalism, and distributing threatening letters, formed the basis for the various diagnoses of defendant over the years. As such, they were relevant to the jury's full understanding and consideration of those diagnoses. *See* N.C.G.S. § 8C-1, Rule 705 (1992); *State v. Coffey*, 336 N.C. 412, 420, 444 S.E.2d 431, 436 (1994).

The trial court has broad discretion over the scope of cross-examination. *State v. Woods*, 345 N.C. 294, 307, 480 S.E.2d 647, 653, *cert. denied*, — U.S. —, 139 L. Ed. 2d 132 (1997). In a sentencing proceeding, the Rules of Evidence do not limit this discretion because they do not apply. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992); *see also* N.C.G.S. § 15A-2000(a)(3) (evidence "may be presented as to any matter that the court deems relevant to sentence"). Because defendant first elicited the testimony about his prior bad acts and because those acts formed part of the basis of

his expert's diagnoses, the trial court did not abuse its discretion in permitting the State to cross-examine the expert regarding them.

Further, defendant waived his right to appellate review by not fully objecting and not properly preserving the objections he made. Although defendant filed motions *in limine* requesting that the trial court preclude the State from presenting evidence of his prior bad acts, "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995). Defendant objected to some evidence of prior bad acts, but he waived any right to review of that evidence by presenting similar evidence on direct examination of his own expert and by not objecting to similar evidence offered by the State. *See State v. Alford*, 339 N.C. 562, 569-70, 453 S.E.2d 512, 516 (1995).

Finally, the State's cross-examination of defendant's expert regarding defendant's prior bad acts did not violate defendant's plea agreement. That agreement specifically permitted the State to offer evidence about defendant's prior crimes if such evidence became relevant to cross-examination of a defense witness. This assignment of error is overruled.

[4] By his third assignment of error, defendant contends the trial court erred and violated his constitutional rights when it refused to allow him to inform the jury that he had received a life sentence for first-degree murder in South Carolina under which he is parole-eligible after serving twenty years. Defendant concedes that this Court has decided this issue contrary to his position. In *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995), this Court held that "evidence about parole eligibility is not relevant in a capital sentencing proceeding because it does not reveal anything about defendant's character or record or about any circumstances of the offense." The Court also held that *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994), does not affect this position where a defendant is parole-eligible if given a life sentence. *Payne*, 337 N.C. at 516, 448 S.E.2d at 99. In *Simmons* the United States Supreme Court held that it was error to refuse to give a proposed jury instruction that a defendant was ineligible for parole under state law. That case is inapposite because defendant here will be eligible for parole after serving

twenty years of his life sentence in South Carolina and would have been eligible for parole after serving twenty years had he received a life sentence in this case. *See 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). This assignment of error is overruled.

[5] By his fourth assignment, defendant argues that because he had not been *convicted* of the prior murder before he committed the murder in this case, the trial court improperly submitted the (e)(3) aggravating circumstance to the jury. He recognizes that N.C.G.S. § 15A-2000(e)(3) permits a jury to consider as an aggravating circumstance whether "defendant had been previously convicted of a felony involving the use or threat of violence to the person." He asserts, however, that this aggravating circumstance *cannot* be submitted when only the *conduct*, not the *conviction*, preceded the murder at issue. He acknowledges that the *conduct* upon which his prior murder conviction was based occurred before the murder at issue.

Defendant relies primarily upon dictum in *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), where this Court stated that a jury instruction on the (e)(3) aggravating circumstance is correct when it "tells the jury that the [prior felony] conviction, in order to be an aggravating circumstance, must have preceded the murder for which defendant had been found guilty." This dictum is contrary to many decisions of this Court, both pre- and post-*Williams*. This Court has held on numerous occasions that the (e)(3) circumstance is properly submitted when the *conduct* upon which the prior conviction is based occurred prior to the murder at issue. In *State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583 (1979), we stated:

> G.S. 15A-2000(e)(3) states that one of the aggravating factors which may justify the imposition of the death penalty is the fact that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person." This section requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the "use or threat of violence to the person," and that (3) the *conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose.*

(Emphasis added.) The *Goodman* interpretation was reaffirmed several times before *Williams*. *See, e.g.*, *State v. Hamlette*, 302 N.C. 490,

503-04, 276 S.E.2d 338, 347 (1981); *State v. Silhan*, 302 N.C. 223, 266, 275 S.E.2d 450, 480 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 679, 488 S.E.2d 133, 138 (1997). In cases decided post-*Williams*, this Court has reviewed its prior decisions and reaffirmed the *Goodman* holding. *See, e.g., State v. Burke*, 343 N.C. 129, 157-59, 469 S.E.2d 901, 915, *cert. denied*, — U.S. —, 136 L. Ed. 2d 409 (1996); *State v. Lyons*, 343 N.C. 1, 22, 468 S.E.2d 204, 214, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996).

We now reaffirm that the "previously convicted" language in N.C.G.S. § 15A-2000(e)(3) includes "criminal activity *conducted* prior to the events out of which the charge of murder arose," even when the *conviction* came after those events, provided the conviction occurs before the capital sentencing proceeding in which it is used as the basis of the (e)(3) aggravator. *Lyons*, 343 N.C. at 22, 468 S.E.2d at 214 (emphasis added). We disavow the language in *Williams* to the contrary. *See Williams*, 339 N.C. at 46, 452 S.E.2d at 272. Because defendant *committed* the murder in South Carolina *before* he committed the murder here and was convicted of it prior to this capital sentencing proceeding, the trial court properly submitted the South Carolina conviction for consideration under the (e)(3) aggravating circumstance. We thus overrule this assignment of error.

[6] In his next assignment, defendant contends the trial court committed prejudicial error by denying his requests for peremptory instructions on the statutory mitigating circumstance regarding his age at the time of the crime, N.C.G.S. § 15A-2000(f)(7), and on the nonstatutory mitigating circumstance that he had graduated from truck-driving school. We disagree.

Where a defendant requests a peremptory instruction and "all of the evidence . . . , if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). All of the evidence here did not support the existence of the mitigating circumstance regarding defendant's age, however.

Under the (f)(7) mitigating circumstance, age does not mean solely chronological age. Rather, the circumstance "permits the jury to consider such factors as the defendant's mental and physical maturity, experience, and prior criminal history as well as his chronological age in determining whether age is mitigating." *State v. Simpson*, 341 N.C. 316, 350, 462 S.E.2d 191, 210 (1995), *cert. denied*, — U.S.

—, 134 L. Ed. 2d 194 (1996). Although defendant was only twenty-two and a half years old when he murdered Hurley, his mental and physical maturity, experiences, and prior criminal history all support the trial court's decision to deny the request for a peremptory instruction on the (f)(7) circumstance. Defendant had an IQ of 115-125. He had graduated from truck-driving school. He admitted to hiding the bodies of his murder victims to avoid being accused of those crimes. Defendant had entered the military at the age of nineteen. He had considerable work experience, including jobs at a factory, in a restaurant, and as a truck driver. He had two sons. He also had a considerable history of criminal behavior. From the age of ten, defendant had been lying, stealing, vandalizing property, breaking into homes, threatening people, and using illegal drugs. Additionally, defendant admitted that he had committed a prior murder. Under these circumstances the assertion that "all of the evidence" supports the existence of the (f)(7) mitigating circumstance cannot avail. *See, e.g., id.* at 346-47, 462 S.E.2d at 208; *State v. Turner*, 330 N.C. 249, 268-69, 410 S.E.2d 847, 858 (1991). The trial court thus did not err in denying defendant's request for a peremptory instruction.

[7] Defendant twice requested and was denied a peremptory instruction on the nonstatutory mitigating circumstance that he had graduated from truck-driving school. The evidence on this was uncontroverted, and the State stipulated to this fact. The trial court thus erred in denying defendant's requests. *State v. Buckner*, 342 N.C. 198, 235, 464 S.E.2d 414, 435 (1995), *cert. denied*, — U.S. —, 136 L. Ed. 2d 47 (1996).

This error is harmless beyond a reasonable doubt, however. N.C.G.S. § 15A-1443(b) (1988). The jury knew defendant had graduated from truck-driving school and that this was uncontroverted. It knew that it could consider this as a nonstatutory mitigator because it was listed as such on the Issues and Recommendation as to Punishment form. During the State's closing arguments, the prosecutor stated, "With regard to the nonstatutory, you have to find first, folks, the truck driver school. You have to find first that it exists. Well, we've all stipulated he graduated from the school." Under these circumstances, we cannot reasonably hold that a peremptory instruction on this nonstatutory mitigating circumstance would have altered the jury's conclusion regarding defendant's sentence. This assignment of error is overruled.

[8] In his sixth assignment, defendant asserts that the trial court abused its discretion in overruling his objection to a statement made

during the State's closing argument and that the court should have intervened *ex mero motu* to correct a later remark by the prosecutor. Both comments concerned how jurors should treat mitigating circumstances. First, one of the prosecutors stated that the jury "must consider [whether] any of the factors [the jurors] may have heard about [are] mitigating. Are they such as the law requires . . . ." At this point defendant objected and was overruled. Second, the State's other prosecutor stated:

> There are two types of circumstances that you deal with, statutory and non-statutory, and there's a different process you go about when you decide whether or not they exist. The statutory . . . if you find that they exist, then you should consider them in whatever way you might want to use them. With regard to the non-statutory, . . . you have to find first that it exists. . . . Secondly, you have to find that it has mitigating value.

Defendant did not object to this statement at trial.

It is well settled that the arguments of counsel are left largely to the discretion of the trial court. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986).

> In capital cases . . . an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

State v. Johnson, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). A trial court is not required to intervene *ex mero motu* where a prosecutor makes comments during closing argument which are substantially correct "shorthand summaries" of the law, "even if slightly slanted toward the State's perspective." *State v. Frye*, 341 N.C. 470, 491, 461 S.E.2d 664, 682-83 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996).

As to the first statement here, defendant's objection interrupted the prosecutor's sentence, and the trial court could not determine whether the sentence would be objectionable. The court thus properly permitted the prosecutor to complete her statement. Defendant does not now contest the propriety of the prosecutor's completed

statement. The trial court thus did not err or abuse its discretion in overruling the objection.

The second argument which defendant now asserts was improper, while perhaps somewhat misleading as to the value the jury must accord to statutory mitigating circumstances, was not so grossly improper as to require the trial court to intervene *ex mero motu*. Further, the court correctly instructed the jurors on the law regarding statutory and nonstatutory mitigating circumstances. It also instructed that the jurors must apply the law as the court gave it to them, not as the attorneys gave it to them or as the jurors might like it to be. Under these circumstances we cannot reasonably find reversible error warranting a new capital sentencing proceeding.

In his next assignment, defendant argues that the trial court impermissibly ordered disclosure to the State of a report prepared by a clinical psychologist, Dr. Diane Folingstad, who had examined defendant, at defendant's request, in preparation for trial. Defendant does not assert that this report was privileged work product.

The trial court did not order disclosure of this report upon the State's first request. At the beginning of the sentencing proceeding, it denied the State's request to discover Folingstad's report because defendant had not decided whether he would have Folingstad testify. After defendant conclusively determined that he would not call Folingstad, the State again requested discovery of her report. After hearing arguments from both sides, the court again declined to compel defendant to disclose Folingstad's report to the State.

Defendant did not introduce this report and did not call Folingstad to testify. Instead, Dr. Bruce Welch, a forensic psychiatrist, testified on defendant's behalf regarding defendant's mental status. Welch told the jury that before forming his expert opinion, he had examined all possible information about defendant, including past tests done by psychologists, psychiatrists, and any mental health workers who may have been in contact with defendant.

After direct examination of Welch, the trial court elicited *voir dire* testimony from him. Welch testified that although he had viewed Folingstad's report, he had not viewed her raw data and had not relied upon anything in her report in generating his expert opinion. At this point the trial court ordered defendant to disclose Folingstad's report to the State. Defendant argues that the State had no right to discover this report and that the trial court's order permitting discovery was error.

At common law neither the State nor a defendant enjoyed a *right* of discovery. *State v. Goldberg*, 261 N.C. 181, 191, 134 S.E.2d 334, 340, *cert. denied*, 377 U.S. 978, 12 L. Ed. 2d 747 (1964), *overruled on other grounds by News & Observer Publishing Co. v. State ex rel. Starling*, 312 N.C. 276, 283, 322 S.E.2d 133, 138 (1984). However, limited rights of discovery have evolved for both the State and a defendant under the United States Constitution, *see, e.g., Brady v. Maryland,* 373 U.S. 83, 10 L. Ed. 2d 215 (1963) (constitutional requirement that the State disclose certain information favorable to defendant prior to trial), and state statutes, N.C.G.S. §§ 15A-901 to -910 (1988) (statutory rights of discovery for defendant and the State).

[9] The State had no right to discover the nontestifying expert's report under these constitutional or statutory principles. No court has concluded that the federal Constitution demands disclosure of such reports. Although North Carolina's discovery statutes permit the State to discover some of a defendant's documents, they do not authorize discovery of the report at issue.

N.C.G.S. § 15A-905(b) provides, in relevant part:

> [T]he court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations . . . made in connection with the case . . . within the possession and control of the defendant *which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial*, when the results or reports relate to his testimony.

(Emphasis added.) Because defendant did not intend to introduce the report at trial and did not call Folingstad to testify, the State did not have a right to discover this report under N.C.G.S. § 15A-905(b). Moreover, N.C.G.S. § 15A-906 restricts discovery of reports found inadmissible under N.C.G.S. § 15A-905(b). N.C.G.S. § 15A-906 provides: "Except as provided in G.S. 15A-905(b) this Article *does not authorize the discovery or inspection of reports . . . made by the defendant* or his attorneys *or agents* in connection with the investigation or defense of the case . . . ." (Emphasis added.) Thus, the trial court did not possess statutory authority to order defendant to disclose the report to the State.

[10],[11] However, the "absence of discovery as a matter of right does not necessarily preclude the trial judge from ordering discovery in his discretion." *State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 840 (1977). The trial court possesses "inherent authority" to compel discovery in certain instances in the interest of justice. *Id.* at 124-25, 235 S.E.2d at 839-40; *see also State v. Taylor*, 327 N.C. 147, 153-54, 393 S.E.2d 801, 806 (1990). The General Statutes place some limits on this inherent authority. For example, "where a statute expressly restricts pretrial discovery, . . . the trial court has no authority to order discovery." *Hardy*, 293 N.C. at 125, 235 S.E.2d at 840 (concluding that N.C.G.S. § 15A-904, which parallels N.C.G.S. § 15A-906, limits the trial court's inherent authority to compel discovery). Under this limitation the trial court properly declined to compel defendant to disclose his psychologist's report when the State requested such disclosure *prior to trial.*

[12],[13] However, even when the statutes limit the trial court's authority to compel *pretrial* discovery, the court may retain inherent authority to compel discovery of the same documents at a later stage in the proceedings. *See Taylor*, 327 N.C. at 154, 393 S.E.2d at 806 (judiciary has inherent power to compel disclosure of facts after a trial is complete and during a post-trial motion); *Hardy*, 293 N.C. at 125, 235 S.E.2d at 840 (trial court properly exercised its inherent authority to compel discovery of documents restricted from pretrial discovery under N.C.G.S. § 15A-904 after the trial was underway). Thus, the question is whether the trial court possessed inherent authority to compel disclosure of a nontestifying psychologist's report to the State *after* defendant admitted guilt and *after* the capital sentencing proceeding was underway.

> Once a trial is underway,
>
> the major concern is the "search for truth" as it is revealed through the presentation and development of all relevant facts. To insure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence.

Hardy, 293 N.C. at 125, 235 S.E.2d at 840. In a capital sentencing proceeding, where the Rules of Evidence do not apply, a trial court has great discretion to admit *any* evidence it " 'deems relevant to sentenc[ing].' " *Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322 (quoting *Daughtry*, 340 N.C. at 517, 459 S.E.2d at 762). More specifically, the

trial court must permit the State "to present any competent evidence supporting the imposition of the death penalty." *Id.*

After defendant's mental health expert testified that he had studied every mental health report in defendant's medical history, the State sought to discover one such report for use during its cross-examination of defendant's expert. Under these circumstances, we hold that the trial court did not abuse its discretion in compelling defendant to disclose that report to the State. We accordingly overrule this assignment of error.

Assuming *arguendo* that the trial court erred in compelling such discovery, the error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b). Defendant does not assert that any error in compelling such discovery was prejudicial. Instead, he simply notes that the State took advantage of the nontestifying psychologist's report to prepare a "devastating cross-examination" of defendant's testifying expert. Nothing in the record, however, suggests that the State's cross-examination would not have been equally effective without the use of the psychologist's report. Thus, we cannot reasonably find prejudicial error warranting a new capital sentencing proceeding.

[14] By his final assignment, defendant contends the trial court improperly denied his pretrial motion to question jurors the State challenged for cause based upon their views on the death penalty. Defendant also argues that the court improperly prevented him from questioning five individual jurors after the court excused them for cause.

A defendant has no absolute right to question or to rehabilitate prospective jurors before or after the trial court excuses such jurors for cause. *State v. East*, 345 N.C. 535, 547, 481 S.E.2d 652, 660, *cert. denied*, — U.S. —, 139 L. Ed. 2d 236 (1997). Rather, the trial court "retains discretion as to the extent and manner of questioning, and its decisions will not be overturned absent a showing of abuse of discretion." *Id.; see also State v. Brogden*, 334 N.C. 39, 43-46, 430 S.E.2d 905, 908-09 (1993).

The trial court denied defendant's pretrial motion in which defendant sought a blanket statement permitting him to rehabilitate *every* juror the State challenged for cause. The trial court explained that it would exercise its discretion upon each *individual* request for rehabilitation, and it appears to have done so on a

juror-by-juror basis. Defendant has not shown an abuse of discretion, and we find none.

Defendant requested rehabilitation in five instances. In each the jurors had clearly demonstrated that they would have been unable to vote for the death penalty under any circumstances, and the trial court properly excused them for cause. The court asked clarifying questions of the first four to assure their opposition to the death penalty before excusing them. The last juror's statements were so clear that the court did not need to ask further questions before excusing him. There is no evidence from which to conclude that the trial court abused its discretion in denying defendant's requests to rehabilitate jurors. We accordingly overrule this assignment of error.

PROPORTIONALITY REVIEW

Having concluded that defendant's capital sentencing proceeding was free of prejudicial error, it is our duty to ascertain: (1) whether the evidence supports the jury's findings of the aggravating circumstance on which the sentence of death was based; (2) whether the sentence was entered under the influence of passion, prejudice, or any other arbitrary consideration; 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).

The jury found as an aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3). The record fully supports this finding. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We turn then to our final statutory duty of proportionality review.

[15] In proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 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, *cert. denied*, — U.S. —, 139 L. Ed. 2d 177 (1997), *and 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). This case is distinguishable from those cases. First, there are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain death sentences; the (e)(3) aggravator, 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*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). The (e)(3) aggravating circumstance reflects upon a defendant's character as a recidivist. *State v. Brown*, 320 N.C. 179, 224, 358 S.E.2d 1, 30, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Further, defendant here has been convicted of two murders. "We have remarked before, and it bears repeating, that this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim." *State v. Price*, 326 N.C. 56, 96, 388 S.E.2d 84, 107, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). It suffices to say that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

After comparing this case to 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 held the death penalty proportionate. Accordingly, we cannot conclude that this death sentence is excessive or disproportionate. Therefore, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

LEWIS KURTZMAN v. APPLIED ANALYTICAL INDUSTRIES, INC.

No. 103PA97

(Filed 7 November 1997)

Labor and Employment § 65 (NCI4th)— employment contract—assurances—moving residence—not converted from at-will

An action for breach of an employment contract was remanded for an order setting aside the verdict for plaintiff and entering judgment for defendant notwithstanding the verdict where defendant contacted plaintiff and recruited him for a position as director of sales; plaintiff inquired into the security of the proposed position during negotiations; he was told "If you do your job, you'll have a job," "This is a long-term growth opportunity for you," "This is a secure position," and "We're offering you a career position"; plaintiff began his employment with defendant on 30 March 1992, moved immediately from Massachusetts to Wilmington, with his wife and daughter joining him following the sale of their home; and defendant terminated his employment on 2 November 1992. Although plaintiff argues that the combination of defendant's assurances and plaintiff's move to accept the offer of employment created a contract under which plaintiff could be discharged only for cause, plaintiff-employee's change of residence in the wake of defendant-employer's statements here does not constitute additional consideration making what is otherwise an at-will employment relationship one that can be terminated by the employer only for cause. The employment-at-will doctrine has prevailed in North Carolina for a century; the narrow exceptions to it have been grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law. The society to which the employment-at-will doctrine currently applies is a highly mobile one in which relocation to accept new employment is common. To remove an employment relationship from the at-will presumption upon an employee's change of residence, coupled with vague assurances of continued employment, would substantially erode the rule and bring considerable instability to an otherwise largely clear area of the law.

Am Jur 2d, Employment Relationship § 35.

Justice FRYE dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 261, 480 S.E.2d 425 (1997), affirming a judgment awarding damages to plaintiff entered by Cobb, J., out of session on 1 August 1995, following a jury verdict for plaintiff at the 22 May 1995 Civil Session of Superior Court, New Hanover County. Heard in the Supreme Court 14 October 1997.

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, II, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Frank H. Lancaster, for defendant-appellant.

Hunton & Williams, by Amy E. Simpson, for North Carolina Citizens for Business and Industry, amicus curiae.

Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, for the North Carolina Academy of Trial Lawyers, amicus curiae.

WHICHARD, Justice.

Plaintiff, Lewis Kurtzman, brought suit against his former employer, Applied Analytical Industries, Inc., alleging, *inter alia*, breach of an employment contract. On 1 June 1995 a jury returned a verdict in plaintiff's favor and awarded him $350,000 in damages. Defendant moved to set aside the verdict or, in the alternative, for a new trial. The trial court denied both motions. Defendant appealed to the Court of Appeals, which unanimously affirmed the trial court except in immaterial part. This Court allowed defendant's petition for discretionary review on 5 June 1997.

Defendant, Applied Analytical Industries, Inc., is based in Wilmington, North Carolina, and assists clients in securing FDA approval of pharmaceutical products. Plaintiff has worked in the pharmaceutical industry for over twenty years and was employed as national sales manager of E.M. Separations Technology in Rhode Island immediately prior to his employment with defendant. Defendant contacted plaintiff in October 1991 and began recruiting him for a position as director of sales in Wilmington. In January 1992 defendant offered plaintiff the position, and the parties negotiated the terms of employment until plaintiff accepted defendant's offer on 6 March 1992.

Evidence at trial tended to show that during negotiations, plaintiff inquired into the security of his proposed position with defendant.

Defendant's agents attempted to assure plaintiff by statements that included the following: "If you do your job, you'll have a job"; "This is a long-term growth opportunity for you"; "This is a secure position"; and "We're offering you a career position." Plaintiff began his employment with defendant on 30 March 1992. He immediately moved to Wilmington, and following the sale of his home in Massachusetts, his wife and daughter joined him there. Defendant terminated plaintiff's employment on 2 November 1992.

Plaintiff argues that the combination of the additional consideration of moving his residence and defendant's specific assurances of continued employment removed the employment relationship from the traditional at-will presumption and created an employment contract under which he could not be terminated absent cause. This asserted exception is gleaned principally from *Sides v. Duke Univ.*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). Plaintiff argues that the exception is well established in North Carolina's jurisprudence and that the judgment in his favor thus should be affirmed. We disagree.

North Carolina is an employment-at-will state. This Court has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party. *Soles v. City of Raleigh Civil Serv. Comm'n*, 345 N.C. 443, 446, 480 S.E.2d 685, 687 (1997); *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987). There are limited exceptions. First, as stated above, parties can remove the at-will presumption by specifying a definite period of employment contractually. Second, federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer. *See, e.g.*, 29 U.S.C. § 623(a) (1988) (Age Discrimination Act); 42 U.S.C. § 2000e-2a (1988) (Equal Employment Opportunities Act); 42 U.S.C. § 12112(a) (Supp. 1988) (Americans with Disabilities Act); N.C.G.S. § 95-241 (1993) (prohibiting discharge in retaliation for filing workers' compensation, OSHA, and similar claims). Finally, this Court has recognized a public-policy exception to the employment-at-will rule. *See Amos v. Oakdale Knitting* Co., 331 N.C. 348, 416 S.E.2d 166 (1992) (discharging an employee for refusing to work for less than minimum wage violates public policy); *Coman v. Thomas Mfg. Co.*,

325 N.C. 172, 381 S.E.2d 445 (1989) (discharging an employee for refusing to falsify driver records to show compliance with federal transportation regulations offends public policy).

Plaintiff does not rely upon any of these exceptions. He instead invokes an asserted exception earlier described by the Court of Appeals as follows:

> Generally, employment contracts that attempt to provide for permanent employment, or "employment for life," are terminable at will by either party. Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, *removing his residence from one place to another in order to accept employment*, or assisting in breaking a strike, such a contract may be enforced.

Burkhimer v. Gealy, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682 (emphasis added), *disc. rev. denied*, 297 N.C. 298, 254 S.E.2d 918 (1979). The Court of Appeals relied upon this "moving residence" exception as additional support for its holding in *Sides v. Duke University*. There, the plaintiff, a nurse anesthetist who had moved from Michigan to North Carolina to accept employment at Duke University Medical Center, sued the Medical Center based on the termination of her employment. After concluding that the plaintiff had stated a claim that fell within a public-policy exception to the at-will doctrine, the court considered a "moving residence" exception, stating:

> The additional consideration that the complaint alleges, her move from Michigan, was sufficient, we believe, to remove plaintiff's employment contract from the terminable-at-will rule and allow her to state a claim for breach of contract since it is also alleged that her discharge was for a reason other than the unsatisfactory performance of her duties.

Sides, 74 N.C. App. at 345, 328 S.E.2d at 828.

Here, plaintiff wishes to rely on this asserted "moving residence" exception to state a claim for relief. He does not contend that defendant's assurances of continued employment were sufficient, standing alone, to create an employment contract for a definite term. Under well-settled law, they are not. This Court has held that a contract for "a regular permanent job" is not sufficiently definite to remove the employment relationship from the at-will presumption. *Still v. Lance*,

279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 149, 25 S.E.2d 436, 437 (1943). The assurances defendant made here were no more specific than those in *Still* and *Malever*. Further, the assurance plaintiff here primarily relies upon, "If you do your job, you'll have a job," is not sufficient to make this indefinite hiring terminable only for cause. *See Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964) (plaintiff-employee's contention that he had an agreement with defendant-employer such that plaintiff would "have a permanent job as long as [his] work was satisfactory" was insufficient to remove the employment contract from the terminable-at-will rule).

Nor does plaintiff contend that a statutory or public-policy exception to the at-will doctrine applies. Rather, he argues that the combination of defendant's assurances, such as, "If you do your job, you'll have a job," and plaintiff's move from Massachusetts to North Carolina to accept the offer of employment, created a contract under which plaintiff could be discharged only for cause. The question thus is whether this Court should recognize a "moving residence" exception to the general rule of employment at will.

Plaintiff's contention that this exception is well established in our jurisprudence is incorrect. This Court has not heretofore expressly passed upon it. While *Malever*, on which defendant relies, is somewhat pertinent, we do not consider it dispositive. The Court's focus there was on whether the employer's use of the term "permanent" in reference to the employment sufficed to remove the case from the employment-at-will doctrine, not on whether the employee's relocation constituted additional consideration that accomplished such removal. Further, the Court noted that the employee's relocation appeared motivated primarily by family rather than employment considerations. *Malever*, 223 N.C. at 149, 25 S.E.2d at 437. In *Harris v. Duke Power Co.*, we cited application of the "moving residence" exception in *Sides* as part of a background discussion of exceptions to the general rule of employment at will. *Harris*, 319 N.C. at 629, 356 S.E.2d at 359. We neither specifically approved nor disapproved such an exception, however, and any language in *Harris* that may be viewed as suggesting the contrary is disapproved. The pertinent language quoted above from the Court of Appeals' opinions in *Burkhimer* and *Sides* is also disapproved.

The employment-at-will doctrine has prevailed in this state for a century. *See Edwards v. Seaboard & Roanoke R.R. Co.*, 121 N.C. 490, 491-92, 28 S.E. 137, 137 (1897). The narrow exceptions to it have been

grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law. The facts here do not present policy concerns of this nature. Rather, they are representative of negotiations and circumstances characteristically associated with traditional at-will employment situations.

Further, as we recognized in *Coman*, "adoption of the [at-will] rule by the courts greatly facilitated the development of the American economy at the end of the nineteenth century." *Coman*, 325 N.C. at 174, 381 S.E.2d at 446. A century later, the rule remains an incentive to economic development, and any significant erosion of it could serve as a disincentive. Additional exceptions thus demand careful consideration and should be adopted only with substantial justification grounded in compelling considerations of public policy.

We perceive no such justification here. The society to which the employment-at-will doctrine currently applies is a highly mobile one in which relocation to accept new employment is common. To remove an employment relationship from the at-will presumption upon an employee's change of residence, coupled with vague assurances of continued employment, would substantially erode the rule and bring considerable instability to an otherwise largely clear area of the law. *See House v. Cannon Mills Co.*, 713 F. Supp. 159, 164 (M.D.N.C. 1988) ("Recognition of a general exception whenever relocation or a job change is involved would emasculate the terminable-at-will rule, because many if not most hirings involve either a job change or a change of residence or both."). We thus hold that plaintiff-employee's change of residence in the wake of defendant-employer's statements here does not constitute additional consideration making what is otherwise an at-will employment relationship one that can be terminated by the employer only for cause.

We do not, as the dissenting opinion suggests, hold that the establishment of "a definite term of service" is the sole means of contractually removing the at-will presumption. We simply follow settled law which holds that the employer's assurances of continued employment do not remove an employment relationship from the at-will presumption, *Tuttle*, 263 N.C. at 219, 139 S.E.2d at 251, and now hold that the asserted additional consideration of the employee's relocation of residence to accept the employment likewise does not alter this status. Because we do not recognize the exception plaintiff seeks, we need not consider, as does the dissent, whether the evidence sufficed to support a verdict for plaintiff under the asserted exception.

For the reasons stated, the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Superior Court, New Hanover County, for an order setting aside the verdict for plaintiff and entering judgment for defendant notwithstanding the verdict.

REVERSED AND REMANDED

Justice FRYE dissenting.

Although our cases have in the past made reference to the existence of an "additional consideration" exception to the doctrine of employment at will, *see Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987); *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964), and our Court of Appeals has more fully described the exception based on moving residence, *see Sides v. Duke Univ.*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985); *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682, *disc. rev. denied*, 297 N.C. 298, 254 S.E.2d 918 (1979), as the majority notes, this Court has never expressly passed upon the precise issue presented by the facts of this case. This Court granted defendant's petition for discretionary review in this case to decide, first, whether North Carolina recognizes an exception to the rule of employment at will based on: (1) an employer's making statements that can be construed as assurances that the employee will be discharged only for deficient performance, and (2) an employee's providing "additional consideration" by moving his residence to accept employment in response to those assurances. I believe a more precise statement of this question is whether an enforceable contract exists between employer and employee, so as to remove the presumption that the employment is terminable at will, where the employer makes specific assurances and the prospective employee gives additional consideration in reliance on those assurances.

The majority correctly states that North Carolina follows the doctrine of employment at will. However, employment at will is not, nor should it be, an ironclad mandate which prevents employers and employees from negotiating the terms of the employment relationship to their mutual satisfaction. The general rule of employment at will is more accurately construed as a rebuttable presumption which can be overcome by the words and conduct of the parties, allowing a jury to find that the parties in fact reached certain agreements within

a contract of employment. I read the majority's decision as holding that representations made by an employer to a prospective employee and supported by additional consideration are insufficient as a matter of law to create an enforceable contract unless the employer specifies a definite term of service. Because this holding contradicts established principles of contract law, I must respectfully dissent.

The case often cited as the earliest adoption of North Carolina's employment-at-will rule, *Edwards v. Seaboard & Roanoke R.R. Co.*, 121 N.C. 490, 28 S.E. 137 (1897), in fact recognized the contractual nature of the employment relationship. The facts in *Edwards* required the Court to discern the intent of the parties as to the term of employment. The Court held that the contract was not specific as to the term of service, and therefore, "[i]t does not seem unreasonable that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, *leaving the parties to sever their relations at will*, for their own convenience." *Id.* at 491, 28 S.E. at 137 (emphasis added).

In reviewing the origins of employment at will, this Court has noted that American courts moved toward the doctrine after "the industrial revolution and the development of freedom of contract." *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 174, 381 S.E.2d 445, 446 (1989). Nothing else appearing, freedom of contract arguably presumes the freedom of either party to terminate the employment relationship at will. However, an inflexible adherence to this presumption cannot stand in the face of evidence of contrary intent on the part of the contracting parties. As stated by the majority, "parties can remove the at-will presumption by specifying a definite period of employment contractually." Likewise, where an employer agrees to restrict his right to discharge an employee in exchange for additional consideration provided by the employee, the courts must recognize that a contract has been formed which removes the presumption of employment at will.

In applying this analysis, the essential inquiry is whether the necessary elements of an enforceable contract were present. "A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing." *Campbell v. Campbell*, 234 N.C. 188, 191, 66 S.E.2d 672, 674 (1951). Cases in which an employee relocates merely as an incident of accepting new employment will not rebut the presumption of employment at will. However, an agreement and consideration are both present where the employer has induced the employee to

move his residence based on specific assurances that he will not be discharged except for deficient performance. This approach, which relies on contract principles, does not establish a "general exception" to employment at will in all cases involving a relocation.

The second issue presented by defendant-appellant in this case is whether, if North Carolina recognizes such an exception to the rule of employment at will, the record in this case supports the application of the exception and is sufficient to sustain the verdict returned in favor of plaintiff. Again, I believe a more precise question is whether plaintiff presented sufficient evidence to support a jury's finding that an enforceable contract existed so as to rebut the presumption of employment at will. The majority states that the assurance primarily relied upon by plaintiff "is not sufficient to make this indefinite hiring terminable only for cause" and holds that the Court of Appeals erred in affirming the trial court, which denied defendant's motion for judgment notwithstanding the verdict. I disagree.

A motion for judgment notwithstanding the verdict pursuant to Rule 50(b)(1) is essentially a renewal of an earlier motion for a directed verdict. *See Raintree Homeowners Ass'n v. Bleimann*, 342 N.C. 159, 164, 463 S.E.2d 72, 75 (1995) (citing *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974)). Therefore, the test for determining whether a motion for judgment notwithstanding the verdict should have been granted is the same as that which is applied when determining whether a motion for a directed verdict could have been properly granted. *See id.* (citing *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977)). "A directed verdict is proper only if it appears that the nonmovant failed to show a right to recover upon *any* view of the facts which the evidence reasonably tends to establish." *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 606 (1985); *see also Haas v. Warren*, 341 N.C. 148, 152, 459 S.E.2d 254, 256 (1995). Further, all of the evidence must be considered in the light most favorable to the nonmoving party, here the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom and resolving all conflicts, contradictions, and inconsistencies in plaintiff's favor. *See Haas*, 341 N.C. at 152, 459 S.E.2d at 256.

In this case the jury was presented, and answered, the following crucial questions:

> [1.] Before plaintiff, Kurtzman, accepted a position of employment with defendant, AAI, did AAI make specific assurances to

him that he would be discharged from employment with AAI only for deficient performance?

ANSWER: Yes

. . . .

[2.] Did the defendant, AAI, breach the employment contract by terminating the plaintiff, Kurtzman, without just cause?

ANSWER: Yes

The proper question for this Court, therefore, is whether there was evidence, viewed in the light most favorable to plaintiff as the non-moving party, from which the jury could find that defendant made specific assurances to plaintiff that he would be discharged only for deficient performance and that defendant breached the employment contract by terminating plaintiff without just cause.

There was testimony in this case that during the course of negotiation for employment, plaintiff made known his concern about job security and received certain assurances from defendant. Plaintiff, who at that time held a secure position, was concerned about the security of the position for which he was being recruited. Defendant assured plaintiff that it was a "career position." When plaintiff specifically inquired about a written contract, defendant responded that he did not need a contract "if he was any good" and that as long as he did his job, he would have a job. From these statements a jury could reasonably conclude that defendant promised plaintiff he would not be discharged unless his performance was deficient. In reliance on these assurances, and in acceptance of defendant's promise, plaintiff resigned from his job and moved his residence in order to accept employment with defendant. A jury could reasonably find that this action by plaintiff constituted sufficient additional consideration to support the employment contract.

All the evidence considered by the jury, viewed in the light most favorable to plaintiff, could reasonably support plaintiff's contention that defendant made specific assurances that plaintiff would not be discharged unless his performance was deficient and that the contract was supported by additional consideration apart from plaintiff's services. Therefore, I believe that the trial judge properly denied defendant's motion for a directed verdict and for judgment notwithstanding the verdict and that the Court of Appeals correctly affirmed the trial court.

IN THE MATTER OF: CHRISTOPHER BRAKE

No. 29PA97

(Filed 7 November 1997)

Infants or Minors § 121 (NCI4th)— abused child—order authorizing action to terminate parental rights—ceasing efforts to reunite family

The trial court had the authority to permit a county DSS to cease efforts to reunite an abused and neglected juvenile with his parents as part of its order authorizing the DSS to initiate an action to terminate parental rights.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 45 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 125 N.C. App. 211, 480 S.E.2d 61 (1997), reversing an order entered by Allen (Claude W., Jr.), J., on 4 December 1995 in District Court, Vance County. Heard in the Supreme Court 8 September 1997.

Jeffery L. Jenkins for petitioner-appellant Vance County Department of Social Services.

Melissa C. Lemmond, attorney advocate for petitioner-appellant juvenile, Christopher Brake.

Paul J. Stainback for respondent-appellee mother, Tammy West.

MITCHELL, Chief Justice.

The question presented for review is whether the trial court had the authority to permit the Vance County Department of Social Services (hereinafter "DSS") to cease efforts to reunite a juvenile with his parents as part of its order authorizing DSS to initiate an action to terminate parental rights. We conclude that the trial court had such authority and reverse the unpublished decision of the Court of Appeals which held to the contrary.

In an order filed 24 May 1994 in the District Court, Vance County, the minor child, Christopher Brake, who was then five years old, was adjudicated an abused and neglected juvenile. He was removed from the legal and physical custody of his mother, respondent

Tammy West. He was placed into nonsecure custody with DSS. Periodic reviews of the juvenile's placement were conducted pursuant to N.C.G.S. § 7A-657. At a review hearing on 5 July 1995, the trial court entered an order finding that the juvenile's mother had failed to comply with previous court orders. The order also directed that "efforts to reunite [the juvenile] with his mother . . . may be CEASED, and a termination of parental rights action may be filed by [DSS], pursuant to N.C.G.S. [§] 7A-657(c) and 42 U.S.C. 671 and 675." The order also directed that visits between the juvenile and his mother be discontinued.

Respondent mother filed a motion seeking relief, pursuant to Rule 60(b) of the Rules of Civil Procedure, from the 5 July 1995 order of the trial court and alleging that the order was void. The trial court denied the motion, and respondent mother appealed. The Court of Appeals concluded that the trial court did not have the authority to permit DSS to discontinue efforts to reconcile the juvenile and his mother and reversed the order of the trial court denying respondent mother's Rule 60(b) motion. The Court of Appeals based its decision upon the authority of *In re Reinhardt*, 121 N.C. App. 201, 464 S.E.2d 698 (1995). This Court allowed DSS's petition for discretionary review.

DSS contends that the trial court did have the authority to allow DSS to cease efforts to achieve a reconciliation of the juvenile and his mother in the present case. We agree. The cessation of reunification efforts is a natural and appropriate result of a court's order initiating a termination of parental rights.

In *Reinhardt*, the Court of Appeals concluded:

> DSS has an affirmative statutory obligation to make reasonable efforts "to prevent or eliminate the need for placement of the juvenile in foster care." N.C.G.S. § 7A-657(e); N.C.G.S. § 7A-651(c)(2) (Supp. 1994); *see* 42 U.S.C.A. § 671(a) (West 1995). The statutes do not permit the trial court to relieve DSS of this duty and indeed at each review hearing, the trial court is required to make findings as to the efforts of DSS to reunify the family. N.C.G.S. § 7A-657(e); N.C.G.S. § 7A-651(c)(2). Accordingly, the directive attempting to relieve DSS of its obligation to make reasonable efforts to reunite the family must be eliminated. . . .

In re Reinhardt, 121 N.C. App. at 204, 464 S.E.2d at 701. We do not agree with this analysis. Instead, we conclude that nothing in the

North Carolina Juvenile Code (N.C.G.S. ch. 7A, subchapter XI (1995 & Supp. 1996)) precluded the trial court from specifying in its order in this case that DSS "may" cease reconciliation efforts.

We conclude that the legislature must have intended for the trial court to have the power to allow DSS to cease efforts to reunite the juvenile with his mother while it was pursuing efforts to terminate her parental rights. It would be a vain effort, at best, for a court to enter an order that had the effect of directing DSS to undertake to terminate the family unit while at the same time ordering that it continue its efforts to reunite the family. In fact, such an order would tend to be both internally inconsistent and self-contradictory.

This Court presumes that the legislature acted in accordance with reason and common sense, and that it did not intend an absurd result. *King v. Baldwin*, 276 N.C. 316, 172 S.E.2d 12 (1970). Also, when construing a statute, we always look to its purpose. *Id.* An underlying theme of the North Carolina Juvenile Code is for the trial court to serve the best interest of the child. *In re Shue*, 311 N.C. 586, 319 S.E.2d 567 (1984). Certainly, then, the trial court must be able to allow DSS to terminate reunification efforts if the court finds that it is in the child's best interest to do so. Any order of a trial court resulting in the commencement of steps to terminate parental rights carries with it by implication a finding that further efforts at reunification will be fruitless and will not be in the best interest of the child. We conclude that in such situations, it is appropriate for the trial court to specify in its order, as the trial court did in the present case, that efforts to reunite a child with its parents may be terminated. For these reasons, we expressly overrule *Reinhardt* to the extent that it holds to the contrary.

We note that an amendment to N.C.G.S. § 7A-577(h), effective 1 October 1997, provides that in orders entered after that date:

> If the court finds through written findings of fact that efforts to eliminate the need for placement of the juvenile in custody clearly would be futile or would be inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time, then the court *shall specify in its order* that reunification efforts are not required or order that reunification efforts cease.

Act of Aug. 13, 1997, ch. 390, sec. 5, 1997 N.C. Sess. Laws —, — (amending law pertaining to custody and placement of juveniles).

This amendment, among other things, allows a trial court to specify in its order that reunification efforts *may* cease, which we have found proper in this case. N.C.G.S. § 7A-577(h) as rewritten by the amendment now allows the trial court to specify in appropriate cases that reunification efforts *must* cease.

For the foregoing reasons, we conclude that the order of the trial court denying the respondent mother's Rule 60(b) motion was proper and that the decision of the Court of Appeals to the contrary was in error. The decision of the Court of Appeals must be and is reversed.

REVERSED.

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, JACOB M. KAPLAN, AND DAVID S. KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, SCOTT ALLRED, STEPHEN MICHAEL BEALL, SETH HINSHAW, ALBERT HODGES, JEFFREY ALEXANDER KENDALL, FATHER CONRAD KIMBROUGH, JULIAN McCLAMROCH, BERNARD McHALE, DUANE RICHARDSON, CANDIDO ROSARIO, A/K/A CANDIDO ROSARIO MATOS, DR. KEITH SCHIMMEL, RONALD STEINKAMP, JOHN THOMPSON, KEVIN WOLPERT, LEIGH ALLRED, KAREN L. BEANE, VIRGINIA BELL, SHARON STEELE CLARK, MARIANA DONADIO, LIBBY DUNSMORE, RHONDA EDMONDS, A/K/A RHODA EDMONDS, THERESA FARLEY, PAMELA FORD ALLISON, YVONNE FORD, HARIETTE GABRIELE, GEORGIA GAINES, ELSIE GALAN, KARIN GRUBBE, DEBORAH HEBESTREIT, DIANNE McCLAMROCH, ELAINE McHALE, REBECCA MORRISON, MONICA POLLARD, CAROL REDMOND, MARTA RICHARDSON, ELIZABETH D. SALTER, A/K/A BETTY SALTER, KIMBERLY SCHIMMEL, ANNABELLE SIMPSON, BETTY STEINKAMP, LYNN THOMPSON, LAUREL TREDDINICK, AMBER WINFIELD, CATHERINE WOLPERT, JOHN DOES XX THROUGH XXVIII, AND JANE DOES XXXV THROUGH XLII

No. 450A96

(Filed 7 November 1997)

Racketeer Influenced and Corrupt Organizations § 7 (NCI4th)— anti-abortion picketing—N.C. RICO Act action—pecuniary gain—causal nexus with unlawful activity—insufficient showing

A doctor and members of his family who sued the Prolife Action League of Greensboro (PALG) and its president for anti-abortion picketing of the family's residence and the doctor's

office failed to establish a causal nexus between PALG's pecuniary gain and defendants' alleged organized unlawful activity as required by the N.C. RICO Act. N.C.G.S. §§ 75D-2(c), 75D-4.

Am Jur 2d, Extortion, Blackmail, and Threats §§ 241 et seq.

Civil action for damages under state racketeer influenced and corrupt organizations acts (RICO) for losses from racketeering activity. 62 ALR4th 654.

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. 720, 475 S.E.2d 247 (1996), affirming partial summary judgment in favor of defendants entered by Ross, J., on 15 May 1995 in Superior Court, Guilford County. Heard in the Supreme Court 13 October 1997.

Smith Helms Mulliss & Moore, L.L.P., by Alan W. Duncan and Matthew W. Sawchak, for plaintiff-appellants.

Arthur J. Donaldson and American Center for Law & Justice, by Walter M. Weber, pro hac vice, for defendant-appellees Linda Winfield and Linda Winfield d/b/a the Prolife Action League of Greensboro.

PER CURIAM.

Plaintiffs' appeal to this Court is on the basis of the dissenting opinion of Judge Johnson, who dissented "as to that part of the majority opinion which finds that summary judgment was properly granted for defendants Linda Winfield and the Prolife Action League of Greensboro." *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 729, 475 S.E.2d 247, 254 (1996) (Johnson, J., dissenting). Judge Johnson concluded that "not only do the activities allegedly engaged in by defendants fall within the prohibited behaviors espoused in the North Carolina RICO [Racketeer Influenced and Corrupt Organizations] Act, but also that there is a sufficient causal nexus between the pecuniary gain of certain defendants and those activities in which they have engaged." *Id.* We agree, however, with the majority of the panel of the Court of Appeals that partial summary judgment was properly entered in defendants' favor by Judge Ross.

In so holding, the Court of Appeals stated:

> We assume, without deciding, that plaintiffs have offered sufficient evidence of a pattern of racketeering activity prohibited

> under [N.C.G.S. §] 75D-4. Nevertheless, to withstand summary judgment, plaintiffs' forecast of evidence must also demonstrate a causal nexus between PALG's [Prolife Action League of Greensboro] alleged pecuniary gain and defendants' organized unlawful activity under [N.C.G.S. §] 75D-4.
>
> To establish pecuniary gain, plaintiffs direct this Court to three checks from defendant Virginia Bell (Bell checks) and PALG newsletters which solicit contributions. It is beyond question the Bell checks clearly evidence the receipt of money by PALG. In fact, defendants admit PALG is "getting money to operate the organization." The present record is nonetheless devoid of any indication PALG derived this monetary gain from, or as a result of, activities prohibited by [N.C.G.S. §] 75D-4. On the other hand, the newsletters, unlike the Bell checks, do not, in and of themselves, establish pecuniary gain. Further, even assuming the solicitations resulted in donations, plaintiffs failed to allege, much less proffer, evidence that the donations were in any way derived as a result of organized unlawful activity prohibited by [N.C.G.S. §] 75D-4.

Id. The Court of Appeals concluded that plaintiffs had failed to establish a causal nexus between PALG's pecuniary gain, as required by N.C.G.S. § 75D-2(c), and defendants' alleged organized unlawful activity, as prohibited by N.C.G.S. § 75D-4. We agree.

However, in discussing the legislative history of the North Carolina RICO Act, the Court of Appeals relied upon the minutes of a legislative committee of the General Assembly in determining legislative intent. We disavow those portions of the Court of Appeals' opinion.

We affirm the decision of the Court of Appeals solely for the reasons stated in this opinion.

MODIFIED AND AFFIRMED.

GROVER A. HESTER v. ALLSTATE INSURANCE COMPANY, N.C. FARM BUREAU MUTUAL INSURANCE COMPANY, ROBERT S. LOWERY AND KEY AUTOMOBILE ASSOCIATES

249A97

(Filed 7 November 1997)

Insurance § 571 (NCI4th)— automobile liability insurance—furnished for regular use—exclusion from coverage

An exclusion in a personal automobile liability policy for a vehicle not named in the policy but furnished for the regular use of the named insured precluded liability coverage for the named insured while operating a vehicle provided by his employer for his regular use even though the policy provided operator coverage for the named insured and any family member "for the . . . use of any auto."

Am Jur 2d, Automobile Insurance § 244.

When is automobile furnished or available for regular use within "drive other car" coverage of automobile liability policy. 8 ALR4th 387.

Appeal by defendant Allstate Insurance Company pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 173, 484 S.E.2d 457 (1997), affirming summary judgment for plaintiff, entered by Duke, J., on 7 March 1996 in Superior Court, Pitt County. Heard in the Supreme Court 15 October 1997.

Hardee & Hardee, by G. Wayne Hardee and Charles R. Hardee, for plaintiff-appellee.

Ward and Smith, P.A., by Donald S. Higley, II, and Ryal W. Tayloe, for defendant-appellant Allstate Insurance Company.

Speight, Watson and Brewer, by J. Warner Wells, II, and William C. Brewer, Jr., for defendant-appellee N.C. Farm Bureau Mutual Insurance Company.

Wallace, Morris, & Barwick, P.A., by Paul A. Rodgman and Elizabeth A. Heath, for defendant-appellee Lowery.

Battle, Winslow, Scott & Wiley, P.A., by Samuel S. Woodley, Jr., on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

Bailey & Dixon, L.L.P., by David S. Coats, on behalf of Nationwide Mutual Insurance Company, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Cozort, *Hester v. Allstate Ins. Co.*, 126 N.C. App. 173, 178, 484 S.E.2d 457, 460 (1997), and upon the authority of *N.C. Farm Bureau Mut. Ins. Co. v. Warren*, 326 N.C. 444, 390 S.E.2d 138 (1990), and *Whaley v. Great Am. Ins. Co.*, 259 N.C. 545, 131 S.E.2d 491 (1963), the decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the trial court for entry of summary judgment for defendant Allstate.

REVERSED AND REMANDED.

SAMUEL FEREBEE v. TAMMY R. HARDISON

No. 288A97

(Filed 7 November 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 230, 484 S.E.2d 857 (1997), affirming in part and reversing in part a judgment entered by Phillips, J., on 28 August 1995, in Superior Court, Craven County and remanding for a new trial on punitive damages. Heard in the Supreme Court 15 October 1997.

Wilkinson & Rader, P.A., by Steven P. Rader, for plaintiff-appellee.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III; and Kellum & Jones, by Norman B. Kellum, Jr., and Douglas M. Jones, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Lewis, the decision of the Court of Appeals is reversed as it pertains to puni-

tive damages and the case is remanded to the Court of Appeals for further remand to the Superior Court, Craven County, for reinstatement of the trial court's judgment as to punitive damages.

REVERSED AND REMANDED.

COMMISSIONER OF LABOR OF NORTH CAROLINA v. HOUSE OF RAEFORD FARMS, INC.

No. 504PA96

(Filed 7 November 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 124 N.C. App. 349, 477 S.E.2d 230 (1996), reversing the order entered 12 September 1995 by Johnson (E. Lynn), J., in Superior Court, Hoke County. Heard in the Supreme Court 13 October 1997.

Michael F. Easley, Attorney General, by Hilda Burnett-Baker, Special Deputy Attorney General, and Daniel D. Addison, Assistant Attorney General, for plaintiff-appellee.

Jordan, Price, Wall, Gray & Jones, L.L.P., by Henry W. Jones, Jr., and A. Hope Derby, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. ARTHUR EDWARD BALDWIN

No. 126PA97

(Filed 7 November 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 to review a decision of the Court of Appeals, 125 N.C. App. 530, 482 S.E.2d 1 (1997), which granted a new trial to the defendant who had been convicted of first-degree murder and sentenced to life in prison by Wood, J., on 19 December 1995 in Superior Court, Forsyth County. Heard in the Supreme Court 16 October 1997.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State-appellant.

J. Clark Fischer for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. RICHARD LEE BURNS

No. 118A97

(Filed 7 November 1997)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 125 N.C. App. 616, 483 S.E.2d 194 (1997), awarding defendant a new trial in cases tried before Martin (Jerry Cash), J., in Superior Court, Forsyth County, which resulted in convictions and judgments of imprisonment for attempted incest, first-degree sexual offense, and taking indecent liberties with a minor. On 8 May 1997 the Supreme Court allowed discretionary review of additional issues. Heard in the Supreme Court 16 October 1997.

Michael F. Easley, Attorney General, by Jill B. Hickey, Assistant Attorney General, for the State-appellant.

Lawrence J. Fine for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. CATHY ANN MILLS BARNES AND DONALD RAY HOOKS

No. 66A97

(Filed 7 November 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, 125 N.C. App. 75, 479 S.E.2d 236 (1997), finding no error in a trial that resulted in judgments entered by Rousseau, J., on 30 January 1996 in Superior Court, Guilford County, sentencing defendants to active prison sentences upon their convictions by a jury of robbery with a dangerous weapon. On 8 May 1997, the Supreme Court retained defendants' notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and allowed discretionary review of an additional issue. Heard in the Supreme Court 15 October 1997.

Michael F. Easley, Attorney General, by Sueanna P. Sumpter, Assistant Attorney General, for the State.

John Bryson for defendant-appellants.

PER CURIAM.

AFFIRMED.

MITCHELL EDWARDS AND WIFE, DAPHNE EDWARDS v. JOSEPH ROBERT WEST D/B/A CENTURY 21 WEST & COMPANY, AND BOB WEST, INC.

No. 174A97

(Filed 7 November 1997)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 125 N.C. App. 742, 483 S.E.2d 746 (1997), dismissing the appeal from a judgment entered by Bowen, J., on 22 September 1995 in Superior Court, Cumberland County, for failure to include within the record on appeal a certificate of service required pursuant to N.C.R. App. P. 9(a)(1)(i) and 26(a) and (d). On 5 June 1997, the Supreme Court allowed discretionary review of an additional issue. Heard in the Supreme Court 14 October 1997.

The Yarborough Law Firm, by Garris Neil Yarborough, for plaintiff-appellees.

McCoy, Weaver, Wiggins, Cleveland & Raper, P.L.L.C., by Richard M. Wiggins, for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is reversed. *See Hale v. Afro-American Arts International, Inc.*, 335 N.C. 231, 436 S.E.2d 588 (1993).

REVERSED.

STATE OF NORTH CAROLINA v. DAVY GENE STEPHENS

No. 10A96

(Filed 5 December 1997)

1. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—statutory mitigating circumstances—mitigating value

The trial court did not err in a capital sentencing hearing in its instructions on statutory mitigating circumstances where defendant contended that the court instructed the jurors that they were required to consider only those mitigating circumstances they deemed to have mitigating value, but a reasonable interpretation of the instructions, construed contextually, could not have misled jurors to believe they could disregard any statutory mitigating circumstances found to exist. Defense counsel apparently did not notice the one instance in which the trial court partially mixed the statutory and nonstatutory standards and made no objection either at that point or later when specifically asked at the close of instructions if counsel had any corrections or objections. Moreover, the jurors had before them in each case an Issues and Recommendation form which clearly delineated the difference between statutory and nonstatutory circumstances. The one misstatement could not have confused the jury as to statutory and nonstatutory circumstances and did not constitute prejudicial error.

Am Jur 2d, Criminal Law §§ 598, 599.

Instructions to jury: Sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

2. Criminal Law § 431 (NCI4th Rev.)— capital murder—prosecutor's argument—evidence not rebutted by defendant—not a comment on defendant's failure to testify

There was no violation of a defendant's constitutional rights in a capital prosecution for first-degree murder where the prosecutor in his closing argument challenged the defense to explain why defendant was found in an attic with one of the murder weapons if he was not guilty. The prosecutor did not comment directly on defendant's failure to testify, but fairly argued that defendant had failed to present exculpatory evidence that rebutted the State's evidence relating to where the murder weapon was found.

Am Jur 2d, Trial §§ 595-604.

3. Criminal Law § 120 (NCI4th Rev.)— capital murder—copy of ballistics report—typo—not revealed until trial—no mistrial

The trial court did not abuse its discretion during a capital prosecution for first-degree murder by denying defendant's request for a mistrial where defendant received a copy of the ballistic report six months before trial and a typographical error was revealed through the testimony of an SBI agent. Although defendant contends that the statement was essential to the theory of his case, the inconsistency was plain on its face; defendant had ample opportunity to investigate the error; if anything, defendant was advantaged rather than prejudiced by showing the fallibility of the State's expert; and the error was not probative or exculpatory. Defendant was not prejudiced by the trial testimony which corrected the typographical error in the report; even assuming a discovery violation, the trial court did not abuse its discretion in deciding not to sanction the State. The record shows a well-reasoned decision; the court clearly expressed the thought that this statement in the report should have raised some question in defense counsel's mind.

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

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

4. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—hearsay testimony—not relevant—not admissible

The trial court did not err during a capital sentencing hearing by preventing defendant from introducing a conversation which occurred between defendant's girlfriend and the wife of his accomplice immediately prior to the murders and which defendant contended supported the mitigating circumstance that defendant played only a minor role in the murders in that the jury could have inferred that the accomplice's desire to retrieve pawned rings was the primary motive for going to the scene. Although it has been held that the rules of evidence may be relaxed during the sentencing phase when the statements are relevant and trustworthy, the Supreme Court has never stated that the rules of evidence should be totally abandoned. For a hearsay statement to be permitted in a sentencing hearing, it must be relevant to a sentencing issue and bear indicia of reliability. This tes-

timony is not relevant to the circumstance that defendant played only a minor role in the murders because it fails totally to establish that the rings were the motivating factor which sent defendant and his accomplice to the scene or induced them to shoot six people and kill three.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 693 (NCI4th Rev.)— capital sentencing—mitigating circumstances—no history of criminal activity—peremptory instruction—denied

The trial court did not err in a capital sentencing hearing by denying defendant's request to peremptorily instruct the jury that defendant had no significant history of criminal activity where defendant argued that his misdemeanor offenses and his history of drug abuse do not constitute a significant history of prior criminal activity. A peremptory instruction is appropriate when all evidence goes to support that circumstance; it is apparent that this evidence was of such nature that a sentencing jury could reasonably find this circumstance to exist, but there was evidence of prior criminal activity and convictions and it was for the jury to decide whether these constituted a "significant" history.

Am Jur 2d, Criminal Law §§ 598, 599.

6. Jury §§ 228, 226 (NCI4th)— capital murder—jury selection—jurors excused for cause—no error

The trial court did not abuse its discretion in a capital prosecution by allowing the State's challenge for cause of two prospective jurors who indicated that they might have difficulty voting in favor of the death penalty, and by not allowing defendant to rehabilitate one prospective juror. The full text of the voir dire clearly indicates that both prospective jurors clearly expressed their personal opposition to the death penalty without any equivocation.

Am Jur 2d, Jury § 279.

7. Criminal Law § 1353 (NCI4th Rev.)— capital sentencing—instruction—duty to recommend death

The pattern jury instruction for capital sentencing imposing a duty upon the jury to return a recommendation of death if it finds the mitigating circumstances insufficient to outweigh

the aggravating circumstances and the aggravating circumstances sufficiently substantial to call for the death penalty is constitutional.

Am Jur 2d, Trial §§ 1441 et seq.

8. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing—instruction—mitigating circumstances must outweigh aggravating circumstances

A first-degree murder defendant's constitutional rights were not violated by the trial court's instruction to the jury that mitigating circumstances must outweigh aggravating circumstances and thereby directing the jury to answer Issue III affirmatively if it found the mitigating circumstances were of equal weight of the aggravating circumstances.

Am Jur 2d, Trial §§ 1441 et seq.

9. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing—instructions—nonstatutory mitigating evidence—value

The trial court did not err in a capital sentencing hearing in its instructions by not allowing the jury to consider evidence as mitigating if it found that the nonstatutory mitigating circumstance had no value.

Am Jur 2d, Trial §§ 1441 et seq.

10. Criminal Law § 1360 (NCI4th Rev.)— capital sentencing—aggravating circumstances—notice

The trial court did not err in a capital sentencing hearing by denying defendant's motion to require the prosecution to disclose the aggravating circumstances that it intended to rely upon during the sentencing phase of the trial. It has been consistently held that a defendant is not constitutionally entitled to an enumeration of the aggravating factors to be used against him; statutory notice as contained in N.C.G.S. § 15A-2000(e) is sufficient.

Am Jur 2d, Criminal Law §§ 598, 599.

11. Jury § 32 (NCI4th)— capital sentencing—jurors excused by district court judge

The trial court did not err in a capital sentencing hearing by denying defendant's motion to prohibit district court judges from excusing prospective jurors outside defendant's presence. The district court properly conducted this preliminary, administrative

process pursuant to statute, and such process was not part of the defendant's capital trial.

Am Jur 2d, Jury §§ 131, 132.

12. Criminal Law § 1374 (NCI4th Rev.)— capital sentencing—aggravating circumstances—course of conduct—not vague and overbroad

The course of conduct aggravating circumstance for first-degree murder sentencing is not unconstitutional as vague and overbroad.

Am Jur 2d, Criminal Law §§ 598, 599.

13. Constitutional Law § 370 (NCI4th)— death penalty—not unconstitutional

The North Carolina death penalty statute, N.C.G.S. § 15A-2000, is not unconstitutional, arbitrary and discriminatory on its face and as applied.

Am Jur 2d, Criminal Law §§ 581, 612, 613, 615.

14. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A death sentence was not disproportionate where the record fully supports the aggravating circumstances found by the jury, there is no evidence or indication that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, this case is distinguishable from the cases in which the death penalty was found disproportionate, and it is similar to cases where the death penalty was found proportionate. Defendant was convicted of the murder of three individuals and the jury convicted defendant on the theory of malice, premeditation, and deliberation in all of the murders, which indicates a more cold-blooded and calculated crime. An additional aggravating circumstance was found in two of the murders.

Am Jur 2d, Criminal Law § 628.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing three sentences of death entered by Cashwell, J., at the 27 November 1995 Criminal Session of Superior Court, Johnston County, upon jury verdicts finding defendant guilty of three counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by this

Court 19 December 1996. Heard in the Supreme Court 8 September 1997.

Michael F. Easley, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

John R. Rittelmeyer for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 13 February 1995 for three counts of first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury; on 20 March 1995, he was indicted for an additional count of assault with a deadly weapon with intent to kill. Defendant was tried capitally to a jury at the 27 November 1995 Criminal Session of Superior Court, Johnston County, Judge Narley L. Cashwell presiding. The jury found defendant guilty of all charges. Following a capital sentencing proceeding, the jury recommended sentences of death as to each murder conviction. On 20 December 1995, the trial court sentenced defendant to three separate sentences of death, one for each of the three convictions for first-degree murder; to a term of sixty-three to eighty-five months' imprisonment on each of the two convictions for assault with a deadly weapon with intent to kill inflicting serious injury; and to a term of twenty-five to thirty-nine months' imprisonment on the conviction for assault with a deadly weapon with intent to kill.

At trial, the State presented evidence tending to show that on the evening of 20 January 1995, defendant and his accomplice, William Barrow, had dinner together and shared a bottle of Everclear and some whisky. The following morning, at approximately 2:00 a.m., defendant and Barrow drove to the Johnston County Grill Road home of Lynn Wright, a reputed drug dealer. Upon arrival, defendant and Barrow went straight to Wright's bedroom and shot him six times, killing him. Defendant and Barrow then separated in the house, and Barrow walked onto the porch and shot Antwon Jenkins in the head, killing him. Barrow then attempted to kill James White, but the bullet only grazed the side of White's face. Defendant entered the living room and attempted to shoot eighty-three-year-old Kenneth Farmer in the head, but the shot only hit Farmer in the arm as he threw his hand up. Defendant next tried to shoot John Wright but apparently ran out of bullets. Defendant and Barrow then left the Grill Road home but returned shortly thereafter. At this time, defendant shot and killed Michael Kent Jones, and Barrow seriously injured June Bates

with gunshot wounds to her back and arm. Bates escaped and called for help from a nearby house.

When deputies arrived at the Grill Road home on 21 January 1995, they found a black man lying on the porch, dying from gunshot wounds to his head. The officers found four fired cartridge cases, caliber 38 Special, in a water basin in the front room. In the first bedroom, the officers found another black man, Lynn Wright, lying on the floor surrounded by blood and crack cocaine. Behind the house, the officers found another victim, Kenneth Farmer, who had been shot in the left arm. Farmer was able to identify one of the shooters as defendant Davy Stephens because Stephens had been to the house on several previous occasions. Farmer later picked Stephens out of a police photographic lineup. Following a lead, officers found defendant hiding in the attic of a house occupied by his girlfriend, and he was apprehended. The officers also found a 38 Special revolver near defendant in the attic.

The State offered testimony from three medical examiners who concluded that Lynn Wright, Antwon Jenkins and Michael Kent Jones all died of gunshot wounds. Special Agent Eugene Bishop gave a ballistic report on the 38 Special revolver found with the defendant at the time of his arrest and determined that four cartridge casings found in the water basin at the Grill Road house were fired by this 38 Special. Bishop also tested a bullet found in the clothes of June Bates and concluded this bullet bore rifling characteristics similar to a 357 Magnum.

[1] In his first assignment of error, defendant contends that the trial court erred in instructing the jurors, in the sentencing phase, that they were required to consider only those statutory mitigating circumstances that they deemed to have mitigating value. Defendant thus argues that he is entitled to a new sentencing proceeding because there is a reasonable likelihood such instruction led the jurors to believe they could accord no mitigating value to the statutory mitigating circumstances. We conclude the jury could not have been so misled.

The trial court's instructions to the jury, when read as a whole and viewed in light of the Issues and Recommendation as to Punishment forms, did not misinform jurors of their duty to weigh any statutory mitigating circumstance which they found to exist when considering their recommendation of a life imprisonment or death sentence. A reasonable interpretation of the instructions, con-

strued contextually, could not have misled jurors to believe they could disregard any statutory mitigating circumstances found to exist. A jury charge must be construed contextually and will be upheld when the charge as a whole is correct. *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641, *cert. denied*, — U.S. —, 136 L. Ed. 2d 133 (1996).

Reading the entire charge in context, the instructions in question could not have had the effect of confusing issues of statutory and nonstatutory mitigating circumstances for the jury. Since defendant was on trial for three separate murders, the trial court gave three separate instructions on mitigating circumstances. The trial court, in each of the three cases, submitted and instructed on three statutory mitigators: that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); that the capital felony was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). The (f)(4) mitigator, that the murder was committed by another and defendant was only an accomplice and his participation was relatively minor, was submitted with respect to one of the murders. In all three cases, the jury answered "yes" with respect to the (f)(1) and (f)(2) statutory mitigators while at the same time rejecting the (f)(6) mitigator, and the jury rejected the (f)(4) mitigator in the one case. Further, in each case, the trial court submitted eighteen nonstatutory mitigating circumstances and the catchall provision, and the jury in each case found that eight of these both existed and had mitigating value. The jury thus demonstrated its discernment in light of the instructions.

With regard to each of the statutory mitigating circumstances in each case, the trial court instructed the jurors that they "will find this *mitigating circumstance*" if they find particular factual matters exist, and that if one or more of the jurors find "by a preponderance of the evidence that this circumstance exists you would so indicate by having your foreperson write, yes, in the space provided after *this mitigating circumstance* on the Issues and Recommendation Form." (Emphasis added.) This was a correct instruction and specifically informed the jurors that each was a "mitigating circumstance" if one or more of them found it to exist.

We do note that in one instance the trial court partially mixed the statutory and nonstatutory standards. After instructing the jury on

the facts that would support the (f)(1) mitigator, the no significant history of prior criminal activity circumstance, in the murder of Lynn Wright, the trial court properly instructed the jurors that if they found this circumstance to exist, their foreperson would so indicate by writing "yes" on the form, but if none of them found this circumstance to exist, their foreperson should write "no" on the form. The trial court then mistakenly added the phrase, "[t]he foreperson is to answer yes as to mitigating circumstances if one juror finds a mitigating circumstance and deems it to be mitigating." It is significant with respect to the jury's notice of this statement that defense counsel did not apparently notice this miscue and made no objection either at this point or later at the close of jury instructions when specifically asked by the trial court if counsel had any corrections or objections.

This Court has previously held that a mere *lapsus linguae* by the trial court while reading instructions to the jury, which is not called to the trial court's attention at the time it is made, will not constitute prejudicial error when it is apparent from a contextual reading that the jury could not have been misled. *State v. Reid*, 335 N.C. 647, 667, 440 S.E.2d 776, 787 (1994). This situation is distinguishable from those cases in which this Court has found error where the trial court's instructions confused statutory and nonstatutory mitigating circumstances. *See State v. Roseboro*, 344 N.C. 364, 379-80, 474 S.E.2d 314, 322-23 (1996); *State v. Howell*, 343 N.C. 229, 239-40, 470 S.E.2d 38, 43-44 (1996); *State v. Jaynes*, 342 N.C. 249, 285, 464 S.E.2d 448, 470 (1995), *cert. denied*, — U.S. —, 135 L. Ed. 2d 1080 (1996). In *Howell* and *Jaynes*, the trial court lumped together all of the statutory and nonstatutory mitigating circumstances, improperly informing the jury that it should determine if statutory mitigating evidence had mitigating value. In *Roseboro*, the trial court applied the nonstatutory standard for determining mitigating value to all of the statutory and nonstatutory mitigating evidence. In contrast, in this case, no such broad, all-encompassing instructions were applied, and correct written instructions were included on the Issues and Recommendation form as to each circumstance submitted. The jurors had before them in each case an Issues and Recommendation form which clearly delineated the difference between statutory and nonstatutory, designating each statutory circumstance as "mitigating" and each nonstatutory circumstance as requiring a finding that it both exists and has mitigating value.

In light of the instructions as a whole and the correct Issues and Recommendation forms taken by the jury into the jury room, we con-

clude that this one misstatement could not have confused the law as to statutory and nonstatutory circumstances for the jury and did not constitute prejudicial error. This assignment of error is overruled.

[2] In his second assignment of error, defendant contends that the prosecutor commented on defendant's election not to testify, thus violating defendant's constitutional rights. In closing, the prosecutor argued:

> MR. LOCK: The defense may raise other challenges to our evidence when they argue to you but I have a challenge. I challenge them to explain why their client was found in an attic—
>
> MR. HOLLAND: Objection.
>
> THE COURT: Overruled.
>
> MR. LOCK: —with one of the murder weapons located just inches from him if he's not guilty.

This brief statement in argument by the prosecutor clearly does not constitute a comment on the defendant's failure to testify and merely draws the jury's attention to the fact that particular evidence offered by the State was uncontradicted or unrebutted. The prosecution is, of course, forbidden by both the Fifth Amendment to our federal Constitution and by statute from commenting on the failure of a defendant to testify at trial. *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965); N.C.G.S. § 8-54 (1986); *State v. York*, 347 N.C. 79, 489 S.E.2d 380 (1997). However, a prosecutor's argument that the State's evidence was uncontradicted does not constitute an improper reference to the defendant's failure to testify. *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, — U.S. —, 136 L. Ed. 2d 160 (1996). Here, the prosecutor did not comment directly or indirectly on defendant's failure to testify, but fairly argued that defendant had failed to present exculpatory evidence that rebutted the State's evidence relating to where the murder weapon was found. This assignment of error is without merit.

[3] In his third assignment of error, defendant asserts that the trial court committed reversible error in denying the defense's request for a mistrial after an alleged discovery violation arose during trial. Defendant contends that a discovery violation occurred when a typographical error in a State Bureau of Investigation (SBI) ballistic report was revealed through testimony of an SBI agent. We disagree. Under the particular facts and circumstances here presented, there

was no discovery violation, and the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant asserts that the State committed a discovery violation under N.C.G.S. § 15A-907, which requires the State to continue to disclose evidence as it is discovered, and under N.C.G.S. § 15A-903(d), which requires the State to turn over all documents and tangible objects material to the preparation of the defense. The facts of this case do not support defendant's position. The defendant received a copy of the ballistic report six months before trial. The section of the report in question reads: "Q-1 has similar rifling characteristics and some microscopic markings in common with tests fired from K-1, but lacks sufficient microscopic detail to determine that K-2 fired Q-1." This statement on the report is at best unclear as to whether it is a reference to the 38 Special revolver or the 357 Magnum revolver, and in light of this, it was neither probative nor exculpatory. The State complied with N.C.G.S. § 15A-903(d) when it provided the ballistic report to the defense approximately six months before trial. Furthermore, the State did not violate N.C.G.S. § 15A-907 in breaching its continuing duty to disclose evidence since the prosecutor himself read and noticed the inconsistency in the report only the evening before trial, and any detailed reading would reflect an uncertainty as to its meaning. The prosecutor's failure to discuss this lack of clarity or discrepancy in the report with defense counsel, after it was confirmed as a typographical error by the witness at the lunch recess just prior to the witness' testimony, did not prejudice the defendant or constitute a discovery violation under N.C.G.S. § 15A-907.

Defendant contends that this one statement in the report was essential to the theory of his case and that he was irreparably prejudiced when the typographical error was discovered so close to the end of trial. We find this argument to be without merit. The inconsistency in the report was plain on its face, and the defendant had ample opportunity to investigate the error. Furthermore, under the facts here presented, defendant was not prejudiced, but, if anything, was advantaged by showing the fallibility of the State's expert. Significantly, the error was not probative or exculpatory. The defendant's theory that Barrow shot both Bates and Jones is not corroborated by this one unclear, inconsistent statement in the ballistic report, and there was plenary evidence from eyewitnesses as to the physical locations of defendant and Barrow relative to their victims. We thus hold defendant was not prejudiced by the trial testimony which corrected the typographical error in the ballistic report.

However, even assuming *arguendo* this was a discovery violation, the trial court did not abuse its discretion in deciding not to sanction the State. "The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988); *accord State v. King*, 311 N.C. 603, 619, 320 S.E.2d 1, 11 (1984). The record in this case shows that the trial court made a well-reasoned decision. The trial court clearly expressed the thought that this statement in the report should have raised some question in defense counsel's mind that this statement may have contained an error. The trial court stated: "I mean just to read that . . . seems to me would have caused someone to say, 'there must be a problem here.' They are comparing this bullet against two different . . . guns." We therefore hold that there was no discovery violation and that the trial court did not abuse its discretion when it denied the motion for a mistrial. This assignment of error is overruled.

[4] In defendant's fourth assignment of error, he contends that the trial court, during the sentencing phase, committed reversible error in preventing defendant from introducing testimony concerning a conversation between Mrs. Barrow and Debbie Jordan, defendant's girlfriend, which occurred immediately prior to the murder. Defendant contends that this conversation would have provided probative evidence supporting the N.C.G.S. § 15A-2000(f)(4) mitigating circumstance, that he played only a minor role in the murders on Grill Road, and that the plan was "hatched" by William Barrow. Defendant contends that testimony by Jordan would have established that Barrow pawned his wife's rings to Lynn Wright and that Wright had later sold these rings. Defendant asserts that the jury could have inferred from this testimony that Barrow's desire to retrieve these rings was the primary motive for going to the Grill Road home. However, the testimony proffered by Jordan merely established that she knew through the defendant and the Barrows that Lynn Wright would take items in pawn for drugs and that Mrs. Barrow was missing some rings. This evidence is not only hearsay, but is irrelevant.

Although the North Carolina Rules of Evidence do not apply formally to sentencing hearings, N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992), for a hearsay statement to be permitted in a sentencing proceeding, it must be relevant to a sentencing issue and bear indicia of reliability. *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990); *State v. Barts*, 321 N.C.

170, 362 S.E.2d 235 (1987). The desired testimony of Debbie Jordan regarding the missing rings is not relevant to the (f)(4) mitigating circumstance that defendant played only a minor role in the murders because it fails totally to establish that the rings were the motivating factor which sent defendant and Barrow to the Grill Road home or, more to the point, induced them to shoot six people, killing three.

Defendant further contends that in not allowing the testimony, the trial court violated his due process rights to present evidence. We disagree. Although this Court has held that the rules of evidence may be relaxed during the sentencing phase when the statements are relevant and trustworthy, *Barts*, 321 N.C. at 180, 362 S.E.2d at 240, this Court has never stated that the rules of evidence should be totally abandoned. We conclude that the proffered testimony of Jordan concerning the pawning of Mrs. Barrow's rings had no relevance to the (f)(4) mitigating circumstance, and this assignment of error is overruled.

[5] In his fifth assignment of error, defendant asserts that the trial court committed reversible error in denying defendant's request to peremptorily instruct the jury that defendant had no significant history of criminal activity. The defendant argues that his misdemeanor offenses and his history of drug abuse do not constitute a significant history of prior criminal activity, and he was, therefore, entitled to a peremptory instruction that he had no significant history of prior criminal activity and that the jury should accord mitigating weight to that circumstance. We do not agree.

A peremptory instruction is appropriate when all evidence goes to support that circumstance. *State v. Wooten*, 344 N.C. 316, 334, 474 S.E.2d 360, 370 (1996), *cert. denied*, — U.S. —, 137 L. Ed. 2d 348 (1997); *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993). The trial court must give a peremptory instruction on a statutory mitigating circumstance when the evidence is uncontroverted. *State v. Simpson*, 341 N.C. 316, 344, 462 S.E.2d 191, 207 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 194 (1996). The crucial issue for this Court is thus whether the evidence is uncontroverted that defendant had no significant history of criminal activity. Generally, "[s]ignificant means important or notable." *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). Upon review of this evidence, it is apparent that while the evidence relevant to this mitigating circumstance was of such nature that a sentencing jury could reasonably find this circumstance to exist and its

submission to the jury was thus proper, there was evidence of prior criminal activity and convictions, and it was thus for the jury to decide whether these constituted a "significant" history. The evidence establishes that defendant was convicted in 1982 of hit-and-run property damage and driving under the influence. In 1983, he was convicted of driving while his license was suspended; in 1986, he was convicted again of driving under the influence. Furthermore, defendant had a long history of purchasing and using illegal drugs. The trial court did not err by refusing a peremptory instruction and by leaving to the jury the determination of the existence of this statutory mitigating circumstance.

[6] In his sixth assignment of error, defendant contends that the trial court erroneously allowed the State's challenge for cause of two prospective jurors, Lillie Vinson and Thurmon Holder, who indicated that they might have difficulty voting in favor of the death penalty. In addition, defendant complains that he was not given the opportunity to rehabilitate prospective juror Holder. We conclude there was no error in this regard.

This Court has held: "Whether to allow a challenge for cause in jury selection is a decision ordinarily left to the sound discretion of the trial court which will not be reversed on appeal except for abuse of discretion." *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992); *accord State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987). The standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the prospective juror's views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)); *accord State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Because "a prospective juror's bias for or against the death penalty cannot always be proven with unmistakable clarity," this Court must defer to the trial court's judgment concerning whether a prospective juror would be able to follow the law. *State v. Miller*, 339 N.C. 663, 679, 455 S.E.2d 137, 145, *cert. denied*, — U.S. —, 133 L. Ed. 2d 169 (1995).

In the case *sub judice*, the full text of the *voir dire* clearly indicates that both prospective jurors Vinson and Holder clearly expressed their personal opposition to the death penalty without any

equivocation. Under these circumstances, the trial court did not abuse its discretion by excusing these prospective jurors for cause. Furthermore, the trial court did not abuse its discretion in denying defendant's request to attempt to rehabilitate prospective juror Holder. Whether to allow defendants an opportunity to rehabilitate a prospective juror challenged for cause lies within the trial court's discretion. *State v. Flippen*, 344 N.C. 689, 697-98, 477 S.E.2d 158, 163 (1996); *State v. Burr*, 341 N.C. 263, 281, 461 S.E.2d 602, 611 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996); *State v. Daughtry*, 340 N.C. 488, 509, 459 S.E.2d 747, 757 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 739 (1996). Prospective juror Holder unequivocally demonstrated that his opposition to the death penalty would substantially impair his ability to perform his duties as a juror. This assignment of error is without merit.

PRESERVATION ISSUES

[7] Defendant in his seventh assignment of error seeks this Court's reconsideration of its prior decisions upholding the constitutionality of our pattern instruction imposing a "duty" upon the jury to return a recommendation of death if it finds the mitigating circumstances insufficient to outweigh the aggravating circumstances and the aggravating circumstances sufficiently substantial to call for the death penalty. *State v. DeCastro*, 342 N.C. 667, 467 S.E.2d 653, *cert. denied*, — U.S. —, 136 L. Ed. 2d 170 (1996); *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); *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. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). Upon consideration of defendant's argument and authorities cited, we find no compelling reason for this Court to overrule our previous holding on this issue. This assignment of error is overruled.

[8] In his eighth assignment of error, defendant asserts that his constitutional rights were violated by the trial court's instruction to the jury that mitigating circumstances must outweigh aggravating circumstances and thereby directing the jury to answer Issue III affirmatively if it found the mitigating circumstances were of equal weight to the aggravating circumstances. Issue III on the Issues and Recommendation as to Punishment form provides: "Do you unanimously find beyond a reasonable doubt that the mitigating circum-

stance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?" Defendant acknowledges that this Court has previously decided this issue adversely to defendant's position and upheld the constitutionality of this instruction. *State v. Keel*, 337 N.C. 469, 493-94, 447 S.E.2d 748, 761-62 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995). We find no basis for reversing our prior holding in this regard. This assignment of error is overruled.

[9] Next, defendant contends in his ninth assignment of error that the trial court erred in its instructions in not allowing the jury to consider evidence as mitigating if it found that the nonstatutory mitigating circumstance had no mitigating value. It is well established under North Carolina law that the instruction given by the trial court in this regard is correct and not in violation of the state or federal Constitution. *State v. Womble*, 343 N.C. 667, 694, 473 S.E.2d 291, 307 (1996), *cert. denied*, — U.S. —, 136 L. Ed. 2d 719 (1997). This instruction does not limit or prevent the jury's consideration of any relevant evidence in mitigation. It simply requires the jury to find both the existence of the nonstatutory circumstance and that it has mitigating value. We therefore reject this assignment of error.

[10] In his tenth assignment of error, defendant argues that the trial court erred in denying defendant's motion to require the prosecution to disclose the aggravating circumstances that it intended to rely upon during the sentencing phase of the trial. This Court has consistently held that "a defendant is not constitutionally entitled to an enumeration of aggravating factors to be used against him: statutory notice as contained in N.C.G.S. § 15A-2000(e) is sufficient." *State v. McLaughlin*, 323 N.C. 68, 84, 372 S.E.2d 49, 61 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *accord State v. Taylor*, 304 N.C. 249, 257, 283 S.E.2d 761, 767 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). This assignment of error is overruled.

[11] In his eleventh assignment of error, defendant contends that the trial court erred in denying defendant's motion to prohibit district court judges from excusing prospective jurors outside of defendant's presence. The district court's excusal or deferral of prospective jurors prior to trial did not violate defendant's constitutional right to be present at all phases of his trial because his trial had not yet begun. The district court properly conducted this preliminary, administrative process pursuant to statute, and such process was not part

of the defendant's capital trial. *State v. Geddie*, 345 N.C. 73, 92, 478 S.E.2d 146, 155 (1996), *cert. denied*, — U.S. —, — L. Ed. 2d —, 66 U.S.L.W. 3255 (1997); *State v. McCarver*, 341 N.C. 364, 379, 462 S.E.2d 25, 33 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 482 (1996); *State v. Cole*, 331 N.C. 272, 275, 415 S.E.2d 716, 717 (1992). This assignment of error is overruled.

[12] Defendant's twelfth assignment of error is that the course of conduct aggravating circumstance is unconstitutional because it is vague and overbroad. This Court has repeatedly held that North Carolina's capital sentencing scheme contained in N.C.G.S. § 15A-2000 is constitutional on its face and as applied. *State v. McKoy*, 327 N.C. 31, 37-39, 394 S.E.2d 426, 429-30 (1990); *State v. Barfield*, 298 N.C. 306, 343-54, 259 S.E.2d 510, 537-44 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). This Court has also held the course of conduct aggravating circumstance is constitutional and is not vague or overbroad. *State v. Cole*, 343 N.C. 399, 421, 471 S.E.2d 362, 373 (1996), *cert. denied*, — U.S. —, 136 L. Ed. 2d 624 (1997); *State v. Williams*, 305 N.C. 656, 684-86, 292 S.E.2d 243, 260-61, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). We decline to revisit this issue, and this assignment of error is overruled.

[13] In his final assignment of error, defendant argues that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional, arbitrary and discriminatory on its face and as applied in this case. This Court has consistently held that "North Carolina's death penalty statute, N.C.G.S. § 15A-2000, is constitutional and not based upon subjective discretion, applied arbitrarily, capriciously, or pursuant to a pattern of discrimination based upon race, gender, or poverty." *State v. Garner*, 340 N.C. 573, 605, 459 S.E.2d 718, 735 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 872 (1996); *accord State v. Williams*, 339 N.C. 1, 52, 452 S.E.2d 245, 275 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 61 (1995). Defendant concedes this issue has been considered and rejected. We therefore stand by our holding in *Garner* and reject this assignment of error.

PROPORTIONALITY REVIEW

[14] Having found no error in either the guilt/innocence phase of defendant's trial or the capital sentencing proceeding, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether passion, prejudice or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the

sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

In the present case, the defendant was convicted of three counts of first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of assault with a deadly weapon with intent to kill. In all three murders, the jury found the aggravating circumstance that the murders were part of a course of conduct by defendant including other crimes of violence against other persons. Further, in the murders of Antwon Jenkins and Michael Kent Jones, the jury found the murders were committed for the purpose of avoiding arrest, by means of eliminating these victims as witnesses. After thoroughly reviewing the record, transcript and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. We further conclude that there is no evidence or indication that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

The final statutory duty of this Court is to conduct a proportionality review. One purpose of proportionality review is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. at 354, 259 S.E.2d at 544. Another "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). In conducting proportionality review, we compare this case to others in the pool, as 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). 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).

This case is distinguishable from the cases in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. First, the defendant was convicted of the mur-

ders of three individuals. "We have remarked before, and it bears repeating, that this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim." *State v. Price*, 326 N.C. at 96, 388 S.E.2d at 107. Further, the jury convicted the defendant on the theory of malice, premeditation, and deliberation in all of the murders. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

We recognize that juries have imposed sentences of life imprisonment in several cases which have similarities to the present case. 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. at 198, 443 S.E.2d at 47. Our review of such cases reveals that they are distinguishable and do not render the sentences of death in this case disproportionate. None of those cases involved a defendant who committed a triple murder, with regard to which the jury found the same aggravating circumstance to exist in all three and an additional aggravating circumstance in two of the murders. It suffices here to say that we have examined all of the cases cited by defendant and conclude that each of them is distinguishable from the present case.

Further, this case is similar to cases in which we have found the death penalty proportionate. We have upheld a sentence of death where, as in this case, the jury found the aggravating circumstances involved in the present case. Here, we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment. *E.g.*, *State v. Ingle*, 340 N.C. 108, 455 S.E.2d 664 (1995) (double murder as to which the jury found the aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that the murder was part of a course of conduct involving other violent crimes—death sentence proportionate); *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994) (double robbery-murder as to which the jury found the aggravating circumstances that the murder was part of a course of conduct including other violent crimes; that the murder was especially

heinous, atrocious, or cruel; that the murder was committed while the defendant was engaged in homicide, rape, robbery, etc.; and that defendant was previously convicted of a violent felony—death sentence proportionate), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995).

Based on the nature of these crimes, and particularly the features noted above, we cannot conclude as a matter of law that the sentences of death were disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

JOHN MICHAEL KRAUSS v. WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 25PA97

(Filed 5 December 1997)

Infants or Minors § 35 (NCI4th)— termination of parental rights—child custody—natural parent—absence of standing

A natural parent whose parental rights were terminated for abuse and neglect did not have standing to seek custody of his biological children as an "other person" under N.C.G.S. § 50-13.1(a) where the DSS had legal custody of the children when the termination petition was filed and termination was effectuated pursuant to N.C.G.S. § 7A-289.33(1), since that statute is an exception to the general grant of standing to seek custody in § 50-13.1(a).

Am Jur 2d, Infants §§ 28 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 124 N.C. App. 785, 479 S.E.2d 509 (1996), affirming an order entered by Goodman, J., on 16 April 1996, in District Court, Wayne County, allowing defendant's Rule 12(b)(6) motion to dismiss. Heard in the Supreme Court 10 September 1997.

G. Nicholas Herman for plaintiff-appellant.

Baddour, Parker & Hine, P.C., by E.B. Borden Parker and William D. Orander, III, for defendant-appellee.

ORR, Justice.

This case addresses whether a natural parent whose parental rights have been terminated for abuse and neglect nevertheless has standing to seek custody of his biological children as an "other person" under N.C.G.S. § 50-13.1(a).

Plaintiff is the natural father of two minor children, John Michael Krauss and Geneva Fransica Krauss. In June 1989, defendant Wayne County Department of Social Services ("DSS") became aware of allegations that plaintiff was abusing his son and daughter. *In re Krauss*, 111 N.C. App. 456, 434 S.E.2d 252 (1993) (unpublished) ("*Krauss II*"). At that time, his son was four and a half years old, and his daughter was three and a half years old. *In re Krauss*, 102 N.C. App. 112, 113, 401 S.E.2d 123, 124 (1991) ("*Krauss I*"). DSS initiated an investigation, and plaintiff thereafter signed a Voluntary Boarding Home Agreement in which he consented to place the children in DSS's legal custody. However, before DSS received physical custody of the children, plaintiff took them to his mother and stepfather's house in Georgia. When DSS learned that plaintiff had removed the children without its permission, it sought and obtained a nonsecure custody order. Plaintiff then promptly surrendered physical custody of the children to DSS.

On 6 June 1989, DSS filed a petition alleging that plaintiff was abusing and neglecting the two children. *Krauss II*, 111 N.C. App. 456, 434 S.E.2d 252. At the abuse and neglect hearing, DSS presented evidence revealing that plaintiff had terrorized, neglected, and sexually molested his children. *Krauss I*, 102 N.C. App. at 115-16, 401 S.E.2d at 125-26. Testimony from the children and other sources revealed that plaintiff would wear a vampire costume and tie the children up to scare them. *Id.* at 115-16, 401 S.E.2d at 125. He would also commit sexual acts upon the children, including "tongue kissing" and performing oral sex on them. *Id.* at 116, 401 S.E.2d at 125. Based on this as well as other evidence, the trial court entered an order on 8 September 1989 adjudicating both children to be abused and neglected pursuant to N.C.G.S. § 7A-517. *Id.* at 113-14, 401 S.E.2d at 124. Plaintiff appealed this order, and the Court of Appeals affirmed the trial court's decision. *Id.* at 117, 401 S.E.2d at 126.

While the abuse and neglect hearing was pending appeal, DSS filed a petition on 15 November 1989 seeking to terminate plaintiff's parental rights. *Krauss II*, 111 N.C. App. 456, 434 S.E.2d 252. A parental termination hearing was held at the 29 May 1990 Civil Session of Wayne County District Court. *Id.* Based on the same evidence which was presented at the abuse and neglect hearing, the trial court entered an order on 9 October 1991 terminating plaintiff's parental rights for neglect and continuing custody of the children with DSS with full placement rights. *Krauss v. Wayne County Dep't of Social Servs.*, 124 N.C. App. 785, 479 S.E.2d 509 (1996) (unpublished) ("*Krauss III*").

Plaintiff appealed to the Court of Appeals. The Court of Appeals reversed and remanded the case on the basis that the trial court's findings of fact failed to show whether the court considered if a change in circumstances had occurred between the time plaintiff lost custody and the date of the termination hearing. *Krauss II*, 111 N.C. App. 456, 434 S.E.2d 252. On 7 June 1994, the trial court made additional findings of fact regarding changed circumstances and once again terminated plaintiff's parental rights. This order was not appealed.

On 30 September 1994, plaintiff filed the present action against DSS seeking custody of the two children. In the complaint, plaintiff alleged that a substantial change in circumstances had occurred since 9 October 1991, the date when his parental rights were first terminated, and 7 June 1994, the date when his parental rights were terminated following his appeal. Plaintiff alleged that it was in the best interests of the children that he now be awarded custody.

On 5 December 1994, DSS filed an answer to the complaint. In its answer, DSS made a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief could be granted. The 12(b)(6) motion was made on the basis that plaintiff did not have standing because his parental rights had previously been terminated for abuse and neglect. On 16 April 1996, the court granted the motion and dismissed the complaint.

Plaintiff appealed, and the Court of Appeals unanimously affirmed the trial court on 17 December 1996. *Krauss III*, 124 N.C. App. 785, 479 S.E.2d 509. Plaintiff then petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31, which we allowed on 6 March 1997.

Plaintiff argued to the Court of Appeals that he has standing to seek custody of his two natural children as an "other person" under N.C.G.S. § 50-13.1(a) despite the fact that his parental rights were previously terminated. N.C.G.S. § 50-13.1(a), the statute which authorizes standing to seek custody, provides: "Any parent, relative, or *other person,* agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided." N.C.G.S. § 50-13.1(a) (1995) (emphasis added). Plaintiff concedes that he lacks standing to seek custody as a "parent" under N.C.G.S. § 50-13.1(a) due to the fact that his parental rights were terminated and such termination was subsequently effectuated under N.C.G.S. § 7A-289.33. N.C.G.S. § 7A-289.33 provides:

> An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child. . . .
>
> (1) If the child had been placed in the custody of . . . a county department of social services . . . and is in the custody of such agency at the time of such filing of the petition . . ., that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1). . . .

N.C.G.S. § 7A-289.33 (1995) (effective until 1 July 1996). N.C.G.S. § 48-9(a)(1), the adoption statute invoked by N.C.G.S. § 7A-289.33(1), details when consent for adoption may be given by persons other than the child's parents, including when a county DSS may consent to the adoption of a child.

The Court of Appeals concluded that plaintiff lacked standing as an "other person," relying primarily on *Kelly v. Blackwell*, 121 N.C. App. 621, 468 S.E.2d 400, *disc. rev. denied*, 343 N.C. 123, 468 S.E.2d 782 (1996). In *Kelly*, the issue was whether a biological father who had consented to the adoption of his natural children under N.C.G.S. § 48-23(2) could later seek custody of his children as an "other person" under N.C.G.S. § 50-13.1(a). *Id.* at 622, 468 S.E.2d at 400-01. There, the biological father had consented to the adoption of his children by their stepfather. *Id.* at 621, 468 S.E.2d at 400. After learning that the stepfather was allegedly abusing the children, the biological father attempted to regain custody. *Id.* at 622, 468 S.E.2d at 400. The

Kelly court explained that N.C.G.S. § 48-23(2), the statute delineating the legal effects of adoption, expressly stated that a natural parent of the person adopted is " '*divested of all rights with respect to such person*' " after consenting to the adoption. *Id.* (quoting N.C.G.S. § 48-23(2) (1991) (superseded by N.C.G.S. § 48-1-106(c)) (1995)). N.C.G.S. § 50-13.1(a), on the other hand, requires that "[a] person seeking custody under N.C. Gen. Stat. § 50-13.1 *must be able to claim a right* to such custody." *Id.* at 622, 468 S.E.2d at 401 (emphasis added). The biological father, therefore, did not have standing as an "other person" pursuant to N.C.G.S. § 50-13.1(a) because he had been "*divested of all rights*" under N.C.G.S. § 48-23(2).

In the case *sub judice*, the Court of Appeals held that N.C.G.S. § 7A-289.33, the statute which addresses the legal effects of a termination order, similarly divested the plaintiff of any "right" to seek custody. *Krauss III*, 124 N.C. App. 785, 479 S.E.2d 509. The Court of Appeals reached this conclusion on two separate grounds. First, the court explained that N.C.G.S. § 7A-289.33 expressly provides that the termination of parental rights " '*completely and permanently terminates all rights and obligations of the parent to the child.*' " *Id.* The court reasoned that the "rights" referred to in this statute necessarily included the right to seek custody after the termination of parental rights. Second, the court explained that plaintiff also relinquished any "right" to seek custody because DSS had legal custody of the children pursuant to N.C.G.S. § 7A-289.33(1). That subsection of the statute provides that if DSS has custody of the child when the termination petition is filed, DSS acquires the same rights regarding placement of the child as if the child had been surrendered for adoption pursuant to N.C.G.S. § 48-9(a)(1) (superseded by N.C.G.S. § 48-3-601 (1995), effective 1 July 1996).

For the reasons which follow, we hold that the Court of Appeals correctly determined that plaintiff does not have standing to seek custody of his biological children as an "other person" under N.C.G.S. § 50-13.1(a). Consequently, we affirm the decision of the Court of Appeals.

In *Oxendine v. Catawba County Dep't of Social Servs.*, 303 N.C. 699, 281 S.E.2d 370 (1981), we addressed whether the plaintiff foster parents had standing as an "other person" pursuant to N.C.G.S. § 50-13.1(a) to seek custody of their foster child, Jeffrey. Jeffrey was placed with his foster parents when he was about five weeks old. *Id.* at 700, 281 S.E.2d at 371. His biological parents had "executed writ-

ten releases of their rights and consent[ed] to . . . [his] adoption" under N.C.G.S. § 48-9(a)(1). *Id.* at 706, 281 S.E.2d at 375. After caring for Jeffrey for almost one year, the foster parents requested consent from DSS to adopt him. *Id.* at 700, 281 S.E.2d at 371. When DSS denied the request, the foster parents filed an action seeking permanent custody. *Id.* at 700-01, 281 S.E.2d at 371-72. The foster parents argued that they had standing to seek custody as an "other person" pursuant to N.C.G.S. § 50-13.1(a). *Id.* at 704, 281 S.E.2d at 373.

In *Oxendine*, we held that the result was governed by N.C.G.S. § 48-9.1(1), the statute which then detailed the legal effects of consenting to adoption under N.C.G.S. § 48-9(a)(1). *Id.* at 706, 281 S.E.2d at 375. At that time, N.C.G.S. § 48-9.1(1) provided in part:

> The county *department of social services* which the director represents, or the child-placing agency, *to whom surrender and consent has been given, shall have legal custody of the child and the rights of the consenting parties* . . . until entry of the interlocutory decree provided for in G.S. 48-17, or until the final order of adoption is entered . . . or until consent is revoked. . . .

N.C.G.S. § 48-9.1(1) (1991) (emphasis added) (superseded by N.C.G.S. §§ 48-3-502, 48-3-705 (1995), effective 1 July 1996). Based on this language, we concluded that the county DSS to which the child is surrendered retains legal custody of the child until one of the listed events occurs. *Oxendine*, 303 N.C. at 707, 281 S.E.2d at 375. Thus, legal custody did not transfer to the foster parents at any point in time. The foster parents did not have standing "to contest the department or agency's exercise of its rights as legal custodian." *Id.*

Although DSS had legal custody under N.C.G.S. § 48-9.1(1), the foster parents argued that they had standing under N.C.G.S. § 50-13.1(a). We disagreed. *Id.* The Court stated:

> G.S. 48-9.1 and G.S. 50-13.1 were enacted in the same session of the Legislature. *See* 1967 N.C. Sess. Laws, ch. 926, s. 1. When the two statutes are construed together, it is apparent that G.S. 50-13.1 was intended as a broad statute, covering a myriad of situations in which custody disputes are involved, while G.S. 48-9.1 is a narrow statute, applicable only to custody of a minor child surrendered by its natural parents pursuant to G.S. 48-9(a)(1). Clearly, G.S. 48-9.1(1) was intended as an exception to the general grant of standing to contest custody set forth in G.S. 50-13.1.

Id. Thus, we held that the foster parents did not have standing to seek custody of Jeffrey because N.C.G.S. § 48-9.1(1) was an exception to N.C.G.S. § 50-13.1. *Id.*

In the case *sub judice*, plaintiff's parental rights were terminated for abuse and neglect, and such termination was effectuated pursuant to N.C.G.S. § 7A-289.33. N.C.G.S. § 7A-289.33(1) provides that if DSS has custody of the child prior to entry of the termination order, then DSS "*acquire[s] all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.*" N.C.G.S. § 7A-289.33(1) (emphasis added). According to this statute, DSS retains legal custody of the child if the child has been placed with DSS when the termination petition was filed. If DSS has custody of the child at that time, then with the entry of the termination order, DSS acquires the same rights that it would have acquired if the parent had consented to the adoption of that child under N.C.G.S. § 48-9(a)(1).

Under *Oxendine*, a parent who has consented to the adoption of his child no longer has standing to subsequently seek custody of that child. This result is required because, as we stated in *Oxendine*, N.C.G.S. § 48-9(a)(1) is narrowly drawn to address a specific custody situation and is therefore intended to be an exception to the general grant of standing provided in N.C.G.S. § 50-13.1(a). *Oxendine*, 303 N.C. at 707, 281 S.E.2d at 375. Thus, it follows that since N.C.G.S. § 7A-289.33(1) invokes the application of N.C.G.S. § 48-9(a)(1), subsection (1) of N.C.G.S. § 7A-289.33 is also an exception to the general grant of standing to seek custody under N.C.G.S. § 50-13.1(a). This rationale also applies to the revised subsection (1) of N.C.G.S. § 7A-289.33, effective 1 July 1996, which also references chapter 48, the adoption chapter, and requires that the same rights be acquired in this specific situation.

In analyzing these two statutes, the Court of Appeals came to a similar conclusion in *Swing v. Garrison*, 112 N.C. App. 818, 436 S.E.2d 895 (1993). In *Swing*, the Court of Appeals held that the grandparents who were seeking custody and visitation of their grandchild did not have standing under N.C.G.S. § 50-13.1. *Id.* at 822, 436 S.E.2d at 898. There, the child had been placed in the custody of DSS after the parental rights of the biological mother had been terminated and the biological father had consented to the adoption of the child. *Id.* at

820-21, 436 S.E.2d at 897. The Court of Appeals stated that DSS had custody of the child "both prior to and at the time of the filing of the petition to terminate the mother's parental rights. Thus, the entry of the order terminating the mother's parental rights vested in DSS the same rights [it] would have acquired had the child been released pursuant to Section 48-9(a)(1)." *Id.* at 822, 436 S.E.2d at 898. Relying on *Oxendine*, the court explained that "[b]ecause DSS has acquired all of the rights for placement of [the child], by virtue of termination of one parent's parental rights and by virtue of the surrender to DSS by the other parent, the grandparents do not have standing 'to contest the department['s] . . . exercise of its rights as legal custodian.' " *Id.* (quoting *Oxendine*, 303 N.C. at 707, 281 S.E.2d at 375) (alteration in original). This decision, while not expressly recognizing that N.C.G.S. § 7A-289.33(1) is an exception to N.C.G.S. § 50-13.1(a), comports with the reasoning behind our decision today.

In addition, interpreting N.C.G.S. § 7A-289.33(1) as an exception to the general grant of standing provided in N.C.G.S. § 50-13.1(a) gives effect to legislative intent. In *Oxendine*, we reasoned that N.C.G.S. § 48-9.1(1) was a narrow statute which was intended to apply only to custody situations where consent for adoption had been given. N.C.G.S. § 7A-289.33(1) is also a narrow statute, intended to apply only to situations where DSS has custody and the parents' rights are later terminated. Both statutes also address the beginning stages of a custody determination where adoption is specifically involved. Under both statutes, DSS is given legal custody of the child. This is merely a necessary step in the overall adoption process. Under both provisions, DSS is also given authority to place the child for adoption at some point in time if certain contingencies do not occur. Thus, these two provisions should be read in a similar manner since both provisions narrowly address custody situations where DSS has custody of the child and is placing the child for adoption.

Unlike these two statutes, N.C.G.S. § 50-13.1(a) is a "general statute" addressing all potential custody cases. *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 748 (1995). " 'Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized . . .; but, to the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute. . . .' " *Id.* at 631, 461 S.E.2d at 747 (quoting *National Food*

Stores v. N.C. Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)). Thus, N.C.G.S. § 7A-289.33(1), the more specific statute like N.C.G.S. § 48-9.1(1), must be given effect despite the broad mandate provided by N.C.G.S. § 50-13.1(a).

Finally, it should also be noted that the broad grant of standing in N.C.G.S. § 50-13.1(a) does not convey an absolute right upon every person who allegedly has an interest in the child to assert custody. As we stated in *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994), "N.C.G.S. § 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children." N.C.G.S. § 50-13.1(a) must operate within these confines and thereby promote the best interests of the child in all custody determinations.

Application of the foregoing rule to the present case requires a finding that plaintiff lacks standing as an "other person" under N.C.G.S. § 50-13.1(a). DSS had legal custody of plaintiff's natural children when the termination petition was filed on 15 November 1989. *Krauss III*, 124 N.C. App. 785, 479 S.E.2d 509. DSS, in fact, has had legal custody of the two children since June 1989. Plaintiff's situation is thus governed by N.C.G.S. § 7A-289.33(1). Since N.C.G.S. § 7A-289.33(1) is an exception to the general grant provided under N.C.G.S. § 50-13.1, plaintiff lacks standing to seek custody of his natural children.

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

AFFIRMED.

FREDERICK TINCH v. VIDEO INDUSTRIAL SERVICES, INC., WESTERN TEMPORARY SERVICES, INC., HENDON ENGINEERING ASSOCIATES, INC., METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, AND CARYLON CORPORATION

No. 528PA96

(Filed 5 December 1997)

Appeal and Error § 120 (NCI4th)— summary judgment as to one defendant—right of immediate appeal

The Court of Appeals erred by dismissing as interlocutory plaintiff's appeal from an order granting summary judgment for defendant Video where (1) the summary judgment order terminates plaintiff's action as to that defendant and deprives plaintiff of a jury trial on that alleged cause of action, and (2) the applicability of N.C.G.S. § 97-10.2 as alleged in defendant Hendon's answer raises the possibility of inconsistent verdicts as to defendant Video's liability if plaintiff is required to wait until after trial on the merits against the other defendants to have the merits of plaintiff's appeal as to defendant Video determined.

Am Jur 2d, Appellate Review § 693.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 124 N.C. App. 391, 477 S.E.2d 193 (1996), dismissing as interlocutory appeals by plaintiff and by defendant Hendon Engineering Associates, Inc. from an order entered 5 October 1995 by Gardner, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 9 September 1997.

John A. Mraz, P.A., by John A. Mraz, for plaintiff-appellant.

Ball, Barden & Bell, P.A., by Ervin L. Ball, Jr., for defendant-appellee Video Industrial Services, Inc.

PER CURIAM.

Plaintiff instituted this civil action against, among other defendants, Hendon Engineering Associates, Inc. ("Hendon") and Video Industrial Services, Inc. ("Video") alleging that both defendants were negligent and that defendant Video had knowingly engaged in conduct substantially certain to cause him injury. Plaintiff had been hired by Video through referral from defendant Western Temporary Services, Inc. to assist on a project in which Video was a subcontractor of Hendon. Plaintiff was injured on the job.

Defendant Video moved for summary judgment as to all claims asserted by plaintiff. The trial court entered summary judgment for Video. Defendant Hendon also moved for summary judgment; Hendon's motion was allowed in part and denied in part. The trial court also determined that there was no just reason for delay for purposes of appeal. On appeal the Court of Appeals granted plaintiff's motion to dismiss Hendon's appeal from the partial denial of Hendon's motion for summary judgment. On its own motion the Court of Appeals also dismissed as interlocutory plaintiff's appeal from the order granting Video summary judgment. This Court allowed plaintiff's petition for discretionary review. Hendon's petitions for writ of certiorari and discretionary review were denied by this Court.

The sole issue before this Court is whether the Court of Appeals erred in dismissing plaintiff's appeal as interlocutory. Defendant Video agrees with plaintiff that plaintiff's appeal should not have been dismissed. The general rule is that final judgments are always appealable, but interlocutory decrees can be immediately appealed only when they affect a substantial right and will result in injury to the appellant if not corrected before an appeal from the final judgment. *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980).

In *Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 375 S.E.2d 161 (1989), the trial judge "entered summary judgment in favor of defendant [United States Fire Insurance Company ("USFIC")] and against the plaintiffs with respect to the plaintiffs' claim for actual damages, and entered summary judgment for plaintiffs 'against the defendant USFIC on the liability issues on plaintiffs' claim made pursuant to N.C.G.S. Chapter 75 and N.C.G.S. § 58-54.4 and plaintiffs' claim under the common law for punitive damages. . . .' " *Id.* at 701, 375 S.E.2d at 161. The Court of Appeals dismissed both the plaintiffs' and the defendant's appeals. This Court held that the dismissal of the plaintiffs' appeal was error. This Court stated:

> Plaintiffs were appealing from a summary judgment which dismissed their claim for compensatory damages. That portion of the trial judge's order was a final judgment and plaintiffs were entitled to appellate review of the grant of summary judgment against them on the issue of compensatory damages. *Oestreicher v. American National Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976).

Id. at 701-02, 375 S.E.2d at 162. The final dismissal of a claim under summary judgment involves a substantial right from which a plaintiff has an immediate right of appeal. *Id.*

In the present case the order granting summary judgment as to Video terminates plaintiff's action as to that defendant and deprives plaintiff of a jury trial on that alleged cause of action. Furthermore, the applicability of N.C.G.S. § 97-10.2 as alleged in Hendon's answer raises the possibility of inconsistent verdicts as to defendant Video's liability if plaintiff is required to wait until after trial on the merits against the other defendants to have the merits of plaintiff's appeal as to Video determined. Under these circumstances a determination of the underlying substantive appeal will, in our view, promote finality rather than fragmentation in this case.

For the foregoing reasons we hold that the Court of Appeals erred in dismissing plaintiff's appeal and remand the case to that court for consideration on the merits of the issue raised in plaintiff's brief previously filed in that court.

REVERSED AND REMANDED.

IN RE: INQUIRY CONCERNING A JUDGE, NOS. 194 AND 204 SUSAN O. RENFER, RESPONDENT

No. 498A96-2

(Filed 5 December 1997)

Judges, Justices, and Magistrates § 38 (NCI4th)— district court judge—falsifying court documents—censure

A district court judge's admitted acts of falsifying official court documents by the false entry of guilty pleas without the knowledge of defendants constituted willful misconduct in office as well as conduct prejudicial to the administration of justice that brings the judicial office into disrepute and would have warranted removal from office. However, the Judicial Standards Commission's recommendation of censure is accepted in light of the judge's acknowledgment of wrongdoing, her resignation from office, and her agreement not to hold future judicial office in North Carolina.

Am Jur 2d, Judges § 84; Public Officers and Employees § 193.

Removal or discipline of state judge for neglect of, or failure to perform, jucidial duties. 87 ALR4th 727.

This matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), entered 26 August 1997, that the respondent, Judge Susan O. Renfer, a Judge of the General Court of Justice, District Court Division, Tenth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 1, 2 and 3 of the North Carolina Code of Judicial Conduct. Calendared in the Supreme Court 20 November 1997 and considered on the record without oral argument or submission of briefs.

ORDER OF CENSURE.

On 17 July 1997, respondent, her attorneys, and special counsel for the Commission entered into a stipulation determining as fact evidentiary matters as follows: Respondent presided over the 21 September 1995 Session of District Court, Wake County, at which she made handwritten entries of "guilty" in the cases of two individuals who previously indicated their intent to enter pleas of "not guilty." Respondent presided over the 28 March 1995 Session of District Court, Wake County, at which she attempted to have a defendant plead guilty with the knowledge that defendant was represented by counsel and that said counsel was not present in court. Respondent presided over the 3 April 1996 Session of District Court, Wake County, at which she sentenced a defendant to a forty-five day active sentence but refused to credit defendant with jail time served pending disposition as required by law. Finally, respondent admitted that she had "made statements and taken actions, in and out of court, that could be considered by some as less than patient, dignified, and courteous to attorneys, witnesses, litigants, and court personnel." The stipulation concluded with respondent acknowledging that her conduct would be prejudicial to the administration of justice that could bring the judicial office into disrepute and that such conduct could be interpreted to be in violation of Canons 1, 2 and 3 of the Code of Judicial Conduct.

Respondent waived formal hearing of the matters and agreed to accept a recommendation of censure by the Judicial Standards

Commission on the matters set forth in the stipulation. The Commission, in turn, agreed to dismiss all charges not addressed in the stipulation.

By letter to the Governor dated 17 July 1997, respondent submitted her resignation effective 8 August 1997 and stated, "I will not be seeking reelection to any judicial office and will not act in any judicial capacity within the State of North Carolina following my resignation." Special counsel subsequently advised the Commission that Judge Renfer "had resigned her judicial office effective 8 August 1997 and had stated in her resignation that she would not seek reelection to judicial office or act in any judicial capacity in the State of North Carolina thereafter." On 26 August 1997, the Commission entered its recommendation of censure in accordance with the stipulation.

N.C.G.S. § 7A-376 sets forth the grounds for removal or censure of a judge:

> Upon recommendation of the Commission, the Supreme Court may censure or remove any judge for willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C.G.S. § 7A-376 (1995). In proceedings pursuant to this section, this Court does not act in its usual role as an appellate court, but rather as a court of original jurisdiction. *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 legislature intended for this Court to be guided by the North Carolina Code of Judicial Conduct in defining the meaning of this section. *In re Nowell*, 293 N.C. 235, 243, 237 S.E.2d 246, 252 (1977). The resignation of a judge and its acceptance by the Governor neither deprives this Court of jurisdiction over a proceeding for removal nor limits the sanctions available. *Peoples*, 296 N.C. at 148-49, 250 S.E.2d at 912-13.

In the present proceeding, respondent has, *inter alia*, acknowledged the commission of the acts of falsifying official court documents by the false entry of guilty pleas without the knowledge of defendants. This is clearly willful misconduct in office, as well as conduct prejudicial to the administration of justice that brings the judicial office into disrepute, both within the meaning of N.C.G.S. § 7A-376. While this conduct is such that warrants removal, due to

respondent's acknowledgment of wrongdoing, her resignation from office, and her agreement not to hold future judicial office in North Carolina, the Commission's considered recommendation of censure is accepted.

Now, therefore, pursuant to N.C.G.S. §§ 7A-376, 7A-377(a), and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that Judge Susan O. Renfer be and she is hereby censured.

By order of the Court in Conference this the 4th day of December 1997.

ORR, J.
For the Court

ANDREW THOMAS HARTSELL v. INTEGON INDEMNITY CORPORATION

No. 342A97

(Filed 5 December 1997)

Insurance § 472 (NCI4th)— leased vehicle—destruction by fire—payment to lessor as loss payee—claim by lessee

The trial court erred in dismissing plaintiff insured's claim against defendant insurer for the value of his leased vehicle which was stolen and destroyed by fire because the insurer paid the named loss payee, the lessor, the actual cash value of the vehicle where the policy provided that a loss was to be paid "as interest may appear to [the insured] and the loss payee"; after the loss plaintiff continued to make lease payments for the full duration of the lease; and the plaintiff is thus entitled to insurance proceeds to the extent of his interest in the vehicle as of the date of the loss.

Am Jur 2d, Automobile Insurance §§ 41, 42, 137-139.

Automobile property insurance-sole, unconditional, or absolute ownership clause. 71 ALR2d 223.

What constitutes ownership of automobile within meaning of automobile insurance owner's policy. 36 ALR4th 7.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 511, 485 S.E.2d 893 (1997), affirming an order entered by Johnson (E. Lynn), J., on 27 November 1995 in Superior Court, Moore County, which allowed defendant's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6). Heard in the Supreme Court 17 November 1997.

Robbins May & Rich, L.L.P., by P. Wayne Robbins and Carol M. White, for plaintiff-appellant.

Kitchin, Neal, Webb & Futrell, P.A., by Stephan R. Futrell, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion for the Court of Appeals by Greene, J., the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Moore County, for further proceedings not inconsistent with said dissenting opinion.

REVERSED AND REMANDED.

CAROLINA BUILDERS CORPORATION v. THE ALEXANDER SCOTT GROUP, LTD. D/B/A ALEXANDER SCOTT HOMES, AND DEBORAH L. RUGGLES, AND DAVID A. RUGGLES, AND FIRST UNION MORTGAGE CORPORATION, AND JAMES A. ABBOTT, TRUSTEE, AND LARRY B. GOLDSTEIN, AND RICKI F. GOLDSTEIN, AND AMERICA'S WHOLESALE LENDER, AND COUNTRYWIDE TITLE CORPORATION, TRUSTEE, AND ROBERT C. MONTGOMERY, AND MARY ANNE MONTGOMERY, AND PREMIER MORTGAGE CORPORATION, AND RICHARD WARREN, TRUSTEE, AND A. TROY BARKSDALE, AND MARY JANE BARKSDALE, AND NATIONSBANK OF NORTH CAROLINA, N.A., AND TIM, INC., TRUSTEE, AND MICHAEL P. BERNARD, AND GAIL G. BERNARD, AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, N.A., AND THOMAS E. MUSE, TRUSTEE, AND GREGORY A. QUINTANO, AND THERESA A. QUINTANO, AND JIA LIN CHEN AND HUI YU YANG, A/K/A HUIYU YANG, AND PNC MORTGAGE CORP. OF AMERICA, AND CRAIG & BRISSON, P.A., TRUSTEE, AND DANIEL J. MCCANNA, AND DONNA E. MACCANNA, AND BANK PLUS MORTGAGE CORP., AND DAVID B. CRAIG, TRUSTEE, AND BRUCE R. THORNE, AND CYNTHIA JOYCE THORNE, AND RYLAND MORTGAGE COMPANY, AND WALTER Z. RIGSBEE AND INGRID E. STEGMILLER, TRUSTEES, AND LARRY H. NEWELL, AND JESSIE T. HAGINS, AND LENA HAGINS, AND JAMES WILLIAM APPLEWHITE, III, AND KAREN APPLEWHITE, AND ASHTON MORTGAGE COMPANY, AND LARRY E. ROBBINS,

TRUSTEE, AND ROBIN LEE O'CONNOR-SEMMES, AND KARL WILLIAM SEMMES, AND GMAC MORTGAGE CORPORATION OF PA, AND DONALD L. MORSE AND GAIL STEIN, TRUSTEES, AND THOMAS H. THOMPSON, AND KARLA L. THOMPSON, AND MARY S. MOKATE, AND MORTGAGE CHOICE, INC., AND CHARLES G. BEEMER, TRUSTEE, AND ANTHONY J. ROBERTO, AND DEBRA D. ROBERTO, AND SANDRA ELIZABETH MUTH, AND NORWEST MORTGAGE, INC., AND SPRUILLCO, LTD., TRUSTEE, AND JAMES D. ADDISON, AND SHANLYN S. ADDISON, AND BLAKE E. MILLINOR, AND LEWIS H. NAGLER, AND BARBARA A. NAGLER, AND ATLANTIC RESIDENTIAL MORTGAGE CORPORATION, AND STANLEY W. BURDETTE AND EDWARD A. KOUNESKI, TRUSTEES, AND ROBERT P. SHREWSBURY, AND LAURA S. SHREWSBURY, AND WOODROW T. ROBERSON, AND BRENDA M. ROBERSON, AND PHH U.S. MORTGAGE CORPORATION, AND FIRST AMERICAN TITLE INSURANCE CO., TRUSTEE, AND INVESTORS TITLE INSURANCE COMPANY, AND MICHAEL J. LOPAZANSKI, AND SUZANNE LAZORICK, AND MICHAEL D. LEVINE, TRUSTEE

No. 122PA97

(Filed 5 December 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 125 N.C. App. 615, 483 S.E.2d 195 (1997), affirming a judgment entered 11 December 1995, *nunc pro tunc* to 2 October 1995, by Stephens (Donald W.), J., in Superior Court, Wake County. Heard in the Supreme Court 17 November 1997.

Smith Debnam Hibbert, L.L.P., by Caren D. Enloe, for plaintiff-appellee.

Reynolds & Pendergrass, P.A., by James K. Pendergrass, Jr., and Ted R. Reynolds, for defendant-appellants Deborah and David Ruggles; First Union Mortgage Corp.; James Abbott; Larry and Ricki Goldstein; America's Wholesale Lender; Countrywide Title Corp.; Troy and Mary Jane Barksdale; NationsBank of N.C., N.A.; TIM, Inc.; Gregory and Theresa Quintano; Jia Lin Chen; Hui Yu Yang; PNC Mortgage Corp. of America; Craig & Brisson, P.A.; Bank Plus Mortgage Corp; David Craig; Larry Newell; Jessie and Lena Hagins; James and Karen Applewhite; Ashton Mortgage Co.; Larry Robbins; Robin O'Connor-Semmes; Karl Semmes; GMAC Mortgage Corp. of PA; Donald Morse; Gail Stein; Thomas and Karla Thompson; Mary Mokate; Mortgage Choice, Inc.; Charles Beemer; Anthony and Debra Roberto; Sandra Muth; Norwest Mortgage, Inc; Spruillco, Ltd.; James and Shanlyn Addison; Lewis and Barbara Nagler; Atlantic Residential Mortgage Corp.; Stanley Burdette; Edward

Kouneski; Robert and Laura Shrewsbury; Investors Title Ins. Co.; Michael Lopazanski; Suzanne Lazorick; and Michael Levine.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

JOSEPH MCKINLEY BRYAN TAYLOR, INDIVIDUALLY, AND AS GUARDIAN AD LITEM OF JOSEPH MCKINLEY BRYAN TAYLOR, JR., AND MARTHA CAROLINE MCKELLAR TAYLOR, MINORS; AND MARY PRICE TAYLOR, INDIVIDUALLY V. NATIONSBANK CORPORATION, FORMERLY N.C.N.B. NATIONAL BANK OF NORTH CAROLINA; E.S. MELVIN; AND CAROLE W. FEE BRUCE, TRUSTEES

No. 161PA97

(Filed 5 December 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 515, 481 S.E.2d 358 (1997), affirming a judgment entered by Rousseau, J., on 3 June 1996 in Superior Court, Guilford County. Heard in the Supreme Court 18 November 1997.

Tharrington Smith, L.L.P., by Wade M. Smith, Roger W. Smith, and Randall M. Roden, for plaintiff-appellees.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Larry B. Sitton, and Robert R. Marcus, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. DONALD DEVONE GREEN

No. 308A97

(Filed 5 December 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 126 N.C. App. 437, 486 S.E.2d 491 (1997), finding no error in the judgment entered by Llewellyn, J., on 15 November 1995 in Superior Court, New Hanover County, sentencing defendant for a class I felony pursuant to N.C.G.S. § 90-108(b). Heard in the Supreme Court 19 November 1997.

Michael F. Easley, Attorney General, by Lars F. Nance, Special Deputy Attorney General, for the State.

Daniel Shatz for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to the Superior Court, New Hanover County, for entry of judgment as upon conviction of the misdemeanor offense as set forth in N.C.G.S. § 90-108(a)(7).

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. RUFUS GENE BANKS, JR.

No. 193PA97

(Filed 5 December 1997)

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 the decision of the Court of Appeals, 125 N.C. App. 681, 482 S.E.2d 41 (1997), finding no error in the judgment of Johnson (Marcus L.), J., entered at the 11 September 1995 Session of Superior Court, Mecklenburg County. Heard in the Supreme Court on 18 November 1997.

Michael F. Easley, Attorney General, by Sue Y. Little, Assistant Attorney General, for the State.

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

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DEBORAH ANN CLIFTON

No. 133PA97

(Filed 5 December 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 471, 481 S.E.2d 393 (1997), finding no error in defendant's conviction for involuntary manslaughter entered on 30 June 1995 in Superior Court, Franklin County, Hobgood, J., presiding, and remanding for resentencing. Heard in the Supreme Court 17 November 1996.

Michael F. Easley, Attorney General, by John A. Greenlee, Assistant Attorney General, for the State-appellant.

Mark A. Perry and McMillan, Smith & Plyler, by Duncan A. McMillan, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN THE MATTER OF: THE APPEAL OF SPRINGMOOR, INC.

[347 N.C. 392 (1997)]

IN THE MATTER OF:	)	
THE APPEAL OF SPRINGMOOR, INC.	)	
and AMMONS, INC. from the Denial of	)	ORDER
Applications for Exemption by the Wake	)	
County Board of Equalization and Review	)	
for 1994	)	

No. 79PA97

(Filed 16 October 1997)

Pursuant to N.C.G.S. § 1-260, "[i]n any proceeding which involves the validity of a . . . statute, ordinance or franchise . . . alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard." Accordingly, the Court directs the Attorney General's Office to submit a brief addressing only the constitutionality of N.C.G.S. § 105-275(32). The Attorney General's Office shall have 30 days in which to file a brief. All remaining parties shall have 20 days from the filing of the Attorney General's brief in which to file reply briefs.

By order of the Court in Conference, this 16th day of October, 1997.

Orr, J
For the Court

[347 N.C. 393 (1997)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WILLIAM MORGANHERRING	)	

340A95

(Filed 6 November 1997)

The record on appeal regarding defendant's first assignment of error, pertaining to his motion for appropriate relief heard with the case on appeal, reflects conflicting and insufficient evidence as to the assertion of ineffective assistance of counsel with respect to (1) the withdrawal of defendant's plea of not guilty to the murder charges by reason of insanity, (2) the submission of a stipulation by defendant admitting commission of the physical acts alleged in the bills of indictment and basing defense on absence of mental elements of the crime, (3) the tender of guilty pleas to the sex offenses, (4) the circumstances surrounding these submissions to the trial court, and (5) the defendant's understanding and voluntary tender thereof.

The record on appeal does not reflect that the trial court made findings of fact sufficient to resolve these conflicts in the evidence or to establish an evidentiary basis for this Court's determination of this first assignment of error. We, therefore, remand to the superior court for a hearing on these matters and for findings of fact and conclusions with respect thereto. The order of the trial court containing said findings of fact and conclusions, together with a transcript of the additional evidence, shall be certified to this Court forthwith upon conclusion of the hearing and shall be treated as an addendum to the record. Copies shall be forwarded to all parties for such further proceedings in this Court, if any, as may then be ordered.

It is so ordered.

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

Done by the Court in Conference this 6th day of November 1997.

Orr, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CHARLES WAYNE MUNSEY	)	

417A95-2

(Filed 6 November 1997)

Pursuant to N.C.G.S. § 15A-1418, Defendant's Second Motion for Appropriate Relief (Amended) filed in this Court on 20 October 1997 is allowed for the purpose of entering the following order:

Defendant's Motion for Appropriate Relief is hereby remanded to the Superior Court, Wilkes County.

It is further ordered that an evidentiary hearing be held on the aforesaid motion and that the resulting order containing the findings of fact and conclusions of law of the trial judge determining the motion be transmitted to this Court so that it may proceed with the appeal or enter an order terminating the appeal. Time periods for perfecting or proceeding with the appeal are tolled pending receipt of the order of disposition of the motion in the Trial Division.

By order of the Court in Conference, this 6th day of November, 1997.

Orr, J.
For the Court

BARRIER v. ROSPATCH LABELS/PAXAR CORP.

No. 474P97

Case below: 127 N.C.App. 395

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

BIGGERS v. JOHN HANCOCK MUT. LIFE INS. CO.

No. 459P97

Case below: 127 N.C.App. 199

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

BRADLEY v. BEST SIGNS & SERVICES

No. 477P97

Case below: 127 N.C.App. 395

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

BRILEY v. FARABOW

No. 473PA97

Case below: 127 N.C.App. 281

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1997.

BROWN v. DON PLOTKINS HOME CENTER

No. 506P97

Case below: 127 N.C.App. 555

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997.

BRYANT v. HOGARTH

No. 435P97

Case below: 127 N.C.App. 79

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

BYRD v. CHARLOTTE MECKLENBURG BD. OF EDUC.

No. 443P97

Case below: 127 N.C.App. 208

Petition by respondent (Charlotte-Mecklenburg Bd. of Educ.) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

CARLSON v. CARLSON

No. 434P97

Case below: 127 N.C.App. 87

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

CARTER v. FOOD LION, INC.

No. 479P97

Case below: 127 N.C.App. 271

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

CISSELL v. GLOVER LANDSCAPE SUPPLY, INC.

No. 356A97

Case below: 126 N.C.App. 667

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 6 November 1997.

CONNOR v. ANDERSON

No. 453P97

Case below: 127 N.C.App. 208

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

COOK v. WAKE COUNTY HOSPITAL SYSTEM

No. 202A97

Case below: 125 N.C.App. 618

Motion by defendants and plaintiffs to withdraw appeal allowed 3 November 1997.

ELLINGTON v. HESTER

No. 451P97

Case below: 127 N.C.App. 172

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

ESTATE OF DARBY v. MONROE OIL CO.

No. 470P97

Case below: 127 N.C.App. 301

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 November 1997.

ESTATE OF MULLIS v. MONROE OIL CO.

No. 426PA97

Case below: 127 N.C.App. 277

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1997.

ESTATE OF SMITH v. UNDERWOOD

No. 437P97

Case below: 127 N.C.App. 1

Motion by plaintiff to dismiss denied 6 November 1997. Petition by defendant (Underwood) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

FOUST v. CAMERON

No. 433P97

Case below: 127 N.C.App. 44

Petition by petitioners (Norman and Foust) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997. Motion by Attorney General to dismiss appeal allowed 6 November 1997.

FRANKLIN CREDIT RECOVERY FUND v. HUBER

No. 447P97

Case below: 127 N.C.App. 187

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

FUTRELLE v. DUKE UNIVERSITY

No. 478P97

Case below: 127 N.C.App. 244

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

GRAINGER v. FREIBERGER ARCHITECTURAL SERVICES

No. 499P97

Case below: 127 N.C.App. 555

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

GREENE v. CARPENTER

No. 491P97

Case below: 127 N.C.App. 396

Motion by defendants (Carpenter et al) to withdraw petition for writ of certiorari allowed 4 December 1997. Motion by defendants (Carpenter et al) to withdraw petition for discretionary review allowed 4 December 1997.

HAYWOOD v. HAYWOOD

No. 510P97

Case below: 127 N.C.App. —— (16 September 1997)

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997. Motion by defendant to dismiss appeal allowed 4 December 1997.

HOGOBOOM v. LANDCRAFT PROPERTIES

No. 483P97

Case below: 127 N.C.App. 208

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997. Petition by plaintiff for writ of certiorari to review the orders of the Superior Court, Mecklenburg County and the decision and orders of the North Carolina Court of Appeals denied 6 November 1997.

IN RE DBA AND PJT

No. 504P97

Case below: 127 N.C.App. 553

Petition by juveniles for discretionary review pursuant to G.S. 7A-31 dismissed 6 November 1997.

IN RE SHIREY

No. 466P97

Case below: 127 N.C.App. 396

Petition by juvenile for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

LUCAS, BRYANT & DENNING v. INGRAM

No. 414P97

Case below: 126 N.C.App. 437

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 November 1997.

MARTIN MARIETTA TECHNOLOGIES v. BRUNSWICK COUNTY

No. 421PA97

Case below: 126 N.C.App. 806

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1997 as to the following issue only: Does the Rule 54(b) certification contained in the trial court's June 11, 1996 order together with a final determination on MM's First through Fourth Causes of Action confer appellate jurisdiction pursuant to Rule 54(b)?

MARTIN v. WHISNANT

No. 509P97

Case below: 127 N.C.App. 556

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997.

MAYNOR v. ONSLOW COUNTY

No. 517P97

Case below: 127 N.C.App. 102

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 December 1997.

McFADYEN v. FREEMAN

No. 446P97

Case below: 127 N.C.App. 202

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

MINTER v. OSBORNE CO.

No. 445P97

Case below: 127 N.C.App. 134

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

NATIONSBANK OF VA. v. WDF-HICKORY, INC.

No. 407P97

Case below: 126 N.C.App. 830

Petition by defendants (WDF-Hickory, Inc., Wayne D. Franklin and Basic Tool Co.) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

NORMAN v. CAMERON

No. 433P97

Case below: 127 N.C.App. 44

Petition by petitioners (Norman and Foust) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997. Motion by Attorney General to dismiss appeal allowed 6 November 1997.

PAGE v. MARSHALL OIL CO.

No. 455A97

Case below: 127 N.C.App. 396

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 6 November 1997.

PATTI v. CONTINENTAL CASUALTY CO.

No. 376P97

Case below: 126 N.C.App. 643

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 November 1997.

PEARSON v. C. P. BUCKNER STEEL ERECTION CO.

No. 452PA97

Case below: 126 N.C.App. 745

Petition by plaintiff and intervenors for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1997.

PILAND v. HARRIS SUPERMARKET

No. 507P97

Case below: 127 N.C.App. 553

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997. Motion by defendants to withdraw petition for writ of certiorari allowed 4 December 1997.

POSTELL v. S & N COMMUNICATIONS

No. 524P97

Case below: 127 N.C.App. 209

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 December 1997.

ROBBINS v. TWEETSIE RAILROAD, INC.

No. 371P97

Case below: 126 N.C.App. 572

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

ROSS v. VOIERS

No. 498P97

Case below: 127 N.C.App. 415

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997.

SALGADO v. JOYNER MANAGEMENT SERVICES

No. 438P97

Case below: 127 N.C.App. 209

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

SEELY v. BORUM & ASSOC., INC.

No. 428P97

Case below: 127 N.C.App. 193

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

SHERROD v. NASH GENERAL HOSPITAL, INC.

No. 387A97

Case below: 126 N.C.App. 755

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 29 October 1997.

SLATTON v. METRO AIR CONDITIONING

No. 448P97

Case below: 127 N.C.App. 209

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

STATE v. BLACK

No. 492P97

Case below: 127 N.C.App. 397

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

STATE v. BROWN

No. 65A85-2

Case below: Robeson County Superior Court

Petition by Attorney General for writ of certiorari to review the order of Superior Court, Robeson County denied 6 November 1997.

STATE v. CARNES

No. 540P97

Case below: 127 N.C.App. 561

Petition by defendant for writ of supersedeas and motion for temporary stay denied 19 November 1997.

STATE v. CASHWELL

No. 457P97

Case below: 127 N.C.App. 210

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

STATE v. CONNELL

No. 551P97

Case below: 127 N.C.App. 685

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 4 December 1997.

STATE v. COOK

No. 475P97

Case below: 127 N.C.App. 395

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

STATE v. DICKENS

No. 442P97

Case below: 127 N.C.App. 210

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 November 1997.

STATE v. DOVE

No. 405P97

Case below: 126 N.C.App. 831

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 November 1997.

STATE v. FISHER

No. 62A93-2

Case below: Guilford County Superior Court

Petition by defendant for writ of certiorari to review the order of Superior Court, Guilford County denied 6 November 1997.

STATE v. FLOWERS

No. 553A94

Case below: Rowan County Superior Court

Motion by defendant (Flowers) to dismiss counsel and abandon appeal is remanded 4 December 1997 to Superior Court for a hearing on defendant's motion.

STATE v. GRAVES

No. 456P97

Case below: 126 N.C.App. 831

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 November 1997.

STATE v. HELMS

No. 468PA97

Case below: 127 N.C.App. 375

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1997.

STATE v. HILL

No. 503P97

Case below: 127 N.C.App. 554

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 4 December 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997.

STATE v. HUDSON

No. 512P97

Case below: 127 N.C.App. 557

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 28 October 1997.

STATE v. HURST

No. 441P97

Case below: 127 N.C.App. 54

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997. Motion by Attorney General to dismiss appeal allowed November 1997.

STATE v. JOHNSTON

No. 518A97

Case below: 127 N.C.App. 563

Attorney General's motion to dismiss allowed 4 December 1997.

STATE v. LACKEY

No. 461P97

Case below: 127 N.C.App. 398

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

STATE v. MCNEILL

No. 486A97

Case below: Cumberland County Superior Court

Motion by Attorney General to dismiss allowed 22 October 1997 subject to defendant having 15 days from the date of this order to properly file The Record in the Court of Appeals.

STATE v. MEDLEY

No. 460P97

Case below: 127 N.C.App. 398
347 N.C. 273

Petition by defendant for writ of supersedeas denied 6 November 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied and temporary stay dissolved 6 November 1997.

STATE v. MILLER

No. 413P97-2

Case below: 126 N.C.App. 832

Motion by defendant for appropriate relief denied 6 November 1997.

STATE v. MORGANHERRING

No. 340A95

Case below: Wake County Superior Court

Application by defendant (Morganherring) for writ of habeas corpus dismissed as moot 15 October 1997.

STATE v. MORROW

No. 526P97

Case below: 127 N.C.App. 558

Petition by defendant (Morrow) for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997.

STATE v. NOBLE

No. 99P97

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 6 November 1997.

STATE v. RUFF

No. 550PA97

Case below: 127 N.C.App. 575

Petition by Attorney General for writ of supersedeas allowed 4 December 1997. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 4 December 1997. Motion by Attorney General for temporary stay dismissed 4 December 1997.

STATE v. SADLER

No. 481P97

Case below: 126 N.C.App. 832

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 November 1997.

STATE v. SANDERSON

No. 374A86-5

Case below: Iredell County Superior Court

Motion by defendant (Sanderson) to abandon appeal denied 20 November 1997.

STATE v. STEWART

No. 497P97

Case below: 127 N.C.App. 554

Petition by defendant (Stewart) for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997.

STATE v. TURNER

No. 502P97

Case below: 127 N.C.App. 554

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997. Motion by Attorney General to dismiss appeal denied 4 December 1997.

STATE ex rel. UTILITIES COMM. v. PUBLIC STAFF

No. 408P97

Case below: 126 N.C.App. 833

Petition by intervenor-appellant (Public Staff) for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

TATE TERRACE REALTY INVESTORS, INC. v. CURRITUCK COUNTY

No. 467P97

Case below: 127 N.C.App. 212

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 4 December 1997. Motion by respondents (Currituck and Board of Commissioners) to dismiss notice of appeal allowed 4 December 1997.

VEREEN v. HOLDEN

No. 436P97

Case below: 127 N.C.App. 205

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

WAKE COUNTY HOSP. SYS. v.
SAFETY NAT. CASUALTY CORP.

No. 444P97

Case below: 127 N.C.App. 33

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

WALKER v. BD. OF TRUSTEES OF THE N.C. LOCAL
GOV'T. EMP. RET. SYS.

No. 482PA97

Case below: 127 N.C.App. 156

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 November 1997.

WILLIAMS v. SUTTON

No. 458P97

Case below: 124 N.C.App. 673

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 November 1997.

WILMOTH v. STATE FARM MUT. AUTO. INS. CO.

No. 480P97

Case below: 127 N.C.App. 260

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 November 1997.

WOODFIELD ASSN., INC. v. ACKERMAN

No. 395P97

Case below: 126 N.C.App. 833
347 N.C. 274

Petition by defendant to rehear petition for discretionary review is dismissed by order of the Court 4 December 1997.

PETITION TO REHEAR

ROBINETTE v. BARRIGER

No. 527A94

Case below: 342 N.C. 181
342 N.C. 666

Motion by plaintiff for reconsideration of petition to rehear denied 4 December 1997.

Justice Orr recused.

STATE OF NORTH CAROLINA v. EARL RICHMOND, JR.

No. 347A95

(Filed 6 February 1998)

1. Jury § 142 (NCI4th)— jury selection—question concerning prior murder—uncontroverted facts—impermissible stake-out

The trial court did not err in a capital prosecution for three counts of first-degree murder and one count of first-degree rape by refusing to allow defendant to ask prospective jurors whether they would be able to consider mitigating circumstances and impose a life sentence after being informed that defendant had been previously convicted of first-degree murder. An almost identical question was presented in *State v. Robinson*, 339 N.C. 263, where it was held to be an improper attempt to stake-out the jurors. It is not permissible to ask a prospective juror how a certain set of facts would affect his or her decision and a stake out question is not made permissible simply because it is predicated on a set of facts that is cast as uncontroverted rather than hypothetical. Language in *State v. Bond*, 345 N.C. 1, should not be construed to allow any or all voir dire questions premised on uncontroverted facts, regardless of their tendency to stake out or indoctrinate jurors. Furthermore, *Morgan v. Illinois*, 504 U.S. 719, does not require that a defendant be allowed to ask stake-out questions. The trial court here properly refused to allow questioning about defendant's prior first-degree murder conviction, while allowing defendant to ask prospective jurors whether they would be able to consider all aggravating and mitigating circumstances.

2. Jury § 227 (NCI4th)— jury selection—death penalty—equivocal answers

The trial court did not abuse its discretion by excusing for cause a prospective juror in a capital prosecution for first-degree murder and first-degree rape where the juror was equivocal at times about her ability to impose the death penalty but on several occasions clearly stated her inability to fairly consider the death penalty as punishment.

3. Jury § 227 (NCI4th)— jury selection—death penalty—equivocal answers

The trial court did not abuse its discretion by excusing for cause a prospective juror in a capital prosecution for first-degree murder and first-degree rape where the juror was equivocal at times but made several statements which indicated his inability to follow the law. The juror stated that he was opposed to the idea of the death penalty and that he would probably go with life imprisonment.

4. Jury § 215 (NCI4th)— jury selection—belief in death penalty—consideration of both alternatives

The trial court did not abuse its discretion during jury selection for a capital prosecution for first-degree murder and first-degree rape by denying defendant's challenge for cause of a prospective juror where the juror indicated that she would be inclined to vote for the death penalty, the court explained the process of weighing mitigating and aggravating circumstances, and the juror stated three times that she could fairly consider both sentencing alternatives.

5. Evidence and Witnesses § 221 (NCI4th)— capital murder—evidence that defendant attended victims' funeral—relevant

The trial court did not err in a capital prosecution for three counts of first-degree murder and one count of first-degree rape by admitting evidence that defendant had attended the funeral of the three victims and had served as a pallbearer for one of the child victims, including defendant's statement that carrying the body of a victim he had killed "never gave [him] a bad feeling." Evidence of defendant's participation and demeanor at the funeral tended to shed light on the circumstances of the murders and defendant's intent at the time of the offenses, so that the evidence was relevant under N.C.G.S. § 8C-1, Rule 401, and the trial court was within its discretion in ruling that its probative value was not substantially outweighed by unfair prejudice. N.C.G.S. § 8C-1, Rule 403.

6. Rape and Allied Sexual Offenses § 96 (NCI4th)— first-degree rape—seriousness of injury—deceased victim

The evidence was sufficient to support a conviction for first-degree rape where defendant contended that there was insufficient evidence that he had inflicted serious personal injury in that

serious personal injury does not include injury that results in death. The rule that serious personal injury cannot include injury causing death appears to have its genesis in *State v. Jones*, 258 N.C. 89 (1962), which held that the statute under which a charge of assault with a deadly weapon with intent to kill inflicting serious injury was brought included as an element that the assault inflicts serious injury not resulting in death. It was logical for the General Assembly to limit the injuries capable of supporting assault charges because injury causing death would have elevated the assault to murder, but it would be absurd to allow a defendant to escape a first-degree rape conviction because his victim did not survive the injuries inflicted in the course of the sexual assault. Any language in *State v. Boone*, 307 N.C. 198 and *State v. Thomas*, 332 N.C. 544 suggesting that the serious personal injury element of first-degree rape or sexual offense cannot be injury causing death is disavowed. There was sufficient evidence in this case to support the element of serious personal injury.

7. Homicide § 349 (NCI4th)— first-degree murder—refusal to submit second-degree—no error

The trial court did not err in a capital prosecution for the first-degree murder of a mother and two children and the first-degree rape of the mother by refusing to submit second-degree murder to the jury in connection with the murder of the two children. The evidence showed that after defendant killed the adult victim, he awakened one child, took him into the bathroom, wrapped a cord around his neck five times, and stabbed him at least twenty times in the head and body with a pair of scissors; defendant then went into the other child's room, awakened her, sat her on the edge of the bed, and strangled her with the cord of a curling iron. This evidence shows that defendant acted with deliberation and does not show anger or emotion that overcame his reason so as to reduce the killing to second-degree murder; a rational trier of fact could not have convicted defendant of second-degree murder under this evidence.

8. Criminal Law § 786 (NCI4th Rev.)— capital murder—intoxication—instruction refused—insufficient evidence of intoxication at time of crime

The trial court did not err in a capital prosecution for the first-degree murders of a mother and two children by refusing to

instruct the jury on voluntary intoxication where defendant argued that the evidence showed that he had consumed crack and alcohol on the night of the murders, but the evidence at best showed that he was intoxicated at some time prior to the murders. There is little evidence of the degree of his intoxication at the time of the murders. There is evidence that defendant methodically killed everyone in the house, leading one victim into the bathroom and sitting another on the edge of the bed, and that he tried to hide his crimes, which is indicative of a capacity for premeditation and deliberation. Defendant has not made the necessary showing that he was utterly incapable of forming the requisite intent.

9. Criminal Law § 431 (NCI4th Rev.)— capital murder—prosecutor's argument—intoxication—evidence only from defendant's relatives—not a comment on defendant's failure to testify

The trial court did not abuse his discretion by not intervening *ex mero motu* in response to a statement made by the prosecutor during closing arguments in a capital prosecution for the first-degree murder of a mother and two children and the first-degree rape of the mother where defendant contended that the prosecutor improperly commented on defendant's failure to testify when discussing the evidence of his intoxication on the night of the murders, but the prosecutor's statement was that defendant never told anyone he had been drinking or taking drugs that night and that out of 35 or 40 people at the party, the only two that the jury heard were his own relatives. These statements properly suggested potential bias in defendant's sisters' testimony concerning the degree of his intoxication.

10. Criminal Law § 472 (NCI4th Rev.)— first-degree rape—prosecutor's argument—serious personal injury—deceased victim—correct statement of law

The trial court did not abuse its discretion by not intervening *ex mero motu* in the prosecutor's closing argument in a capital prosecution for three first-degree murders and a first-degree rape where defendant contended that the prosecutor misstated the law concerning the serious personal injury element of first-degree rape, but, as clarified above, the prosecutor's statement of law was correct.

11. Criminal Law § 467 (NCI4th Rev.)— capital murder—prosecutor's argument—premeditation and deliberation—choking

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by not intervening *ex mero motu* when the prosecutor argued that the act of choking someone establishes premeditation and deliberation. The jury may infer premeditation and deliberation from the circumstances of a killing, including the fact that the death was by strangulation, and the prosecutor's statement was not a misstatement of the law or of the facts.

12. Criminal Law § 470 (NCI4th Rev.)— capital murder—prosecutor's argument—killing to eliminate witness—sleeping victim—argument supported by evidence

The trial court did not abuse its discretion in a capital prosecution for three first-degree murders and a first-degree rape by not intervening *ex mero motu* where the prosecutor argued that one of the killings was to eliminate a possible witness. Although defendant argues that the statement was not supported by the evidence because this victim was asleep while her mother and brother were being murdered, the child certainly would have been a possible witness to the events before and after, if not during, the murders.

13. Homicide § 419 (NCI4th)— first-degree murders—instructions—depraved heart malice—no error

The trial court did not err in its charge on two first-degree murders based on malice, premeditation, and deliberation by including in its malice instruction wanton acts manifesting depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life. Although defendant contended that the type of unintentional conduct associated with wanton or depraved heart malice is inconsistent with a specific intent to kill, depraved heart malice can support a first-degree murder conviction provided the State proves premeditation and deliberation. The trial court here properly instructed the jury and there was sufficient evidence of malice, premeditation, and deliberation to support defendant's three first-degree murder convictions based on this theory.

14. Criminal Law § 1338 (NCI4th Rev.)— capital sentencing—prior murder—testimony of victim's father—admissible

The trial court did not err in a capital sentencing proceeding by admitting the testimony of the father of a prior murder victim in which he identified photographs of his daughter at the crime scene and the autopsy and testified about the cause of her death. Assuming this hearsay testimony not to be within a recognized exception, the Supreme Court was satisfied that the father's testimony concerning how she was murdered, the injuries she sustained, and the identification of postmortem photographs were sufficiently reliable to satisfy the requirements of the Confrontation Clause. Moreover, any error was harmless beyond a reasonable doubt because a certified copy of defendant's criminal judgment for this offense was admitted. This evidence adequately supported the trial court's submission of the aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person.

15. Criminal Law § 1338 (NCI4th Rev.)— capital sentencing—prior murder—victim survived by small children—admissible

The trial court did not err in a capital sentencing proceeding by admitting testimony from the father of a prior murder victim that his daughter was survived by two small children. As in *State v. Reeves*, 337 N.C. 700, the evidence is relevant for the jury's deliberations.

16. Criminal Law § 1385 (NCI4th Rev.)— capital sentencing—mitigating circumstance—alcohol and cocaine abuse—subsumed by other circumstances

The proposed capital mitigating circumstances that defendant had long-standing alcohol and cocaine abuse problems and that the use of alcohol and drugs tended to make him act violently were subsumed by other submitted circumstances.

17. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—proposed mitigating circumstance—no proper treatment for psychological problems—subsumed by submitted circumstances

Although it was not clear in a capital sentencing proceeding that the proposed mitigating circumstance that defendant was never given proper treatment for his psychological problems had mitigating value because there was no evidence that defend-

ant had ever sought or requested such treatment, that circumstance was subsumed by nonstatutory circumstances that were submitted.

18. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—proposed mitigating circumstances—positive influence on other inmates—subsumed by submitted circumstances

The proposed capital mitigating circumstance that defendant had a positive influence on other inmates was subsumed by the submitted nonstatutory circumstances that defendant exhibited good conduct in jail following his arrest and that defendant helped other inmates develop their religious faiths.

19. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—proposed mitigating circumstance—seeking divine forgiveness—subsumed by submitted circumstances

The proposed capital mitigating circumstance that defendant has sought forgiveness from God was subsumed in the circumstances that defendant has sought forgiveness since his arrest. This circumstance, with the catchall circumstance, provided an adequate vehicle for the jury to consider the mitigating value of the evidence.

20. Criminal Law § 692 (NCI4th Rev.)— capital sentencing—mitigating circumstance—mental or emotional disturbance—peremptory instruction denied

The trial court did not err in a capital sentencing hearing by refusing to peremptorily instruct the jury on the mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of the murders. Whether defendant was under the influence of such a disturbance was controverted by the State's evidence that the existence of any psychological problems in defendant did not necessarily mean that these problems influenced defendant at the time of the crime and that defendant's behavior at the time of the crime was goal-directed, which indicates that he was not influenced by a mental or emotional disturbance.

21. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstances—severe personality disorder—peremptory instruction denied

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction on the circumstance that

defendant had a severe personality disorder where all of the evidence came from mental health professionals who conducted their evaluations in preparation for this criminal trial. As a result, this evidence lacks sufficient indicia of reliability to permit the conclusion that it is manifestly credible.

22. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstances—defendant's childhood—peremptory instruction denied

The trial court did not err in a capital sentencing hearing by not giving peremptory instructions on the mitigating circumstances concerning defendant's childhood where these circumstances were based largely on the testimony of defendant's sister. The evidence is not manifestly credible because it is common for a defendant's family members to be biased in his favor.

23. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstances—confession—peremptory instruction denied

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction on the mitigating circumstances that defendant confessed to law enforcement officers and that he cooperated with law enforcement officers upon his arrest, submitting to multiple interviews over several days, where the evidence showed that defendant initially lied to the officers, maintaining his innocence even in the face of DNA evidence that he was the donor of sperm found in the adult victim.

24. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—adjustment to prison life—peremptory instruction denied

The trial court did not err in a capital sentencing hearing by not giving a peremptory instruction that defendant would adjust well to prison life where the evidence indicated that defendant freely acknowledged his future dangerousness.

25. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—expression of remorse—peremptory instruction denied

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction that defendant has expressed remorse where there was evidence that, when asked about being a pallbearer for one of the child victims, defendant replied, "It never gave me a bad feeling."

26. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—good conduct in jail—peremptory instruction denied

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction that defendant has exhibited good conduct in jail where the State presented evidence that defendant was interviewed while in pretrial confinement and fabricated stories about when and why he poured alcohol over the adult victim's genitals.

27. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—helping other inmates develop religious faith—peremptory instruction denied

The trial court did not err during a capital sentencing proceeding by not giving a peremptory instruction that defendant has helped other inmates develop their religious faiths where there was evidence that he was involved in prison ministry, but there was no evidence that his efforts had in fact aided in the development of another inmate's faith.

28. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—definition of mitigating circumstances—no intervention ex mero motu

The trial court did not err by not intervening *ex mero motu* in a capital sentencing proceeding during the State's argument where the State repeatedly focused on the idea that mitigation is that which reduces moral culpability while neglecting defendant's age, character, prior record, mentality, education, habits, and environment. Those factors may be relevant considerations, but are not essential to the basic definition of a mitigating circumstance.

29. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—defendant's alcohol consumption—no intervention ex mero motu

The trial court did not err by not intervening *ex mero motu* in a capital sentencing hearing when the State argued that the jury should not find defendant's voluntary consumption of alcohol and drugs mitigating. Although defendant contends that the State's argument was tantamount to misstating North Carolina law, the prosecutor's statement did not tell the jury that it could not find this evidence mitigating, but that it should not. The statement was one of advocacy, not of law.

30. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—dysfunctional families

The trial court did not err by not intervening *ex mero motu* in a capital sentencing hearing when the State argued that we all grew out of dysfunctional families and have psychological problems and that probably about 35 per cent of the world had alcoholic fathers. While these comments may have been oversimplifications, they were within the wide latitude allowed parties in hotly contested cases.

31. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—defendant's recent religious activity—no intervention ex mero motu

The trial court did not err by not intervening *ex mero motu* in a capital sentencing proceeding where the State argued that it was an insult to the jurors' intelligence for defendant to claim that his recent religious activity should be considered mitigating and sarcastically suggested that defendant's service as a pallbearer at the funeral of one of the victims should be included in the catchall mitigating circumstance.

32. Jury § 141 (NCI4th)— capital murder—parole eligibility—jurors' conceptions

The trial court did not err in a capital prosecution for three first-degree murders and a first-degree rape by not permitting *voir dire* of prospective jurors regarding their conceptions of parole eligibility, not allowing defendant to inform the jury as to the law in North Carolina regarding parole eligibility on a life sentence for first-degree murder, and not permitting a psychiatrist to testify concerning defendant's parole eligibility under his federal conviction and its effect on his current mental state and adjustment to incarceration.

33. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—parole eligibility under federal sentence—instruction denied—no error

The trial court did not err in a capital sentencing proceeding by rejecting defendant's request for a jury instruction informing jurors that defendant is ineligible for parole under his federal sentence. The United States Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154, sought to protect against prosecutorial arguments that mislead jurors into believing that if they do not

sentence a defendant to death, he will eventually be released and once again be a threat to society. If a defendant would be sentenced to life in the absence of a death sentence and the State makes such an argument, then *Simmons* requires that the defendant be allowed to inform the jury of the nature of his life without parole sentence. However, if the State refers to future dangerousness only in terms of dangerousness while incarcerated, the concerns of *Simmons* are not implicated. The closing argument here, read as a whole, did not set up a false dilemma like that addressed in *Simmons*.

34. Criminal Law § 925 (NCI4th Rev.)— capital murder—death sentence recommendation—polling of jury

There was no error in a capital sentencing proceeding in the manner in which some of the jurors were polled regarding their recommendation of three death sentences where the clerk failed to ask "Do you still assent thereto?" of three jurors as to one murder and of another juror as to two murders. The clerk informed every juror with respect to all three convictions that the jury had recommended that defendant be sentenced to death and then asked every juror, again with respect to each of the three convictions, "Is this your recommendation?" This questioning satisfies the requirements of N.C.G.S. § 15A-2000(b) because it establishes that each individual juror agreed with the sentence recommendation with respect to each conviction.

35. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A death sentence was not disproportionate where the record fully supports the aggravating circumstances 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 factor; and this case was distinguishable from the seven cases in which the death penalty was found disproportionate in that this defendant was convicted of three murders, all three of the convictions were based on premeditation and deliberation, defendant was also convicted of the first-degree rape of his adult victim, and there are four statutory aggravating circumstances which, standing alone, have been held sufficient to sustain a sentence of death. This case is more similar to cases in which the death sentence was found proportionate than to those in which it was found disproportionate.

Justice FRYE dissenting.

Justice WEBB dissenting.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing three sentences of death entered by Johnson (E. Lynn), J., on 1 June 1995 in Superior Court, Cumberland County, upon jury verdicts finding defendant guilty of three counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment was allowed 3 July 1996. Heard in the Supreme Court 10 December 1996.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

Sam J. Ervin, IV, for defendant-appellant.

WHICHARD, Justice.

On 6 July 1992 defendant was indicted for three counts of first-degree murder and one count of first-degree rape, all occurring during the early morning hours of 2 November 1991. Defendant was tried capitally, and the jury returned verdicts finding him guilty of the first-degree rape and the first-degree murder of Helisa Hayes, the latter based on malice, premeditation, and deliberation and under the felony murder rule; the first-degree murder of Phillip Hayes based on malice, premeditation, and deliberation; and the first-degree murder of Darien Hayes based on malice, premeditation, and deliberation. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for each of the three murders. The trial court sentenced defendant accordingly and additionally sentenced him to a consecutive term of life imprisonment for the first-degree rape. 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.

The evidence tended to show that in the early morning hours of 2 November 1991, defendant went to the home of victim Helisa Hayes, where she resided with her two children, Phillip and Darien. Defendant was a close friend of Helisa's ex-husband. While at the home, defendant had "forceful" sex with Helisa, beat her, and strangled her to death. Defendant then took her son Phillip into the bathroom, where defendant strangled him with the electrical cord of a

curling iron and stabbed him numerous times in his head and body with a pair of scissors. After killing Phillip, defendant went into Darien's bedroom, sat her up on her bed, and strangled her to death with a curling-iron cord.

[1] In his first assignment of error, defendant contends that the trial court erred by refusing to allow him to ask prospective jurors whether, after being informed that defendant had been previously convicted of first-degree murder, they would still be able to consider mitigating circumstances and impose a life sentence. He contends that the trial court's ruling violated his state and federal constitutional rights as enunciated in *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). We disagree.

The question defense counsel proposed to ask prospective jurors, and the trial court's response, were as follows:

> MR. BRITT: I want to ask them if . . . knowing that he had a previous first[-]degree murder conviction, they could still consider mitigating circumstances . . . in determining what their ultimate recommendation as to life or death is going to be.
>
> THE COURT: I'm afraid, Mr. Britt, no matter how you want to couch the question, it is always going to come back to being a stakeout question. I will permit you to ask broad questions about whether they can consider any and all aggravating circumstances and balance that against any and all mitigating circumstances, whatever they might be.

This Court was presented with an almost identical scenario in *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). In that case, as in the case at bar, the defendant had a prior conviction for first-degree murder, and his counsel wished to ask the prospective jurors:

> [I]f you were to . . . find during the sentencing hearing that the defendant had a previous first[-]degree murder conviction prior to the murders for which he is being sentenced this week, could you still follow the Court's instructions and weigh the aggravating and mitigating circumstances and consider life imprisonment as a sentencing option.

Id. at 272, 451 S.E.2d at 202. This Court held this question "to be an improper attempt to 'stake out' the jurors as to their answers to legal questions before they are informed of legal principles ap-

plicable to their sentencing recommendation." *Id.* at 273, 451 S.E.2d at 202.

There is no meaningful distinction between the question proposed in *Robinson* and the one proposed here. Both seek to discover in advance what a prospective juror's decision will be under a certain state of the evidence. This Court has held that it is not permissible to ask a prospective juror how a certain set of facts would affect his or her decision. *State v. Kandies*, 342 N.C. 419, 441, 467 S.E.2d 67, 79, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996); *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). This is because

> such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. . . . [and because] such questions tend to "stake out" the juror and cause him to pledge himself to a future course of action.

Vinson, 287 N.C. at 336, 215 S.E.2d at 68. Questions that seek to indoctrinate prospective jurors regarding potential issues before the evidence has been presented and jurors have been instructed on the law are impermissible. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989).

Further, a stake-out question is not made permissible simply because it is predicated on a set of facts that is cast as uncontroverted rather than hypothetical. In *State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996), *cert. denied*, — U.S. —, 138 L. Ed. 2d 1022 (1997), the defendant was tried capitally for a first-degree murder that was committed by his cohort. During jury selection the State asked a prospective juror if he could follow the law by considering the punishment of death for an accessory who "did not actually 'pull the trigger.' " *Id.* at 14, 478 S.E.2d at 169. Defendant argued that this constituted an impermissible stake-out question. *Id.* at 16, 478 S.E.2d at 170. This Court disagreed, noting that the predicate for the State's inquiry was not a hypothetical set of facts but the uncontroverted fact that the defendant was neither "charged nor going to be tried as a principal." *Id.* at 17, 478 S.E.2d at 170. This observation should not be construed to allow any or all *voir dire* questions premised on uncontroverted facts, regardless of their tendency to stake out or indoctrinate jurors. Rather, it indicates only this Court's conclusion that the trial court did not abuse its discretion by allowing the State to inquire into the prospective jurors' ability to follow the law regarding the

death penalty for accessories in a manner that neither indoctrinated the venire regarding unproven facts nor committed prospective jurors to a decision prior to their being instructed on the law.

With regard to defendant's contention that the trial court here violated *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492, by refusing to allow the proposed questioning, this Court has held that *Morgan* does not require that a defendant be allowed to ask stake-out questions. *See Kandies*, 342 N.C. at 440-41, 467 S.E.2d at 78-79 (holding that "Would the age of the victim in this case . . . make a difference to you as to whether you would impose a life sentence or a death sentence?" is a stake-out question which *Morgan* does not require that a defendant be allowed to ask); *State v. Lynch*, 340 N.C. 435, 451-52, 459 S.E.2d 679, 685-86 (1995) (holding that "How about in a case where a child is killed? Would you automatically tend to feel that the death penalty should be imposed?" comprise a stake-out question which *Morgan* does not require that a defendant be allowed to ask), *cert. denied*, — U.S. —, 134 L. Ed. 2d 558 (1996). The trial court in this case properly refused to allow questioning about defendant's prior first-degree murder conviction, while allowing defendant to ask prospective jurors whether they would be able to consider all aggravating and mitigating circumstances. This ruling did not violate *Morgan*. This assignment of error is overruled.

[2] In his next assignment of error, defendant contends that the trial court improperly excused for cause prospective jurors Oakman and Futch based on the conclusion that they would not be able to give fair consideration to both potential sentences because of personal feelings concerning the death penalty. Defendant argues that the trial court erred under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), contending that the *voir dire* of these jurors did not reveal that their views on the death penalty would prevent or substantially impair the performance of their duties as jurors as those cases require for a for-cause excusal.

The granting of a challenge for cause based on a prospective juror's unfitness is a matter within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994). "[A] prospective juror's bias may not always be 'provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be

able to follow the law impartially.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993) (quoting *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)) (second and third alterations in original).

During Oakman's *voir dire*, she was equivocal at times about her ability to impose the death penalty. However, on several occasions she clearly stated her inability to fairly consider the death penalty as a punishment. At one point the State asked her whether, if the trial proceeded to the sentencing stage, she "could consider, under appropriate circumstances, voting for the death penalty as a punishment." She responded, "To be honest, I think I'd have problems with it." When asked to clarify her feelings, she stated, "I just don't—I feel like, you know, you're taking a life. I mean, because they took a life is not—that's not a proper answer, to take his life. That's not going to bring them back." The State continued to probe by asking, "[D]o you think that, if called upon to make that decision, that, because of your feelings, you would vote for life imprisonment?" Oakman answered "yes." The court asked Oakman whether she could fairly consider both the death penalty and life imprisonment. She responded that she could not. The trial court was within its discretion in excusing this prospective juror for cause.

[3] Similarly, prospective juror Futch, though equivocal at times, made several statements which indicated his inability to follow the law. Futch worked for a newspaper and said he knew DNA had linked defendant to the victim and that defendant had been involved in another murder. In response to questioning by the State concerning his feelings about the death penalty, Futch stated that he was "[j]ust opposed to the idea of it." When asked how his personal feelings might impact his sentencing decision if defendant was found guilty, he stated, "I probably would go with [life imprisonment]." The trial court did not abuse its discretion by excusing this prospective juror for cause. This assignment of error is overruled.

[4] Defendant next argues that the trial court, in violation of *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492, erred by failing to allow his for-cause challenge of prospective juror Richardson. Defendant contends that Richardson's responses during death qualification indicated that she would vote to sentence to death anyone convicted of first-degree murder. In response to questioning by defense counsel, Richardson indicated that she would be inclined to vote for the death penalty in the case of a murder that was "intentional, premeditated,

and without any legal justification or excuse." After questioning by the State and defendant, the trial court stated its suspicion that the prospective juror may have been confused by questions asked "in a vacuum." After explaining the process of weighing mitigating and aggravating circumstances in a sentencing proceeding, the trial court asked Richardson whether she believed she could fairly consider both sentencing alternatives. Richardson stated three times that she could. The trial court thus did not abuse its discretion when it denied defendant's for-cause challenge. This assignment of error is overruled.

[5] Defendant next assigns error to the introduction of evidence that he attended and participated in the victims' funeral. The State elicited testimony that defendant had attended the funeral of the three victims and had served as a pallbearer for one of the child victims. This testimony revealed defendant's statement that carrying the body of a victim he had killed "never gave [him] a bad feeling." Defendant argues this evidence was irrelevant and unduly prejudicial and thus inadmissible under N.C.G.S. § 8C-1, Rules 401 and 403.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). This Court has held that evidence is relevant if it "tend[s] to shed light upon the circumstances surrounding the killing." *State v. Stager*, 329 N.C. 278, 322, 406 S.E.2d 876, 901 (1991). Here, evidence of defendant's participation and demeanor at the funeral tended to shed light on the circumstances of the murders and defendant's intent at the time of the offenses. *See id.* at 321-22, 406 S.E.2d at 900-01 (holding no error in admission of evidence that the defendant was calm and not crying shortly after the victim's death and that she disposed of his personal effects the day after his funeral); *State v. Gallagher*, 313 N.C. 132, 138, 326 S.E.2d 873, 878 (1985) (holding no error in admission of evidence that the defendant did not appear to be grieving at husband's funeral). Therefore, this evidence was relevant under Rule 401.

Rule 403 provides that "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). The evidence complained of was probative of the circumstances surrounding the offenses and of defendant's intent. The trial court was within its discretion in ruling that its probative value was not substantially outweighed by unfair prejudice. Accordingly, this assignment of error is overruled.

[6] In his next assignment of error, defendant contends that the evidence was insufficient to support a finding of first-degree rape, thus undermining his conviction for the first-degree murder of the adult victim which was based, in the alternative, on the felony murder rule. He contends specifically that there was insufficient evidence that he inflicted serious personal injury on the adult victim as required by N.C.G.S. § 14-27.2(a)(2)(b).

In determining whether serious personal injury has been inflicted for purposes of satisfying the elements of first-degree rape, "the court must consider the particular facts of each case." *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367 (1988). The element of infliction of serious personal injury is satisfied

> when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape.

State v. Blackstock, 314 N.C. 232, 242, 333 S.E.2d 245, 252 (1985).

Defendant argues that this Court's decisions in *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992), and *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), establish that in cases of first-degree rape, serious personal injury does not include injury that results in death. Defendant further contends that the evidence of injury aside from that leading to death in this case is insufficient to satisfy the serious personal injury requirement.

The rule that serious personal injury cannot include injury causing death appears to have its genesis in *State v. Jones*, 258 N.C. 89,

128 S.E.2d 1 (1962), a case involving the charge of assault with a deadly weapon with intent to kill. The charge in *Jones* was brought under a statute then codified as N.C.G.S. § 14-32. *Id.* at 90, 128 S.E.2d at 2. This statute included as an element that the assault "inflicts serious injury not resulting in death." *Id.* This Court gave this element its plain meaning. *Id.* at 91, 128 S.E.2d at 3. It was logical for the General Assembly to limit the injuries capable of supporting assault charges to those that do not cause death because injury causing death would have elevated the assault to murder. For the crime to be punishable as an assault, it was necessary that the injury fall short of death.

In *Boone*, 307 N.C. 198, 297 S.E.2d 585, this Court addressed the question of whether a mental injury was sufficient to satisfy the serious personal injury requirement in a case of attempted first-degree rape. The Court cited *Jones*, the assault case, for its definition of serious bodily injury, including language which stated that "[t]he injury must be serious but it must fall short of causing death." *Id.* at 203, 297 S.E.2d at 588-89. In *Thomas*, a case involving a first-degree sexual offense conviction, this Court cited *Boone* for the proposition that serious personal injury cannot include injury resulting in death. *Thomas*, 332 N.C. at 555, 423 S.E.2d at 81. *Thomas* thus completed the migration of this restricted definition of serious injury from the assault context to the sexual offense and rape context.

This restricted definition was not essential to the holding of either *Boone* or *Thomas*. Further, unlike the assault statute at issue in *Jones*, the statutes governing first-degree rape and first-degree sexual offense do not limit the injuries underlying the charge to those not resulting in death. N.C.G.S. §§ 14-27.2, 14-27.4 (Supp. 1997). While defining serious injury to exclude fatal injuries is appropriate in the context of assault charges, the underlying logic does not extend to cases of first-degree rape and sexual offense. Serious injuries that prove fatal transform an assault into a murder, but they do not similarly change a first-degree rape into a different crime. Rather, it is proper, based on such facts, to charge a defendant with both first-degree rape and murder. Fatal injuries are obviously serious, and it would be absurd to allow a defendant to escape a first-degree rape conviction because his victim did not survive the injuries he inflicted in the course of the sexual assault. Any language in *Thomas* and *Boone* suggesting that the serious personal injury element of first-degree rape or sexual offense cannot be injury causing death is therefore disavowed.

Here, there was sufficient evidence to support the element of serious personal injury. In the opinion of Dr. John D. Butts, the medical examiner who performed the autopsy, the adult victim died as the result of strangulation. She had numerous blunt-force injuries; tears, scrapes, and bruises; abrading of the skin in the entrance to her vagina; and blood over a portion of her brain beneath a bruise on her scalp. Defendant's first-degree rape conviction properly supports his conviction for the first-degree murder of the adult victim under the felony murder theory. This assignment of error is overruled.

[7] Next, defendant assigns error to the trial court's refusal to submit second-degree murder to the jury in connection with the murders of the two children. Murder in the first degree, the crime of which defendant was convicted with regard to all three victims, is the "intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Brown*, 300 N.C. 731, 735, 268 S.E.2d 201, 204 (1980). A defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. *Id.* at 735-36, 268 S.E.2d at 204. "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).

Defendant argues that there was evidence that permitted a finding that he did not kill the child victims with premeditation and deliberation. Specifically, he argues that evidence was presented which indicated that he killed the children after an altercation with their mother and that he had consumed alcohol and cocaine that night. Defendant contends that this evidence was sufficient to convince a rational trier of fact that the murders of the two children did not involve premeditation and deliberation, thus entitling him to a jury instruction on second-degree murder. We disagree.

The evidence showed that after defendant killed the adult victim, he awakened one child, took him into the bathroom, wrapped a cord around his neck five times, and stabbed him at least twenty times in the head and body with a pair of scissors. Defendant then went into the other child's room, awakened her, sat her on the edge of the bed,

and strangled her with the cord of a curling iron. This evidence shows that defendant acted with deliberation and does not show anger or emotion that overcame his reason so as to reduce the killing to second-degree murder. A rational trier of fact could not have convicted defendant of second-degree murder under this evidence. This assignment of error is overruled.

[8] In his next assignment of error, defendant contends that the trial court erred by refusing to instruct the jury on voluntary intoxication. He argues that the evidence showed that he had consumed crack cocaine and large amounts of alcohol on the night of the murders and that his mental faculties were consequently impaired. He argues that, based on this evidence, he was incapable of forming the specific intent required for a first-degree murder conviction.

We have stated the law on voluntary intoxication as follows:

> 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 [the] 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)) [(citations omitted)].

State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988).

Here, the evidence showed at best that defendant was intoxicated at some time prior to the murders. While defendant may have consumed alcohol and cocaine prior to the murders, there is little evidence of the degree of his intoxication at the time of the murders.

Defendant argues that because he was unable to recall the murders clearly, he must have been severely intoxicated at the time. The evidence, however, suggests that defendant methodically killed everyone in the house, leading one victim into the bathroom and sitting another on the edge of the bed. He also tried to hide his crimes by pouring alcohol on the adult victim's genitals and taking with him the scissors he had used to stab one of the child victims. Such behavior is indicative of a capacity for premeditation and deliberation. Defendant has not made the necessary showing that he was "utterly incapable" of forming the requisite intent. *State v. Skipper*, 337 N.C. 1, 36, 446 S.E.2d 252, 271 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). This assignment of error is overruled.

[9] Defendant next assigns error to the trial court's failure to intervene *ex mero motu* in response to statements the prosecutor made during closing arguments. Defendant did not object to any of the challenged comments at trial. "In deciding whether the trial court improperly failed to intervene *ex mero motu* to correct an allegedly improper argument of counsel at final argument, our review is limited to discerning whether the statements were so grossly improper that the trial judge abused his discretion in failing to intervene." *State v. Holder*, 331 N.C. 462, 489, 418 S.E.2d 197, 212 (1992).

Defendant contends that the prosecutor improperly commented on defendant's failure to testify when discussing the evidence of his intoxication on the night of the murders. The prosecutor pointed out that defendant never told anyone he had been drinking or taking drugs that night. The prosecutor argued, "What you did hear was two sisters—and I'm sure they love him deeply, no matter what he has done. Out of 35 or 40 people at that party, why are the only two that you hear his own relatives, his own blood kin?" These statements did not improperly comment on defendant's failure to testify. Rather, they properly suggested potential bias in defendant's sisters' testimony concerning the degree of his intoxication. *See State v. Brown*, 327 N.C. 1, 20, 394 S.E.2d 434, 445-46 (1990) (holding it proper for prosecutor to argue that jury should scrutinize the testimony of a witness for bias).

[10] Defendant also contends that the prosecutor misstated the law concerning the serious personal injury element of first-degree rape. While telling the jury what the court would instruct on first-degree rape, the prosecutor said that "the State must prove that the Defendant inflicted serious personal injury upon the victim," and

remarked, "Doesn't get any more serious than death. This is a serious injury." As clarified above, this was a proper statement of the law.

[11] Defendant adds that the prosecutor erred by stating that the mere act of choking someone establishes premeditation and deliberation. The prosecutor stated:

> And I submit to you that you have to premeditate when you choke someone to death. It's not like pulling out a gun and snapping a shot off. It's as deliberate, as premeditated an act as you can have. Some time period, however short. When you have to walk all the way to a back bedroom and you take a cord back there with you, that is premeditation. Nothing but. When you take an 8-year-old to the floor, who is struggling, and you stab him and stab him and stab him; when you drive an instrument all the way through his body, that is premeditation.

Defendant contends that this argument is contrary to this Court's description of premeditation and deliberation in *State v. Walters*, 275 N.C. 615, 170 S.E.2d 484 (1969), where we said it is sufficient if these mental processes occur prior to, and not simultaneously with, the killing. *Id.* at 623, 170 S.E.2d at 490.

This Court has explained the element of premeditation and deliberation in greater detail in other cases. We have recognized that because "premeditation and deliberation are processes of the mind, they are not ordinarily subject to direct proof but generally must be proved if at all by circumstantial evidence." *State v. Huffstetler*, 312 N.C. 92, 109, 322 S.E.2d 110, 121 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). The brutal manner of the killing and the nature of the victim's wounds are circumstances from which the jury can infer premeditation and deliberation. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). The jury may infer premeditation and deliberation from the circumstances of a killing, including the fact that death was by strangulation. *State v. Vereen*, 312 N.C. 499, 515, 324 S.E.2d 250, 260 (holding evidence of a brutal attack, sexual assault, and strangulation sufficient to support a finding of premeditation and deliberation), *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985); *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983) (finding sufficient evidence of premeditation and deliberation where victim was bound and died of strangulation), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

The prosecutor's argument was not a misstatement of the law or of the facts. The trial court thus did not err by failing to intervene *ex mero motu.*

[12] Finally, defendant contends that the prosecutor misstated the evidence when he argued that defendant killed Darien Hayes to eliminate a witness. The prosecutor stated that defendant intended to "eliminate somebody that might be a possible witness" to her mother's rape and murder. Defendant argues this statement is not supported by the evidence because the evidence shows that Darien Hayes was asleep while her mother and brother were being murdered.

This is not a gross misstatement of the evidence. Had the child lived, she certainly would have been a possible witness to the events before and after, if not during, the murders. None of the statements defendant complains of was so grossly improper as to require the trial court to intervene *ex mero motu.* This assignment of error is therefore overruled.

[13] Defendant next assigns error to the trial court's charge on first-degree murder based on malice, premeditation, and deliberation in the cases of Helisa and Darien Hayes. The trial court instructed as follows:

> Malice means not only hatred, ill-will or spite, as it is ordinarily understood. To be sure, that is malice. But it also means that condition of mind that prompts a person to take the life of another intentionally or to intentionally inflict serious injury upon another which proximately results in her death without just cause, excuse or justification, or *to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social [duty] and a callous disregard for human life.*

(Emphasis added.) Defendant contends that although such "wanton malice" or "depraved heart" malice may support a conviction for second-degree murder, the type of unintentional conduct associated with such malice is inconsistent with guilt of first-degree murder on the basis of malice, premeditation, and deliberation, which necessarily involves a specific intent to kill.

Contrary to defendant's contentions, depraved-heart malice can support a first-degree murder conviction provided the State proves premeditation and deliberation. *See State v. Rose*, 335 N.C. 301, 329-30, 439 S.E.2d 518, 533-34 (upholding use of the same pattern

jury instruction in a case of first-degree murder based on premeditation and deliberation), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). The trial court properly instructed the jury on malice, specific intent, premeditation, and deliberation in its first-degree murder instructions. Further, there was sufficient evidence of malice, premeditation, and deliberation to support defendant's three first-degree murder convictions based on this theory. This assignment of error is overruled.

[14] In his next assignment of error, defendant contends that the trial court committed prejudicial error by admitting testimony of Arthur Nadeau that was not within his personal knowledge and constituted inadmissible hearsay. At defendant's sentencing proceeding, the State introduced a certified copy of a criminal judgment wherein defendant had been convicted of murder in the United States District Court, District of New Jersey, on 28 May 1993. The victim was Lisa Ann Nadeau. The State called her father, Arthur Nadeau, as a witness, and he identified photographs of his daughter at the autopsy and the crime scene in addition to testifying about the cause of her death.

Defendant contends that the trial court erred by permitting the State to present the circumstances surrounding the death of Ms. Nadeau through the testimony of Mr. Nadeau. Defendant concedes that the North Carolina Rules of Evidence do not apply to capital sentencing proceedings but argues that according to the United States Supreme Court's interpretation of the Sixth Amendment's Confrontation Clause in *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980), such hearsay evidence is prohibited unless the State proves the hearsay declarant is unavailable or that the evidence is reliable.

In *Idaho v. Wright*, 497 U.S. 805, 111 L. Ed. 2d 638 (1990), the Court explained in greater detail the Confrontation Clause's requirements with respect to hearsay evidence. To comport with the Confrontation Clause, hearsay must contain sufficient "indicia of reliability." *Id.* at 815-16, 111 L. Ed. 2d at 652-53. "[T]he 'indicia of reliability' requirement [can] be met in either of two circumstances: where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.' " *Id.* at 816, 111 L. Ed. 2d at 653 (quoting *Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608). These guarantees of trustworthiness are based on the totality of the circumstances "sur-

round[ing] the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 820, 111 L. Ed. 2d at 655-56.

The hearsay at issue consisted of Mr. Nadeau's recitation of Ms. Nadeau's cause of death, a description of her injuries, the position of her body after her death, and the identification of certain photographs of her body. Defendant points out that Mr. Nadeau is not a pathologist and was not present when his daughter's body was discovered. Defendant contends that Mr. Nadeau's testimony thus consists of hearsay not within a recognized exception to the hearsay rule.

Assuming this hearsay testimony not to be within a recognized exception, we review it to determine whether it is supported by "particularized guarantees of trustworthiness." *Id.* at 816, 111 L. Ed. 2d at 653. Though Mr. Nadeau was not present when his daughter's body was discovered, he actively followed the investigation of the murder and attended defendant's trial "[f]rom day one." It is not clear from the record from whom Mr. Nadeau received the information regarding his daughter's injuries and cause of death. Given his paternal relationship to the victim and his intense involvement in the case, however, we are satisfied that his testimony concerning how his daughter was murdered and the injuries she sustained as well as his identification of postmortem photographs of her were sufficiently reliable to satisfy the requirements of the Confrontation Clause. Moreover, error, if any, in the admission of such testimony was harmless beyond a reasonable doubt because clearly competent evidence of defendant's first-degree murder conviction for this offense was admitted in the form of a certified copy of his criminal judgment. This evidence adequately supported the trial court's submission of the (e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person. *See State v. Roper*, 328 N.C. 337, 359-60, 402 S.E.2d 600, 612-13 (employing similar analysis), *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). This assignment of error is overruled.

[15] Defendant next contends that the trial court erred by admitting Mr. Nadeau's testimony that the victim of defendant's prior violent felony was survived by two small children. Defendant argues this evidence was irrelevant and therefore inadmissible. We disagree.

In *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995), this Court held that the trial court properly admitted evidence that the victim was a good

person, wife, and mother who died not knowing what had happened to her two-and-a-half-year-old child. *Id.* at 722-23, 448 S.E.2d at 811. The evidence in this case is closely analogous to that held admissible in *Reeves*. This case differs from *Reeves* in that the evidence in *Reeves* pertained to the victim of the crime for which the defendant was being sentenced, while this case involves evidence pertaining to a victim in a crime for which defendant had previously been convicted and sentenced. In *Reeves* this Court concluded that this type of evidence was "relevant to give the jury information as to all the circumstances of the crime." *Id.* at 723, 448 S.E.2d at 811. We conclude that the evidence at issue here is similarly relevant for the jury's deliberations. This assignment of error is overruled.

Defendant next contends that the trial court erred by refusing to submit the following nonstatutory mitigating circumstances to the jury: (1) defendant had a long-standing alcohol abuse problem; (2) defendant had a long-standing cocaine abuse problem; (3) defendant's use of alcohol and drugs tended to make him act in a violent manner; (4) defendant never received proper treatment for his psychological problems; (5) defendant has had a positive influence on other inmates; and (6) since his arrest, defendant has sought forgiveness for his crimes from God.

> In order for defendant to succeed on this assignment, he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury.

State v. Benson, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988). If a proposed nonstatutory mitigating circumstance is subsumed in other statutory or nonstatutory mitigating circumstances which are submitted, it is not error for the trial court to refuse to submit it. *Id.* at 327, 372 S.E.2d at 521-22.

[16] With regard to the proposed circumstances that defendant had long-standing alcohol and cocaine abuse problems, we conclude that both were subsumed by other circumstances submitted to the jury. The trial court submitted the following nonstatutory mitigating circumstances: (1) defendant has suffered and suffers from a mixed substance abuse problem; (2) the crime was committed while defendant was under the influence of alcohol; (3) the crime was committed while defendant was under the influence of crack-cocaine; and (4) defendant's use of alcohol and drugs had an effect on his behavior.

The trial court further submitted the statutory (f)(2) mitigating circumstance, "[t]he murder was committed while this defendant was under the influence of mental or emotional disturbance," and the statutory (f)(9) "catchall" mitigating circumstance, "[a]ny other circumstance or circumstances arising from the evidence which any one of you deems to have mitigating value." Because these submitted mitigating circumstances subsumed both proposed circumstances in question, the trial court did not err by refusing to submit them.

The proposed circumstance that defendant's use of alcohol and drugs tended to make him act violently was also subsumed in submitted mitigating circumstances. The trial court submitted as nonstatutory mitigating circumstances: (1) defendant's use of alcohol and drugs had an effect on his personality, and (2) defendant's use of alcohol and drugs had an effect on his behavior. Further, as indicated above, the trial court also submitted the statutory (f)(2) circumstance that the crime was committed while defendant was under the influence of a mental or emotional disturbance and the (f)(9) circumstance, the catchall. These circumstances allowed the jury to consider all of the mitigating evidence raised by the proposed circumstance at issue.

[17] It is not clear that the proposed circumstance that defendant was never given proper treatment for his psychological problems has mitigating value, because there was no evidence that defendant ever sought or requested such treatment. Assuming the proposed circumstance to be mitigating, however, it was subsumed by the following nonstatutory circumstances that were submitted: (1) defendant suffered and suffers from a mixed substance abuse problem, (2) defendant suffers from a severe personality disorder, and (3) defendant has suffered from chronic depression. In addition, the (f)(9) circumstance allowed further consideration of any mitigating evidence raised by this proposed circumstance.

[18] The proposed mitigating circumstance that defendant has had a positive influence on other inmates was subsumed by the following nonstatutory circumstances that were submitted: (1) defendant has exhibited good conduct in jail following his arrest, and (2) defendant has helped other inmates develop their religious faiths.

[19] Finally, the proposed mitigating circumstance that defendant has sought forgiveness from God was subsumed in the following circumstance: since his arrest, defendant has sought forgiveness for his crimes. This circumstance, combined with the (f)(9) catchall circum-

stance, provided an adequate vehicle for the jury to consider the mitigating value of this evidence. This assignment of error is overruled.

[20] Defendant next assigns error to the trial court's refusal to peremptorily instruct the jury with respect to one statutory and ten nonstatutory mitigating circumstances. "[A] trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence." *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 879 (1996).

Defendant first argues that the trial court should have given a peremptory instruction on the (f)(2) statutory mitigating circumstance, that he was under the influence of a mental or emotional disturbance at the time of the murders. Whether defendant was under the influence of such a disturbance when he committed the crimes was controverted by the State's evidence, however. The State's experts testified that the existence of any psychological problems in defendant did not necessarily mean that these problems influenced defendant at the time. These experts also testified that defendant's behavior during the commission of the crimes was goal-directed, which indicates that he was not influenced by a mental or emotional disturbance at the time.

[21] Defendant next argues he was entitled to a peremptory instruction on the circumstance that he had a severe personality disorder. All of the evidence supporting this circumstance came from mental health professionals who conducted their evaluations in preparation for this criminal trial. As a result, this evidence lacks sufficient indicia of reliability to permit the conclusion that it is manifestly credible. *See State v. Bishop*, 343 N.C. 518, 557-58, 472 S.E.2d 842, 863 (1996) (holding that a social history prepared for trial testimony, rather than for treatment, "lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment"), *cert. denied*, — U.S. —, 136 L. Ed. 2d 723 (1997). The trial court thus did not err in failing to peremptorily instruct the jury on this circumstance.

[22] Defendant next argues that the following three circumstances concerning his childhood should have received peremptory instructions: (1) defendant was reared in a family whose father was an alcoholic, (2) defendant's father introduced him to alcohol at an early age, and (3) defendant's father attempted to introduce him to adult sexual

experiences at an early age. These circumstances were based largely on the testimony of defendant's sister. Because it is common for a defendant's family members to be biased in his favor, the evidence supporting these circumstances is not manifestly credible. The trial court thus properly refused to peremptorily instruct the jury on this circumstance.

[23] Defendant next contends that the trial court should have peremptorily instructed the jury with regard to the mitigating circumstances that: (1) defendant confessed to law enforcement officers; and (2) upon his arrest, defendant cooperated with law enforcement officers and submitted to multiple interviews over several days. The evidence supporting these circumstances was clearly controverted because defendant initially lied to the officers about his involvement in the murders, maintaining his innocence even after DNA evidence showed he was the donor of semen found in the adult victim. These circumstances thus did not merit peremptory instructions.

[24] Defendant next argues that the following circumstance should have received a peremptory instruction: defendant would adjust well to prison life. Evidence was presented that defendant told an officer, "I can't say I won't kill again. S--- just happens." This evidence indicates that defendant freely acknowledged his future dangerousness, thus controverting any evidence suggesting he would be a well-behaved prisoner.

[25] The next circumstance that defendant argues should have received a peremptory instruction was that "defendant has expressed remorse for the murders he has committed." This was controverted by evidence that when asked about being a pallbearer at the funeral of one of the child victims, defendant responded, "It never gave me a bad feeling."

[26] Defendant next argues that evidence supporting the circumstance that "defendant has exhibited good conduct in jail following his arrest" warranted a peremptory instruction. The State presented evidence which indicated that while defendant was in pretrial confinement, he was interviewed by Dr. Louis Schlesinger and fabricated stories about when and why he poured alcohol over the adult victim's genitals. This evidence controverts the circumstance in question.

[27] Finally, defendant contends that the trial court should have peremptorily instructed the jury regarding the circumstance that

"defendant has helped other inmates develop their religious faiths." While there was evidence that defendant was involved in prison ministry, there was no evidence that his efforts had in fact aided in the development of another inmate's faith. There was evidence that defendant gave other inmates positive things to think about based on the Bible and that one inmate was attending Bible study more frequently due to defendant's efforts. There was no evidence, however, as to the effect of defendant's admonitions on other inmates or of the Bible study attendance on this one inmate. The evidence thus did not require a peremptory instruction that "defendant has helped other inmates develop their religious faiths." This assignment of error is overruled.

[28] Defendant next assigns error to the trial court's failure to intervene *ex mero motu* on a number of occasions during the State's sentencing phase argument to the jury. Argument that passes without objection by defense counsel at trial "must be gross indeed for this Court to hold that the trial court abused its discretion in not recognizing and correcting *ex mero motu* the comments regarded by defendant as offensive only on appeal." *Brown*, 327 N.C. at 19, 394 S.E.2d at 445. Further, in carrying out their duty to advocate zealously that the facts in evidence warrant imposition of the death penalty, prosecutors are permitted wide latitude in their arguments. *State v. Geddie*, 345 N.C. 73, 97, 478 S.E.2d 146, 158 (1996), *cert. denied*, — U.S. —, 139 L. Ed. 2d 43, 66 U.S.L.W. 3255 (1997).

Defendant first contends that the State improperly focused on one aspect of the concept of mitigation to the exclusion of others. The State repeatedly focused on the idea that mitigation is that which reduces moral culpability, while neglecting to argue that mitigating value may also be based on a defendant's age, character, prior record, mentality, education, habits, and environment. As we recognized when presented with substantially the same argument in *State v. Bishop*, 343 N.C. 518, 472 S.E.2d 842, although these factors "may be relevant considerations in a sentencing hearing, these words are not essential to the basic definition of a mitigating circumstance." *Id.* at 552, 472 S.E.2d at 860. It was not error for the trial court to abstain from intervention *ex mero motu* here.

[29] Defendant next contends that the trial court should have intervened *ex mero motu* when the State argued that the jury should not find defendant's voluntary consumption of alcohol and drugs mitigating. Defendant contends that the State's argument was tantamount to

misstating North Carolina law, which allows voluntary intoxication to be considered as mitigating evidence. The statement was not one of law, however, but one of advocacy; it did not tell the jury that it could not find this evidence mitigating, but that it should not. This was well within the wide latitude permitted to prosecutors in their arguments. It did not require intervention *ex mero motu.*

[30] Defendant next contends that the State's arguments regarding the mitigating circumstances which focused on defendant's dysfunctional family and his father's alcoholism warranted intervention *ex mero motu.* The State argued that "[e]very one of us grew up in a dysfunctional family"; that "you've probably got a dysfunctional family right now if you let the psychologists look at it and tell you about it"; that "[e]very one of us has got some kind of psychological problems, basically"; and that "[h]e didn't grow up any better or any worse than 95 percent of us and 95 percent of you." With regard to defendant's father being an alcoholic, the State argued, "[w]elcome, probably, to about 35 percent of the world." While these comments may have been oversimplifications, they were within the wide latitude allowed parties in hotly contested cases.

[31] Finally, defendant contends that the trial court should have intervened *ex mero motu* when the State argued that it was an insult to the jurors' intelligence for defendant to claim that his recent religious activity should be considered mitigating, as well as when the State sarcastically suggested that defendant's service as a pallbearer at the funeral of one of the victims should be included in the (f)(9) catchall mitigating circumstance. Neither of these arguments was so egregious that the trial court should have intervened in the absence of an objection by defendant. This assignment of error is overruled.

[32] Defendant next assigns error to the trial court's refusal to allow him to inform the jury that he was serving a federal sentence of life without parole for a prior murder conviction. Defendant contends specifically that the trial court erred in denying his motions (1) to permit *voir dire* of prospective jurors regarding their conceptions of parole eligibility, (2) to be allowed to inform the jury as to the law in North Carolina regarding parole eligibility on a life sentence for first-degree murder, and (3) to permit psychiatric testimony concerning defendant's parole ineligibility under his federal conviction and its effect on his current mental state and adjustment to incarceration. Defendant acknowledges that this Court has held contrary to his con-

tentions in *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1; *State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, 514 U.S. 1021, 131 L. Ed. 2d 224 (1995); and *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). We decline to revisit our prior holdings here.

[33] Defendant further contends that, following the State's final summation, the trial court erred by rejecting his request for a jury instruction informing jurors that defendant is ineligible for parole under his federal sentence. Defendant argues, based on *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994), that because the State argued defendant's future dangerousness, he was entitled to such an instruction.

Simmons involved a murder prosecution in South Carolina in which the jury's sentencing options were limited to either the death penalty or life imprisonment. According to the state law applicable to the defendant in *Simmons*, a life sentence meant imprisonment for life without the possibility of parole. During the sentencing phase argument, the prosecutor in *Simmons* argued that the question for the jury was "what to do with [the defendant] now that he is in our midst." *Id.* at 157, 129 L. Ed. 2d at 139. The prosecutor further argued that a death sentence would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.* The defendant requested that the trial court instruct the jury that the defendant would never be eligible for parole under South Carolina law. *Id.* at 158, 129 L. Ed. 2d at 139. The trial court refused to so instruct. *Id.* at 159-60, 129 L. Ed. 2d at 140.

The Supreme Court, in a plurality opinion, recognized that

> prosecutors . . . frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase; they urge the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison.

Id. at 163, 129 L. Ed. 2d at 142. The Court then noted:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. . . . Indeed, there may be no greater assurance of a defendant's future non-dangerousness to the public than the fact that he never will be released on parole.

Id. at 163-64, 129 L. Ed. 2d at 142. The Court limited its analysis to arguments by the State regarding dangerousness to the public, stating:

> Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff.

Id. at 165 n.5, 129 L. Ed. 2d at 143 n.5. It concluded:

> The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole.

Id. at 171, 129 L. Ed. 2d at 147.

The Court thus sought to protect against prosecutorial arguments that mislead jurors into believing that if they do not sentence a defendant to death, he will eventually be released from prison and once again be a threat to society. If a defendant would be imprisoned for life in the absence of a death sentence, then when the State makes such an argument, *Simmons* requires that the defendant be allowed to inform the jury of the nature of his life-without-parole sentence. If, on the other hand, the State refers to future dangerousness only in terms of dangerousness while incarcerated, the concerns of the Court in *Simmons* are not implicated.

Read as a whole, the State's closing argument here did not set up a false dilemma like that addressed in *Simmons*. During the course of the State's closing argument, the prosecutor commented on the proposed nonstatutory mitigating circumstance that defendant was not able to form close relationships with others. The State argued that "the people [defendant] gets close and intimate to, die," and "[t]hank God he doesn't get too close and intimate with people because they die." These statements referred to the evidence that defendant's murders had been perpetrated on women he had known for some period of time and with whom he had had sexual relations. This was not argumentation about defendant's future dangerousness.

Later, the prosecutor focused on the mitigating circumstance that defendant had exhibited good conduct in jail following his arrest. The

State argued that defendant "can control himself when he wants to control himself" and that the "[p]roblem is, you and I don't know when he's going to want to and when he's not, even in a jail cell." To the extent this argument implies that defendant may be dangerous in the future, the State clearly focused on the possibility of his dangerousness while incarcerated. The rule announced in *Simmons* is not triggered by arguments that a defendant may be dangerous while in prison. The potential for dangerousness in prison exists apart from eligibility for parole.

Focusing on the mitigating circumstance that defendant "would adjust well to prison life," the State argued, "[A]re you convinced he won't kill in prison? Are you convinced he won't kill now?" As described above, the rule in *Simmons* is not implicated by arguments about future dangerousness while incarcerated.

Finally, in the State's final remarks to the jury, the prosecutor argued:

> All I ask you to do is pay close attention to what Judge Johnson says and use your common sense . . . . When you know that someone has killed not just once, Lisa Ann Nadeau, not just twice, H[e]lisa Hayes, not just three times, Darien Hayes, not just four times, Philip Hayes. Four times, folks. What does it take? What does it take? There is only one way you can ensure that this Defendant does not kill again, and that is to impose the penalty that he has earned and worked for and deserves. I ask you to impose the death penalty on all three cases.

These remarks followed the State's argument that defendant's conduct "in a jail cell" could not be predicted and that it was possible he would kill again "in prison." Read in context, the State's argument does not present the type of danger that concerned the Supreme Court in *Simmons*. The trial court did not err by refusing to instruct the jury as to the nature of defendant's federal sentence. This assignment of error is overruled.

[34] Defendant next assigns error to the manner in which some of the jurors were polled regarding their recommendation of three death sentences. N.C.G.S. § 15A-2000(b) requires, in pertinent part:

> Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

N.C.G.S. § 15A-2000(b) (1997). The clerk in the trial court questioned each juror individually regarding each of the three death sentences. With respect to each, the clerk asked each juror:

> As to Count No. [], the jury has returned as its recommendation that the Defendant be sentenced to death. Is that your recommendation?

Following each juror's affirmative response, the clerk then asked each juror, "Do you still assent thereto?" Each juror answered this question affirmatively as well. During the questioning of three jurors, however, the clerk failed to ask, "Do you still assent thereto," with respect to one of defendant's murder convictions; and during the questioning of one juror, the clerk failed to ask, "Do you still assent thereto," with respect to two of defendant's murder convictions. Defendant argues that this omission amounts to a violation of N.C.G.S. § 15A-2000(b), thus entitling him to a new sentencing proceeding. We disagree.

N.C.G.S. § 15A-2000(b) requires the polling of the jury to establish "whether each juror concurs and agrees to the sentence recommendation returned." The clerk informed every juror with respect to all three of defendant's convictions that the jury had recommended "that the Defendant be sentenced to death." The clerk then asked every juror, again with respect to each of defendant's three convictions, "Is this *your* recommendation?" This questioning satisfies the requirements of N.C.G.S. § 15A-2000(b) because it establishes that each individual juror agreed with the sentence recommendation returned by the jury with respect to each of defendant's convictions. This assignment of error is overruled.

Defendant next raises several issues which he concedes this Court has decided against his position, including: (1) that North Carolina's capital sentencing scheme is unconstitutional; (2) that the short-form indictment drawn in accordance with N.C.G.S. § 15-144 is unconstitutional; (3) that the State should have been prohibited from exercising peremptory challenges to remove jurors who had expressed some hesitancy about being able to return a sentence of death; (4) that the trial court should have allowed defendant on *voir dire* to ask prospective jurors whether they could consider specific mitigating circumstances during the sentencing phase; (5) that the trial court's instruction that malice may be inferred from an intentional killing with a deadly weapon is unconstitutional; (6) that the trial court's refusal to grant defendant the right of allocution violated

his constitutional rights; (7) that the admission of evidence pertaining to the facts and circumstances surrounding defendant's prior violent felony violated his constitutional rights; (8) that the trial court's instruction to the jury that it might consider all of the evidence introduced during both phases of the trial in making a sentencing recommendation violated his constitutional rights; (9) that the trial court's instructions concerning the (e)(4) and (e)(11) statutory aggravating circumstances violated his constitutional rights; (10) that the trial court's definition of "mitigating circumstance" violated his constitutional rights; (11) that the trial court's failure to peremptorily instruct the jury with regard to certain proposed nonstatutory mitigating circumstances in spite of the lack of manifestly credible evidence supporting them violated his constitutional rights; (12) that the trial court's instructions regarding the weighing of aggravating and mitigating circumstances violated his constitutional rights; (13) that the (e)(3) statutory aggravating circumstance is unconstitutional; (14) that the (e)(4) statutory aggravating circumstance is unconstitutional; (15) that the (e)(5) statutory aggravating circumstance is unconstitutional; (16) that the (e)(9) statutory aggravating circumstance is unconstitutional; (17) that the (e)(11) statutory aggravating circumstance is unconstitutional; (18) that the trial court's refusal to instruct the jury that all twelve jurors must agree in order to sentence defendant to death and that if the jurors could not agree the trial court was required by law to impose a sentence of life imprisonment violated his constitutional rights; and (19) that the trial court's instructions regarding nonstatutory mitigating circumstances violated his constitutional rights. We have reviewed defendant's arguments, and we find no compelling reason to reconsider our prior holdings. These assignments are overruled.

[35] 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 circumstances found by the jury; (2) whether passion, prejudice, or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

With respect to the murder of Helisa Hayes, the jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the use of violence to the person; the murder was committed by defendant while he was engaged in the

commission of or an attempt to commit first-degree rape; and the murder was part of a course of conduct in which defendant engaged, and that course of conduct included the commission by defendant of other crimes of violence against another person or persons.

With respect to the murder of Phillip Hayes, the jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the use of violence to the person; the murder was committed for the purpose of avoiding or preventing a lawful arrest; the murder was especially heinous, atrocious, or cruel; and the murder was part of a course of conduct in which defendant engaged, and that course of conduct included the commission by defendant of other crimes of violence against another person or persons.

With respect to the murder of Darien Hayes, the jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the use of violence to the person; the murder was committed for the purpose of avoiding or preventing a lawful arrest; and the murder was part of a course of conduct in which defendant engaged, and that course of conduct included the commission by defendant of other crimes of violence against another person or persons.

We conclude that the record fully supports the jury's finding of these aggravating circumstances. 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.

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; *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, *cert. denied*, — U.S. —, — L. Ed. 2d —, 66 U.S.L.W. 3262 (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). This case is distinguishable from each of these. First, defendant here was convicted of three murders. This Court has never found a death sentence disproportionate in a multiple-murder case. *State v. Heatwole*, 344 N.C. 1, 30, 473 S.E.2d 310, 325 (1996), *cert. denied*, — U.S. —, 137 L. Ed. 2d 339 (1997). Second, all three of defendant's first-degree murder convictions were based on premeditation and deliberation, and one was also based on 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). Third, defendant was also convicted of the first-degree rape of his adult victim. "[T]his Court has never found a death sentence disproportionate in a case involving a victim of first-degree murder who was also sexually assaulted." *State v. Penland*, 343 N.C. 634, 666, 472 S.E.2d 734, 752 (1996), *cert. denied*, — U.S. —, 136 L. Ed. 2d 725 (1997). Finally, there are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain a sentence of death. *Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8. The jury found all four in this case: the (e)(3) and (e)(11) circumstances with regard to all three murders, the (e)(5) circumstance with regard to the murder of the adult victim, and the (e)(9) circumstance with regard to the murder of one of the child victims.

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. We conclude that the sentence of death is not disproportionate and hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

Justice FRYE dissenting.

I join Justice Webb's dissenting opinion, but with one caveat. *State v. Robinson,* 339 N.C. 263, 451 S.E.2d 196 (1994), *cert. denied,* 515 U.S. 1135, 132 L. Ed. 2d 818 (1995), seems at odds with *State v. Bond,* 345 N.C. 1, 478 S.E.2d 163 (1996), *cert. denied,* — U.S. —, 138 L. Ed. 2d 1022 (1997). Because *State v. Bond* is the more recent case, I would follow it.

Justice WEBB dissenting.

I dissent because I believe there were two errors in the trial requiring a new sentencing proceeding.

At a pretrial conference, the State indicated that if the defendant was found guilty, it would introduce evidence at the sentencing proceeding that the defendant had previously been convicted of first-degree murder and rape. The defendant's attorney then told the court that he wished to inform the jury during the *voir dire* that the defendant had been convicted previously of first-degree murder and ask each prospective juror whether he or she could still consider the mitigating circumstances before rendering a verdict. The court held that this would be a stake-out question and would not allow it.

Counsel may not pose hypothetical questions designed to elicit in advance what a juror's decision will be under a certain state of evidence or upon a given state of facts. Such questions tend to stake out the juror and cause him to pledge himself to a future course of action. *State v. Vinson,* 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated,* 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). In *State v. Bond,* 345 N.C. 1, 17, 478 S.E.2d 163, 170-71 (1996), *cert. denied,* — U.S. —, 138 L. Ed. 2d 1022 (1997), we held it was not a stake-out question when the district attorney during *voir dire* informed the jury of uncontroverted facts and asked the jurors whether they could impose the death penalty in view of these uncontroverted facts.

I believe we are bound by *Bond.* As in *Bond,* the defendant in this case wanted to inform the jurors of uncontroverted facts and ask them how these facts would affect their votes. He should have been allowed to do so.

The majority attempts to distinguish *Bond* from this case. It acknowledges that the predicate for this State's inquiry in

Bond involved an uncontroverted fact, but says this indicates only this Court's conclusion that the superior court did not abuse its discretion. The majority reads something in *Bond* that I do not read. As I read *Bond*, we held that if the jurors are informed of an uncontroverted fact and are asked how this fact would affect their votes, the question is not hypothetical and is not a stake-out question.

The majority contends that this case is governed by *State v. Robinson*, 339 N.C. 263, 273, 451 S.E.2d 196, 202 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995), in which we held it was an improper stake-out question to ask a juror if he could follow the judge's instructions and consider life in prison as a sentencing option if the juror found that the defendant had committed a murder in addition to the three for which he was being tried. This case is distinguished from *Robinson* in that the matter about which the defendant wanted to inquire in *Robinson* was controverted.

I also believe it was error for the superior court not to grant the defendant's request to instruct the jury that he is ineligible for parole under his federal sentence. The majority says this was unnecessary because the State's argument in regard to future dangerousness was limited to dangerousness while the defendant is in prison. I cannot agree. When the prosecuting attorney argued that "[t]here is only one way you can ensure that this Defendant does not kill again, and that is to impose the . . . death penalty," I believe *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994), required that the court instruct the jury as requested by the defendant. I do not believe this statement was so related to a previous argument that the jury would know the prosecuting attorney was referring only to killings in prison.

I vote for a new sentencing proceeding. *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994).

STATE OF NORTH CAROLINA v. JAMIE LAMONT SMITH

No. 233A96

(Filed 6 February 1998)

1. **Jury § 141 (NCI4th)— capital trial—jury voir dire—beliefs about parole—questions not permitted**

The trial court in a capital sentencing proceeding did not err by refusing to allow defendant to inquire, during jury selection, into the prospective jurors' attitudes and beliefs about parole where defendant was sentenced under the scheme in which the sentencing alternative to the death penalty is life in prison without parole, and the trial court instructed the jurors in accordance with N.C.G.S. § 15A-2002 that "if you recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment without parole."

2. **Evidence and Witnesses §§ 2670, 2671 (NCI4th)— disclosure of medical records—implicit necessity finding—no abuse of discretion**

The trial court did not err by ordering the disclosure of defendant's medical records from jail without a specific finding that disclosure was necessary to a proper administration of justice since such finding is implicit in the admission of the records into evidence. Furthermore, the trial court did not abuse its discretion in ordering the medical records disclosed where defendant sought to suppress statements he made to the police while in jail on the ground that he was suffering from controlled substance withdrawal symptoms and was in no condition mentally to give statements to the police, and the State sought to rebut that evidence with his medical records from jail. N.C.G.S. § 8-53.

3. **Jury § 256 (NCI4th)— peremptory challenge—racial discrimination—insufficient showing**

Defendant's showing that he is black and that the State peremptorily struck one black prospective juror was insufficient to establish a *prima facie* case of racial discrimination.

4. **Jury § 256 (NCI4th)— peremptory challenge—race-neutral reasons—prima facie inquiry not moot**

The *prima facie* case inquiry does not become moot when the State provides race-neutral reasons for its peremptory strike.

5. Homicide § 552 (NCI4th)— first-degree murder case—self-serving statement—insufficient to require instruction on second-degree murder

In this prosecution for first-degree murder and attempted first-degree murder arising from an apartment building fire set by defendant, defendant's self-serving statement to officers that he set the fire as a prank was not sufficient evidence of his lack of premeditation and deliberation to entitle him to an instruction on second-degree murder and attempted second-degree murder where the evidence, reasonably construed, indicates that defendant burned the apartment building in an attempt to eliminate witnesses who might be able to testify against him regarding his theft of mail from the apartment building; defendant told an officer that he became concerned about the mail theft being traced to him, so he and a companion decided to burn the building; the two men drove by the building late at night to observe the area, bought kerosene, and drove around before returning between two and three in the morning; defendant admitted that he poured kerosene in front of the apartment door of a woman whose credit card number he had stolen and used; and when the kerosene did not light, he splashed it up the stairs and into the stairwell and succeeded in lighting it. Any reasonable construction of the evidence indicates that the murder was both premeditated and deliberate.

6. Criminal Law § 478 (NCI4th Rev.)— prosecutor's improper question—curative instruction

After defendant's expert testified on cross-examination that he had not medicated defendant during incarceration because it would have interfered with diagnosis and defendant had not had problems with violence, any improper conduct by the prosecutor in asking the witness whether he "didn't hear that [defendant] beat up Richard Jackson or tried to rape him or anything like that" was sufficiently corrected by the trial court's curative instruction that the jury should not consider the question.

7. Criminal Law § 478 (NCI4th Rev.)— question by prosecutor—no prosecutorial misconduct

In a prosecution for murder and attempted murder by setting an apartment building on fire, the trial court did not err by permitting the prosecutor to ask defendant's expert witness whether

an intelligence test administered to defendant contained the question, "If you buy six dollars worth of gasoline and pay for it with a ten-dollar bill, how much change should you receive?" and, when the witness answered in the affirmative, to ask the witness, "He knew that one, didn't he?" Although defendant contended that the State asked the questions only for the rhetorical purpose of alluding to defendant's purchase of kerosene with which he set the fire, the questions did not resemble the prosecutorial misconduct condemned in *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33.

8. Criminal Law § 450 (NCI4th Rev.)— capital trial—prosecutor's argument—videotape—premeditation and deliberation—no reliance on prosecutor's judgment

Where, in describing evidence presented to prove premeditation and deliberation during closing argument in a prosecution for first-degree murder arising from an apartment building fire, the prosecutor referred to a convenience store videotape showing defendant purchasing kerosene used in starting the fire, the prosecutor's subsequent statement, "This is one of the better cases, ladies and gentlemen, that any jury in Buncombe County will ever see. You can see premeditation and deliberation" was not an improper argument asking the jury to rely on the prosecutor's judgment as an expert but merely focused on the unique evidence of premeditation and deliberation presented in the case. In any event, the argument was not so grossly improper as to require intervention by the trial court *ex mero motu.*

9. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—references to another murder victim—course of conduct aggravating circumstance

In a capital sentencing proceeding wherein evidence concerning defendant's rape, murder and burning of another woman less than one month after the murder in this case was properly admitted to support the (e)(11) course of conduct aggravating circumstance, the prosecutor's references in his final summation to the other murder victim did not amount to improperly asking the jury to sentence defendant to death for a crime for which he was not being tried but was a proper argument that defendant deserved the death penalty based on the evidence supporting the (e)(11) aggravating circumstance. N.C.G.S. § 15A-2000(e)(11).

10. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—prosecutor's argument—no due process for victims—no gross impropriety

Any denigration of defendant's constitutional rights that might be implied from the prosecutor's argument in a capital sentencing proceeding about due process rights afforded defendant by the trial and the absence of due process for the victims was not so grossly improper as to require intervention by the trial court.

11. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—comfortable life in prison—proper argument for death penalty

The trial court did not abuse its discretion in failing to intervene *ex mero motu* when the State argued in a capital sentencing proceeding that if defendant were sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television, since the argument merely emphasized the State's position that defendant deserved the death penalty rather than a comfortable life in prison.

12. Criminal Law § 1359 (NCI4th Rev.)— capital sentencing—two aggravating circumstances—same evidence—different aspects of defendant's character

The trial court did not err by submitting in a capital sentencing proceeding both the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in arson and the (e)(10) aggravating circumstance that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more then one person, even though both circumstances were based on the fact that defendant committed the murder by means of arson, since the (e)(5) circumstance addresses a different aspect of defendant's character than does the (e)(10) circumstance in that the (e)(5) circumstance is considered aggravating because it addresses the fact that defendant committed the murder while engaging in another felony, and the (e)(10) circumstance speaks to a distinct aspect of defendant's character that he not only intended to kill a particular person when he set fire to an apartment building but he disregarded the value of every human life in the building by using an accelerant to set the fire in the middle of the night. N.C.G.S. § 15A-2000(e) (5), (e)(10).

13. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—mitigating circumstance—no significant criminal history—absence of prejudice in submission

The trial court did not err to defendant's prejudice by submitting, over defendant's objection, the (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity where there are no extraordinary facts present that establish harm to defendant from the submission of this mitigating circumstance. N.C.G.S. § 15A-2000(f)(1).

14. Criminal Law § 1351 (NCI4th Rev.)— capital sentencing—Issues and Recommendation as to Punishment form—catchall circumstance—unanimity not required

The Issues and Recommendation as to Punishment form submitted to the jury in a capital sentencing proceeding did not unconstitutionally require unanimity from jurors in order to find the (f)(9) statutory catchall mitigating circumstance where both the form and the court's instruction explaining it made clear that the jury should find the circumstance if "one or more" of the jurors found it to exist. N.C.G.S. § 15A-2000(f)(9).

15. Criminal Law § 1402 (NCI4th Rev.)— death sentence not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in similar cases where the jury found as statutory aggravating circumstances that defendant had previously been convicted of a violent felony, that defendant committed the murder for the purpose of avoiding arrest, that defendant committed this murder while engaged in first-degree arson, that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, and that the murder was part of a course of conduct in which defendant committed crimes of violence against other persons; defendant burned an apartment building in the early morning hours by setting fire to kerosene poured in the building in an attempt to eliminate witnesses who might be able to testify against him regarding his theft of mail from the building; the victim died from smoke inhalation and two other tenants suffered severe burns and other injuries; and defendant admitted to setting additional fires.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Downs, J., at the 22 April 1996 Criminal Session of Superior Court, Buncombe County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for first-degree arson, conspiracy to commit first-degree arson, two counts of attempted first-degree murder, misdemeanor larceny, and credit card fraud was allowed 17 July 1997. Heard in the Supreme Court 15 December 1997.

Michael F. Easley, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State.

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

WHICHARD, Justice.

On 1 May 1995 the Buncombe County Grand Jury indicted defendant Jamie Lamont Smith for the attempted first-degree murder of and assault with a deadly weapon with intent to kill inflicting serious injury on Erin Conklin, conspiracy to commit first-degree arson, first-degree murder of David Cotton, attempted first-degree murder of Alison Kafer, first-degree arson, misdemeanor larceny, and misdemeanor financial transaction card fraud. Defendant was tried capitally at the 22 April 1996 Criminal Session of Superior Court, Buncombe County. He presented no evidence during the guilt/innocence phase of the trial. The jury found defendant guilty of all charges.

After a capital sentencing proceeding, the jury found the existence of five aggravating circumstances and seven mitigating circumstances and recommended a sentence of death for the first-degree murder of David Cotton. The trial court imposed the death sentence for this murder and further imposed consecutive sentences of imprisonment for defendant's other convictions. It arrested judgment on the conviction for assault with a deadly weapon with intent to kill inflicting serious injury on Erin Conklin. 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.

The State's evidence tended to show the following. In December 1994 defendant stole mail from Grace Apartments in Asheville, North Carolina, and acquired Pamela Acheson's Sears credit card number

from a Sears credit card bill in the stolen mail. Defendant used the credit card number to purchase clothes valued at $268.98 from a Sears catalog on 19 December 1994.

Early in the morning on 21 December 1994, defendant began to worry that the police could connect him to his mail theft. Defendant and a companion decided to destroy the evidence of the theft by setting fire to Grace Apartments. They purchased kerosene from the Hot Spot convenience store, put it in an antifreeze jug, and went to Grace Apartments sometime around 3:00 a.m. There, defendant poured half of the jug of kerosene along the hallway in front of Pamela Acheson's apartment. Defendant failed in his attempt to light this kerosene. He then splashed more kerosene up the stairs toward the second floor. Defendant laid the kerosene jug on the floor and lit it as he left the apartment complex. As defendant and his companion drove away, they could see fire raging in the building.

The fire spread rapidly and caused significant consequences. David Cotton died in his second floor apartment from smoke inhalation. Erin Conklin suffered severe burns to her hands and arms when the fire reached her as she hung out her window. She also suffered a broken neck when she fell from her window after her burning hands could no longer cling to the window ledge. Alison Kafer suffered severe burns over seventy percent of her body as well as severe inhalation injury to her lungs from breathing smoke.

Defendant confessed to setting the fire and to setting two other fires in apartment complexes. The State presented evidence of the additional fires during defendant's sentencing proceeding.

[1] In defendant's first assignment of error, he argues that the trial court erred in refusing to allow him to inquire, during jury selection, into the prospective jurors' attitudes and beliefs about parole. Defendant asserts that empirical evidence shows that jurors often do not believe that a defendant who is sentenced to life imprisonment will actually spend the rest of his or her life incarcerated. Defendant points to the opinions of this Court 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), and *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), to support this assertion. In both *Robinson* and *Quesinberry*, the defendants collaterally attacked their death sentences with juror affidavits that revealed the jurors' conceptions of parole eligibility for defendants sentenced to life imprisonment. At least one juror in

Robinson said she believed the defendant would be released in five to ten years if sentenced to life. *Robinson,* 336 N.C. at 124, 443 S.E.2d at 329. Jurors in *Quesinberry* similarly believed that the defendant might be paroled in ten years if given a life sentence. *Quesinberry,* 325 N.C. at 132, 381 S.E.2d at 686.

Here, defendant was sentenced under our current capital sentencing scheme in which the sentencing alternative to the death penalty is life in prison without parole. Under this scheme the trial court is statutorily required to "instruct the jury . . . that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (1997). The trial court did instruct the jurors that "if you recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment without parole." Defendant's trial counsel argued to the jury:

> [W]e're not kidding you about life in prison and life without parole. . . . That's what this law says. That's what the [G]eneral [A]ssembly says life without parole means, and that's what his Honor is going to tell you life in prison is, life without parole.

The jury thus was properly informed of the law regarding parole eligibility for defendants sentenced to life imprisonment.

The jurors in *Robinson* and *Quesinberry* did not receive such an instruction because they were instructed under our previous capital sentencing scheme in which a defendant sentenced to life was eligible for parole consideration after twenty years. *See* N.C.G.S. § 15A-1371(a1) (1983) (repealed by Act of Mar. 23, 1994, ch. 21, sec. 3, 1994 N.C. Sess. Laws 59, 60). In the absence of an instruction regarding parole ineligibility, such as the one given in this case, it is to be expected that "[m]ost jurors, through their own experience and common knowledge, know that a life sentence does not necessarily mean that the defendant will remain in prison for the rest of his life." *Quesinberry,* 325 N.C. at 135-36, 381 S.E.2d at 688. Once the jury has been instructed that life imprisonment means life without parole, however, we presume that the jury listens closely to the instruction, strives to understand and follow it, and does not believe the trial court is misinforming it as to the law. *State v. Neal,* 346 N.C. 608, 618, 487 S.E.2d 734, 740 (1997).

We have held that a trial court does not err by refusing to allow *voir dire* concerning prospective jurors' conceptions of the parole eligibility of a defendant serving a life sentence. *See State v.*

Chandler, 342 N.C. 742, 749, 467 S.E.2d 636, 640, *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). This issue was recently decided contrary to defendant's position in *Neal*, a case involving our current capital sentencing scheme under which defendant here was sentenced. *Neal*, 346 N.C. at 617-18, 487 S.E.2d at 739-40. We find no reason to revisit our prior holdings on this issue. This assignment of error is overruled.

[2] Defendant next argues that the trial court erred by ordering disclosure of defendant's medical records from jail. He contends this order violated his physician-patient privilege.

This privilege has no common law predecessor; it is entirely a creature of statute. *State v. Martin*, 182 N.C. 846, 849, 109 S.E. 74, 76 (1921). The governing statute provides, in pertinent part:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician . . . . Confidential information obtained in medical records shall be furnished only on the authorization of the patient . . . . *Any resident or presiding judge . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.*

N.C.G.S. § 8-53 (1986) (emphasis added). The decision that disclosure is necessary to a proper administration of justice "is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling." *State v. Drdak*, 330 N.C. 587, 592, 411 S.E.2d 604, 607 (1992). "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. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

Defendant does not argue that the trial court abused its discretion in ordering the medical records disclosed but rather that it failed to specifically find that disclosure was necessary to a proper administration of justice. N.C.G.S. § 8-53 does not require such an explicit finding. The finding is implicit in the admission of the evidence.

Defendant sought to suppress statements he made to the police while in jail by arguing that he was suffering from controlled sub-

stance withdrawal symptoms and would therefore have been in no condition mentally to give statements to the police. Defendant thus placed at issue his state of mind during the time he was in jail, and the State properly sought to rebut that evidence with his medical records from jail. Defendant makes no argument, and we perceive no reason to believe, that the trial court abused its discretion in ordering the medical records disclosed. This assignment of error is overruled.

[3] Defendant next argues the trial court erred by denying his challenge to the State's peremptory strike of one black prospective juror. Defendant argued to the trial court that the strike was racially motivated, in violation of the equal protection principles recognized in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The trial court ruled that defendant had not made the requisite *prima facie* showing of purposeful racial discrimination. *Id.* at 96, 90 L. Ed. 2d at 87-88. We 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.*

State v. Cummings, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997). Defendant has shown only that he is black and that the State peremptorily struck one black prospective juror. This is insufficient to establish a *prima facie* case of racial discrimination. *See State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995) (concluding the State's peremptory excusal of two of four black prospective jurors was insufficient to establish a *prima facie* case); *State v. Ross*, 338 N.C. 280, 286, 449 S.E.2d 556, 561 (1994) ("The mere facts that defendant is a member of a cognizable racial group and that the prosecutor used one peremptory challenge to exclude a member of defendant's race do not raise the necessary inference of discrimination on account of the juror's race.").

[4] The prosecutor and the trial court mentioned the following race-neutral reasons as possibly supporting the State's peremptory strike: (1) this venireman had been arrested for assault on a female; (2)

defense counsel had once represented this venireman in a traffic matter; (3) this venireman indicated that he had a bachelor's degree in psychology, and there would be psychological testimony in this case; and (4) a Hispanic venireman had already been accepted for jury duty. Defendant argues that when the State provides race-neutral reasons for its peremptory strike, the *prima facie* case inquiry becomes moot under this Court's analysis in *Cummings*, 346 N.C. 291, 488 S.E.2d 550. We disagree. While in *Cummings* we examined the race-neutral reasons the State volunteered after the trial court had found no *prima facie* showing of purposeful discrimination, *id.* at 308-10, 488 S.E.2d at 560-62, it was not necessary to do so. Because we hold that the trial court correctly ruled that defendant failed to make a *prima facie* showing of racial discrimination, we need not examine the validity of any race-neutral reasons for the challenge. This assignment of error is overruled.

[5] Defendant next assigns error to the trial court's refusal to instruct the jury as to second-degree murder with regard to one victim and attempted second-degree murder with regard to another. Murder in the first degree, the crime of which defendant was convicted, is the "intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Brown*, 300 N.C. 731, 735, 268 S.E.2d 201, 204 (1980). A defendant charged with first-degree murder based on premeditation and deliberation is entitled to an instruction on second-degree murder only if the evidence, reasonably construed, tended to show a lack of premeditation and deliberation or if it would permit a jury rationally to find the defendant guilty of second-degree murder while acquitting him of first-degree murder. *State v. Morston*, 336 N.C. 381, 402, 445 S.E.2d 1, 13 (1994).

Defendant notes that the trial testimony of two law enforcement officers regarding defendant's custodial statements revealed that he claimed he had set the fire as a "prank." He argues that this is affirmative evidence of his lack of premeditation and deliberation, thus entitling him to an instruction on second-degree murder and attempted second-degree murder. We disagree.

The evidence, reasonably construed, indicates that defendant burned the apartment building in an attempt to eliminate witnesses who might be able to testify against him regarding mail theft. Defendant himself told a law enforcement officer that he became

concerned about the mail theft being traced to him, so he and a companion decided to burn the building. The two men drove by the building late at night to observe the area, bought kerosene, and then drove around before returning between two and three in the morning when most of the tenants would be at home and asleep. Defendant admitted that he poured kerosene directly in front of the apartment door of the woman whose credit card number he had stolen, the one witness necessary to convict him of his crime. When the kerosene did not ignite, he splashed it up the stairs and into the upper stairwell and succeeded in igniting it.

In light of these facts, defendant's self-serving statement that he set the fire as a prank was not sufficient to support an instruction on second-degree murder. Any reasonable construction of the evidence indicates that the murder was both premeditated and deliberate. No rational jury could have found defendant guilty of second-degree murder while acquitting him of first-degree murder, or guilty of attempted second-degree murder while acquitting him of attempted first-degree murder. This assignment of error is overruled.

[6] Defendant next argues that the trial court erred by allowing improper conduct by the State during the cross-examination of one of defendant's witnesses as well as during the State's closing arguments in both the guilt/innocence and penalty phases. Defendant's first complaint involves the State's cross-examination of one of defendant's expert witnesses. During cross-examination Dr. Pete Sansbury testified that he had not medicated defendant during his incarceration because it would have interfered with diagnosis and was not necessary because defendant had not had problems with violence. The following exchange then took place:

> Q: You didn't hear that he beat up Richard Jackson or tried to rape him or anything like that?
>
> > MR. AUMAN [defense counsel]: Objection.
> >
> > COURT: Sustained.
> >
> > MR. AUMAN: Motion to strike.
> >
> > COURT: Don't consider that question just asked by the assistant district attorney.

Any improper conduct by the State during this exchange was corrected by the trial court's prompt curative instructions. *See State v. Sparrow*, 276 N.C. 499, 514, 173 S.E.2d 897, 907 (1970).

[7] Defendant next complains about the State's later questioning of this witness. Referring to an intelligence test administered to defendant, the State asked the witness about several of the individual test questions. Among these the State asked about a question that read, "If you buy six dollars' worth of gasoline and pay for it with a ten-dollar bill, how much change should you get back?" The witness affirmed that this question was in the test, and the State then asked, "He knew that one, didn't he?" Defendant contends that the State asked this question only for the rhetorical purpose of alluding to defendant's purchase of the kerosene with which he set the fire. Defendant argues this was improper behavior similar to that criticized by this Court in *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994).

In *Sanderson* this Court addressed a situation in which the prosecutor engaged in improper conduct throughout the sentencing proceeding. *Id.* at 7, 442 S.E.2d at 37. With regard to the prosecutor's cross-examination of the defendant's expert witness, we observed that "[h]e insulted her, degraded her, and attempted to distort her testimony," *id.* at 11, 442 S.E.2d at 40, and that he "maligned, continually interrupted and bullied" her, *id.* at 15, 442 S.E.2d at 41. The questions here do not at all resemble the prosecutorial conduct condemned in *Sanderson*. The trial court did not err by allowing the questioning complained of here.

[8] Defendant next complains of a single statement made during the State's closing argument. In describing the evidence presented to prove premeditation and deliberation, the State referred to a videotape from the convenience store showing defendant calmly purchasing kerosene. The State then told the jury, "This is one of the better cases, ladies and gentlemen, that any jury in Buncombe County will ever see. You can see premeditation and deliberation." Defendant argues this was an improper argument which asked the jury to rely on the prosecutor's judgment as an expert. Defendant did not, however, object to this argument at trial.

"In deciding whether the trial court improperly failed to intervene *ex mero motu* to correct an allegedly improper argument of counsel at final argument, our review is limited to discerning whether the statements were so grossly improper that the trial judge abused his discretion in failing to intervene." *State v. Holder*, 331 N.C. 462, 489, 418 S.E.2d 197, 212 (1992). Viewed in context, the State's argument appears to focus on the unique evidence of premeditation and deliberation presented here, a videotape that the jury could actually see,

rather than the prosecutor's judgment about that evidence. The State's argument was not, in any event, so grossly improper as to require intervention *ex mero motu* by the trial court.

Defendant next complains of three arguments made in the State's final summation during the penalty phase. Again, defendant failed to object to any of these arguments at trial; thus, we review the trial court's failure to intervene *ex mero motu* for an abuse of discretion. *Id.*

[9] First, defendant argues that the State made improper reference to another person murdered by defendant, a person whose murder was not charged here. At two points during the State's final summation, the prosecutor referred to Kelli Froemke, a woman whom defendant raped, murdered, and burned less than one month after committing the crimes at issue here. Defendant contends these references amounted to improperly asking the jury to sentence defendant to death for a crime for which he was not being tried. Evidence concerning the murder of Kelli Froemke and the burning of her apartment building was properly admitted during the sentencing phase to support the (e)(11) aggravating circumstance that the murder in this case was part of a course of conduct including other crimes of violence against other persons. N.C.G.S. § 15A-2000(e)(11) (1997). The State was entitled to argue to the jury that defendant deserved the death penalty based on the evidence supporting this aggravating circumstance. The trial court did not err by allowing the State to refer to defendant's other victim.

[10] Second, defendant contends the following argument by the State denigrated defendant's exercise of his constitutional rights to trial, to counsel, and to due process of law:

> Now we're getting to the justice part. This is where we get to the justice part. This is the law in civilized society in Buncombe County and the state of North Carolina, in Asheville, North Carolina. This is due process. You have sat here, you have watched it. You have watched due process. We have our trials; we have them during the daytime. Anybody can come and watch. That's due process. Anybody can call anybody they want as a witness. They can cross-examine anyone they want. Don't you think that "Phillip" Cotton and Erin [Conklin] and Alison Kafer would have liked just a little bit of due process? But no. Your due process is you can hang out a window or suffocate or you can burn up . . ., and you've got two seconds to decide. You

> have a few moments to decide. That's the due process that they were given.

Any denigration of defendant's constitutional rights that may be implied from this argument was not so grossly improper as to require intervention *ex mero motu* by the trial court.

[11] Finally, defendant argues that the State improperly argued to the jury that if defendant were sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television. Defendant concedes that this Court has rejected a similar argument in *State v. Alston*, 341 N.C. 198, 251-52, 461 S.E.2d 687, 716-17 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996). Here, as in *Alston*, the State's argument "served to emphasize the State's position that the defendant deserved the penalty of death rather than a comfortable life in prison." *Id.* at 252, 461 S.E.2d at 717. The trial court did not abuse its discretion by failing to intervene *ex mero motu*. This assignment of error is overruled.

[12] Defendant next contends that the trial court erred by submitting both the (e)(5) aggravating circumstance, that the murder was committed while defendant was engaged in arson, and the (e)(10) aggravating circumstance, that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. Defendant argues it was impermissibly duplicative to submit both circumstances because both were based on the fact that defendant committed the murder by means of arson. While generally the same evidence may not be used to support more than one aggravating circumstance, *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979), this Court has held it permissible to use the same evidence to support multiple aggravating circumstances when the circumstances are directed at different aspects of a defendant's character or the murder for which he is to be punished. *State v. Hutchins*, 303 N.C. 321, 354, 279 S.E.2d 788, 808 (1981).

Defendant argues that this case is similar to *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), in which this Court held it error to submit both the (e)(5) aggravating circumstance, that the defendant committed the murder while engaged in the commission of a robbery, and the (e)(6) aggravating circumstance, that the murder was committed for pecuniary gain. *Id.* at 236, 354 S.E.2d at 451. In *Quesinberry*, given the particular facts of that case, this Court was not persuaded that the (e)(6) circumstance, which addressed the

pecuniary gain *motive* of the murder, truly differed from the (e)(5) circumstance, which addressed the *act* of armed robbery. The Court observed that "[t]he facts of this case . . . reveal that defendant murdered the shopkeeper for the single purpose of pecuniary gain by means of committing an armed robbery." *Id.* at 238, 354 S.E.2d at 452. The Court then noted that "[n]ot only is it illogical to divorce the motive from the act under the facts of this case, but the same evidence underlies proof of both factors." *Id.* at 239, 354 S.E.2d at 452. Finally, in holding it error to submit both circumstances, the Court observed that

> in the particular context of a premeditated and deliberate robbery-murder where evidence is presented that the robbery was attempted or effectuated for pecuniary gain, the submission of both the aggravating factors enumerated at N.C.G.S. 15A-2000(e)(5) and (6) is redundant and . . . one should be regarded as surplusage.

Id. at 239, 354 S.E.2d at 453.

This case differs from *Quesinberry*, however. While in *Quesinberry* the pecuniary gain *motive* could not be logically separated from the *act* of armed robbery, in this case the (e)(5) circumstance addresses a different aspect of defendant's crime than does the (e)(10) circumstance. The (e)(5) circumstance is considered aggravating because it addresses the fact that defendant committed the murder while engaging in another felony, arson. The (e)(10) circumstance, that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, on the other hand, addresses more than the fact that defendant committed murder while perpetrating another felony. This circumstance speaks to a distinct aspect of defendant's character, that he not only intended to kill a particular person when he set fire to the apartment building, but that he disregarded the value of every human life in the building by using an accelerant to set the fire in the middle of the night. This aspect of defendant's character and actions is not fully captured by the (e)(5) circumstance, though both rely on the same evidence. Therefore, it was not error for the trial court to submit both circumstances. This assignment of error is overruled.

[13] Defendant next argues that the trial court erred by submitting to the jury the (f)(1) mitigating circumstance, that defendant had no significant history of prior criminal activity. Defendant notes that he

requested that the trial court not submit this circumstance because the evidence showed that he had a history of illegal drug use, had committed the crimes of breaking and entering and larceny, had pled guilty to another arson, and had previously been in prison. Defendant contends that no reasonable juror could have found this not to be a significant history of prior criminal activity, thus making it error for the trial court to submit the circumstance.

The statute governing capital sentencing proceedings provides, in pertinent part:

> In all cases in which the death penalty may be authorized, the judge *shall include* in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) *which may be supported by the evidence* . . . .

N.C.G.S. § 15A-2000(b) (emphasis added). This Court has explained the law regarding submission of the (f)(1) mitigating circumstance as follows:

> The trial court is required to determine whether the evidence will support a rational jury finding that a defendant has no significant history of prior criminal activity. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

State v. Mahaley, 332 N.C. 583, 597, 423 S.E.2d 58, 66 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). "We have also recognized that common sense, fundamental fairness, and judicial economy require that any reasonable doubt regarding the submission of a statutory or requested mitigating factor be resolved in favor of the defendant." *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 825 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

We held, in a case with similar facts, that assuming *arguendo* that it was error to submit the (f)(1) circumstance, it was not prejudicial to the defendant. *State v. Walker*, 343 N.C. 216, 222-24, 469 S.E.2d 919, 922-23 (defendant had an attempted second-degree mur-

der conviction and a history of illegal drug dealing), *cert. denied*, — U.S. —, 136 L. Ed. 2d 180 (1996). We stated that "[a]bsent extraordinary facts not present in this case, the erroneous submission of a mitigating circumstance is harmless." *Id.* at 223, 469 S.E.2d at 923. There are no extraordinary facts present that meaningfully distinguish this case from *Walker*. The State did not violate the *Walker* proscription against arguing to the jury that defendant had requested this mitigating circumstance when he in fact had objected to it. *See id.* Accordingly, following *Walker*, we hold that the trial court did not err to defendant's prejudice by submitting the (f)(1) mitigating circumstance over his objection.

For the same reasons, we reject defendant's argument that even if a reasonable juror could have found that defendant had no significant prior criminal history, it was nevertheless a violation of defendant's federal constitutional right to effective assistance of counsel for the trial court to submit this circumstance over defendant's objection. There are no "extraordinary facts" present that establish harm to defendant from the submission of this mitigating circumstance. *Id.* This assignment of error is overruled.

[14] In his next assignment of error, defendant contends that the "Issues and Recommendations as to Punishment" form submitted to the jury was unconstitutional. Defendant argues that this form, in violation of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), required unanimity from jurors in order to find the (f)(9) statutory catchall mitigating circumstance. This argument lacks merit.

The form clearly explained that the jurors should consider whether "[o]ne or more of us finds [the catchall] mitigating circumstance to exist." Further, the trial court properly instructed the jury on this mitigating circumstance as follows:

> If any one or more of you find [the catchall mitigating circumstance], by a preponderance of the evidence, you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. And if none of you find any such circumstance to exist, then you would so indicate by writing "no" in that space, and there are lines provided after that if you care to articulate what that circumstance or circumstances may be, any one or more of you. If you do not care to, then you don't have to insert anything.

Both the form and the instruction explaining it made clear that the jury should find the circumstance if "one or more" of the jurors found it to exist. Neither required jury unanimity. This assignment of error is overruled.

Defendant next raises two issues which he concedes this Court has decided against his position: (1) that the trial court violated his constitutional rights when it instructed the jury that it need not consider nonstatutory mitigators unless it found that those circumstances had mitigating value, and (2) that the trial court's instruction giving jurors discretion to consider mitigation under sentencing Issues Three and Four was unconstitutional. We have reviewed defendant's arguments, and we find no compelling reason to reconsider our prior holdings. These assignments are overruled.

Having found no error in either the guilt/innocence phase of defendant's trial or the capital sentencing proceeding, we are required to review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether passion, prejudice, or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary 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). We compare the instant case to others in the pool that "are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). Whether

the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

[15] 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, — U.S. —, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 573-74, 364 S.E.2d 373, 375 (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 our proportionality review, it is proper to compare the present case to those cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). We find the instant case distinguishable from each of the seven cases in which we found the death penalty to be disproportionate. In none of those cases did the jury find the existence of five statutory aggravating circumstances. Here, the jury found each of the five aggravating circumstances submitted to it, including: (1) that defendant had been previously convicted of a felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) that defendant committed this murder for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4); (3) that defendant committed this murder while engaged in first-degree arson, N.C.G.S. § 15A-2000(e)(5); (4) that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, N.C.G.S. § 15A-2000(e)(10); and (5) that the murder was part of a course of conduct in which defendant committed crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11).

Further, multiple aggravating circumstances were found to exist in only two of the disproportionate cases, *Bondurant* and *Young*. Both of these cases are distinguishable from the instant case. In *Young* this Court focused on the failure of the jury to find the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance. *Young*, 312 N.C. at 691, 325 S.E.2d at 194. Here, the jury found each aggravating circumstance submitted to it. In *Bondurant*

this Court emphasized that immediately after defendant's senseless act of murder, defendant exhibited a concern for the victim's life and remorse for his action by seeking assistance for the victim. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. Here, defendant demonstrated no such concern or remorse. He saw Grace Apartments in flames but never called the fire department. Further, he admitted to setting additional fires. For the foregoing reasons, we conclude that each case where this Court has found a sentence of death disproportionate is distinguishable from this case.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all of the cases in the pool when engaging in 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 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 those in which juries have consistently returned recommendations of life imprisonment.

Finally, we noted in *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995), that similarity of cases is not the last word on the subject of proportionality. *Id.* at 287, 446 S.E.2d at 325. Similarity "merely serves as an initial point of inquiry." *Id.*; *see also 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.

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 on the charge of first-degree murder and a fair capital sentencing proceeding, free from prejudicial error.

NO ERROR.

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS AND WILLIAM E. PEELE, JR., CO-ADMINISTRATORS OF THE ESTATE OF

ROSE GIBSON PEELE; JIMMIE BROADY, ADMINISTRATOR OF THE ESTATE OF MINNIE THOMPSON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, ADMINISTRATOR OF THE ESTATE OF PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, ADMINISTRATOR OF THE ESTATE OF DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. AND NELSON BARRINGTON; CO-ADMINISTRATORS OF THE ESTATE OF JOSEPHINE BARRINGTON, PEARLIE GAGNON, ADMINISTRATRIX OF THE ESTATE OF JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, ADMINISTRATOR OF THE ESTATE OF ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON AND LINDA OWENS, CO-ADMINISTRATORS OF THE ESTATE OF FRED BARRINGTON, JR.; ADA BLANCHARD; AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA MCRAE; SANDRA MCPHAUL; EVANDER LYNCH, ADMINISTRATOR OF THE ESTATE OF JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, ADMINISTRATRIX OF THE ESTATE OF ROSIE ANN CHAMBERS; BERNARD CAMPBELL; ROSE CHAPPELL; MARTHA NELSON, ADMINISTRATRIX OF THE ESTATE OF MARTHA RATLIFF; DEBORAH PITTMAN; ANNETTE PIERCE; ZELDA ROBERTS; RICHARD ROBERTS; CLEO REDDICK; DELORES PAUNCY; BOBBY QUICK; DELORES QUICK; LULA SMITH, ADMINISTRATRIX OF THE ESTATE OF CYNTHIA RATLIFF; WILLIE QUICK; MARY BRYANT; DONNA BRANCH DAVIS; DORIS BOSTIC; RACHEL INGRAM; RICHARD M. LIPFORD; ALICE S. WEBB, ADMINISTRATRIX OF THE ESTATE OF JEFFREY A. WEBB; BARBARA SHAW; FLORA C. BANKS, ADMINISTRATRIX OF THE ESTATE OF MARGARET TERESA BANKS; JAMES THOMAS BANKS; LINDA CAROL ELLISON; PAUL SAUNDERS, ADMINISTRATOR OF THE ESTATE OF MARY LILLIAN WALL; JOANNE PAGE, ADMINISTRATRIX OF THE ESTATE OF GAIL VIVIAN CAMPBELL; VELMA BUTLER; ROY FUNDERBURK; MARY SUE RICH, ADMINISTRATRIX OF THE ESTATE OF DONALD BRUCE RICH; PEGGY BROWN, ADMINISTRATRIX OF THE ESTATE OF MARY ALICE QUICK; CAROLYN M. RAINWATER; MARGIE MORRISON, ADMINISTRATRIX OF THE ESTATE OF MICHAEL A. MORRISON; SHERMAN MCDONALD; WILLIAM G. HAMILTON AND MARIE A. HAMILTON; BRENDA F. BAILEY; ELTON RAY CAFFERATA; PAMELA S. COOPER; WILLIAM KELLY, JR., ADMINISTRATOR OF THE ESTATE OF BRENDA GAIL KELLY; CATHERINE DAWKINS, ADMINISTRATRIX OF THE ESTATE OF PHILIP R. DAWKINS; JEANETTE L. SMITH; RUBY BULLARD SELLERS; REGGIE SMITH; CYNTHIA FAYE GRAHAM; WILLIAM WINSTON SMITH, SR.; WILLIAM NOCONDA SMITH, JR.; BETTY EUBANKS, ADMINISTRATRIX OF THE ESTATE OF CYNTHIA S. WALL; BETTY B. WHITE; DARRELL LEONARD WILKINS, ADMINISTRATOR OF THE ESTATE OF ROSE LYNETTE JACOBS WILKINS; ANGELA LYNN COULTER, ADMINISTRATRIX OF THE ESTATE OF JOSIE MAE COULTER; FELTON ALBERT HATCHER; PATRICIA W. HATCHER; MILDRED LASSITER MOATES; OLIN DELLANO MOATES; GLADYS FAYE NOLAN; RONNIE CARROL NOLAN; HOMER F. JARRELL, ADMINISTRATOR OF THE ESTATE OF BERTHA JARRELL; LORETTA SCOTT; LORETTA GOODWIN; BENITA INGRAM; MATTIE P. NICHOLSON; MARY ANN DAIREN; MONICA MCDOUGALD; ALLISON GRIFFIN; BRENDA MCDOUGALD; AND ROY S. MORRISON, JR. v. NORTH CAROLINA DEPARTMENT OF LABOR AND NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION

No. 81PA97

(Filed 6 February 1998)

1. State § 24 (NCI4th)— Tort Claims action—failure to inspect chicken plant—public duty doctrine—applicability

The Industrial Commission erred in an action arising from injuries and deaths in a fire at a chicken plant which had never received a state safety inspection by denying defendants' Rule 12 motions to dismiss plaintiffs' Tort Claims action. Under the Tort Claims Act, the State is liable only under circumstances in which a private person would be liable, and private persons do not possess public duties. The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person would be liable. Any change in the State's sovereign immunity to permit the State to be liable in a situation in which a private person could not should be made by the legislature.

2. Public Officers and Employees § 35 (NCI4th)— Tort Claims Act—failure to inspect chicken plant—public duty doctrine—*Braswell* applied

Although plaintiffs in an action arising from a fire in a chicken processing plant which had never received a safety inspection argued that the public duty doctrine bars only claims against local governments for failure to prevent crimes, the policies underlying recognition of the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, apply here. Just as the limited resources of law enforcement were recognized in *Braswell*, the limited resources of the defendants in this case are recognized and a judicially imposed overwhelming burden of liability for failure to prevent every employer's negligence resulting in injuries or deaths to employees is refused.

3. State § 46 (NCI4th)— Tort Claims Act—fire in chicken plant—public duty doctrine—sufficiency of pleadings

Plaintiffs' specific claims under the Tort Claims Act arising from injuries and deaths in a fire at a chicken plant fail because the duty to inspect imposed upon defendants under N.C.G.S. § 95-4 is for the benefit of the public, not individual claimants, so that plaintiffs' claims fall within the public duty

doctrine. Plaintiffs must allege facts placing the claims within one of the exceptions to the doctrine, but they make no such "special relationship" or "special duty" allegations. Nothing in this opinion overrules the myriad reported and unreported cases allowing recovery against the State under the Tort Claims Act.

Justice ORR dissenting.

Justice FRYE 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, 125 N.C. App. 288, 480 S.E.2d 410 (1997), affirming a decision of the Industrial Commission denying defendants' motions pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), to dismiss plaintiffs' claims. Heard in the Supreme Court 20 November 1997.

Adams, Kleemeier, Hagan, Hannah & Fouts, P.L.L.C., by J. Alexander S. Barrett; Kitchin, Neal, Webb & Futrell, by Henry L. Kitchin; Fuller, Becton, Slifkin & Bell, by Charles L. Becton; Edward L. Bleynat, Jr., and Woodrow W. Gunter, II, for plaintiff-appellees.

Michael F. Easley, Attorney General, by David Roy Blackwell, Elisha H. Bunting, Jr., and Ralf F. Haskell, Special Deputy Attorneys General, for defendant-appellants.

WHICHARD, Justice.

Plaintiffs commenced this negligence action against defendants, the North Carolina Department of Labor and its Occupational Safety and Health Division, pursuant to the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1 (1993) (amended 1994). Plaintiffs sought damages for injuries or deaths resulting from a fire at the Imperial Foods Products plant in Hamlet, North Carolina. Defendants moved, pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), to dismiss plaintiffs' claims. Deputy Commissioner D. Bernard Alston denied the motions. The full Commission affirmed and adopted his decision.

The Court of Appeals affirmed. It held that N.C.G.S. § 95-4, which describes the authority, power, and duties of the Commissioner of Labor, imposed a duty upon defendants to inspect the workplaces of North Carolina and that the breach of this duty gave rise to plaintiffs' action for negligence. *Stone v. N.C. Dep't of Labor*, 125 N.C. App. 288,

291-92, 480 S.E.2d 410, 413 (1997). It further held that the public duty doctrine did not apply to actions brought against the State under the Tort Claims Act. *Id.* at 291, 480 S.E.2d at 412. On 5 June 1997 this Court granted defendants' petition for discretionary review.

Because these claims arise upon defendants' motions to dismiss, we treat plaintiffs' factual allegations, which follow, as true. *See Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 646, 423 S.E.2d 72, 72 (1992). On 3 September 1991 a fire started in a hydraulic line near a deep fat fryer in the Imperial Foods Products chicken plant (the plant) in Hamlet, North Carolina. The fire grew in intensity and spread rapidly through the interior of the plant. Plaintiffs are either former employees of Imperial Foods who suffered injury in the fire or personal representatives of the estates of employees who died in the fire. They or their decedents (plaintiffs) were lawfully inside the plant at the time of the fire. Plaintiffs could not easily escape the plant or the fire because the exits in the plant were unmarked, blocked, and inaccessible. After the fire the North Carolina Department of Labor and its Occupational Safety and Health Division (defendants) conducted their first and only inspection in the plant's eleven-year history of operation. As a result of this inspection, defendants discovered numerous violations of the Occupational Safety and Health Act of North Carolina (OSHANC), including the plant's inadequate and blocked exits and inadequate fire suppression system. Defendants issued eighty-three citations against Imperial Foods Products for violations of OSHANC standards. Plaintiffs alleged, *inter alia*, that defendants had a duty under OSHANC to inspect the plant, defendants breached that duty by failing to inspect until after the fire, defendants' breach caused plaintiffs' injuries or deaths, and plaintiffs' injuries or deaths entitle them to damages in tort.

Plaintiffs have asserted a common law negligence action against the State under the Tort Claims Act. To recover damages under the common law of negligence, private parties "must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Kientz v. Carlton*, 245 N.C. 236, 240, 96 S.E.2d 14, 17 (1957).

Defendants argue that plaintiffs have failed to state a claim upon which relief can be granted because defendants did not owe a duty to the individual plaintiffs due to the public duty doctrine. This doctrine, articulated in *Braswell v. Braswell,* 330 N.C. 363, 370-71, 410 S.E.2d 897, 901-02 (1991), provides that governmental entities and their

agents owe duties only to the general public, not to individuals, absent a "special relationship" or "special duty" between the entity and the injured party. Defendants also contend that because plaintiffs have not stated a claim, the Industrial Commission lacks personal and subject matter jurisdiction over defendants.

The issue, whether the Court of Appeals erred in affirming the Industrial Commission's denial of defendants' motions to dismiss, requires resolution of three sub-issues. First, does the public duty doctrine apply to claims brought under the Tort Claims Act? Second, if it does, does it apply to state agencies like defendants? Finally, if the doctrine applies, does an exception to it apply as well?

[1] The Tort Claims Act provides that the State is liable "under circumstances where [it], if a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C.G.S. § 143-291. Defendants recognize that the State, like a private person, may be subject to liability for negligence under the terms of this legislation. They contend, however, that they are not liable to plaintiffs because under the public duty doctrine, they owe no legal duty to the individual plaintiffs. Defendants assert that their obligation under N.C.G.S. § 95-4 to inspect workplaces in North Carolina serves the public at large, not individual employees. *See Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901. Plaintiffs assert, and the Court of Appeals held, that the public duty doctrine does not apply to bar plaintiffs' claims because it does not apply to the liability of a private person, and under the Tort Claims Act, the State is liable if a private person would be. We disagree, and we reverse the Court of Appeals.

In construing the Tort Claims Act to determine whether it incorporates the common law public duty doctrine, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Legislative purpose is first ascertained from the plain words of the statute." *Id.* Under the Act the State is liable *only* under circumstances in which a private person would be. N.C.G.S. § 143-291.

Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public. *See Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.) (recognizing that if the State were held liable for a failure to enforce laws and regulations establishing safety standards for construction and use of buildings, the State's *status* as a governmental

entity "would be the only basis *for* holding a city or state liable, because only a governmental entity possesses the authority to enact and enforce laws for the protection of the public"), *cert. denied*, 444 U.S. 835, 62 L. Ed. 2d 46 (1979). If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*. The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person could be liable. *See Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901-02. Thus, the plain words of the statute indicate an intent that the doctrine apply to claims brought under the Tort Claims Act.

Our determination of legislative intent is also "guided by . . . certain canons of statutory construction." *Swain Elec. Co.*, 328 N.C. at 656, 403 S.E.2d at 294. Acts, such as the Tort Claims Act, that permit suit in derogation of sovereign immunity should be strictly construed. *Floyd v. N.C. State Highway & Pub. Works Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955), *overruled in part on other grounds by Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 284-85, 192 S.E.2d 273, 277 (1972). Statutes in derogation of the common law likewise should be strictly construed. *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950).

In passing the Tort Claims Act, the legislature incorporated the common law of negligence. *MacFarlane v. N.C. Wildlife Resources Comm'n*, 244 N.C. 385, 387, 93 S.E.2d 557, 559-60 (1956), *overruled in part on other grounds by Barney*, 282 N.C. at 284-85, 192 S.E.2d at 277. The public duty doctrine forms an integral part of that common law. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Plaintiffs ask us to construe the Tort Claims Act broadly so as to erase a fundamental common law doctrine. We decline to do so. Until the legislature clearly expresses that immunity is to be waived even in situations in which the common law public duty doctrine would otherwise apply to bar a negligence claim, we construe the Tort Claims Act as incorporating the existing common law rules of negligence, including that doctrine. *See Floyd*, 241 N.C. at 464, 85 S.E.2d at 705; *McKinney*, 231 N.C. at 542, 58 S.E.2d at 109. Any change in the State's sovereign immunity to permit the State to be liable in a situation in which a private person could not should be made by the legislature, not by this Court under the guise of construction.

[2] Plaintiffs argue that even if the public duty doctrine applies to claims brought under the Tort Claims Act, it does not apply in this case. They contend that it applies only to claims against *local governments* for failure to *prevent crimes.*[1]

When this Court first recognized the public duty doctrine, it discussed the doctrine in terms of the facts before it. *See Braswell*, 330 N.C. at 370, 410 S.E.2d at 901 (addressing the public duty doctrine as it applied to a plaintiff's claims against the Sheriff of Pitt County for failure to provide her with protection). In the context of a claim against a sheriff, we explained that, under the doctrine, "a *municipality* and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish *police protection* to specific individuals." *Id.* (emphasis added).

Once this Court recognized the doctrine, however, our Court of Appeals applied it to a variety of local governmental operations. *See, e.g., Simmons v. City of Hickory*, 126 N.C. App. 821, 823, 487 S.E.2d 583, 585 (1997) (holding that the public duty doctrine applied to bar claim against city for negligently inspecting homes and issuing building permits and stating that "[t]he public duty doctrine has been applied to a variety of statutory governmental duties"); *Sinning v. Clark*, 119 N.C. App. 515, 518, 459 S.E.2d 71, 73 (holding that the public duty doctrine applied to bar a claim against a municipality, the city building inspector, and the city code administrator for gross negligence in an inspection of a home and stating that this doctrine "has been applied by our [c]ourts to various statutory governmental duties"), *disc. rev. denied*, 342 N.C. 194, 463 S.E.2d 242 (1995); *Davis v. Messer*, 119 N.C. App. 44, 55-56, 457 S.E.2d 902, 909 (holding that the public duty doctrine applied to a claim against a fire chief, a fire department, a town, and a county for negligence in their failure to complete their effort to extinguish a fire in plaintiff's home), *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 508 (1995); *Prevette v. Forsyth County*, 110 N.C. App. 754, 758, 431 S.E.2d 216, 218 (holding that the

1. Plaintiffs also argue that *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (1985) (permitting plaintiff to bring a tort action against the Department of Transportation), supports their position that the public duty doctrine does not bar their claim and that they may recover from the State for its negligent failure to take action that could have protected its citizens. *Jordan* was decided before this Court recognized the public duty doctrine in *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. The Court in *Jordan* did not consider whether plaintiff's claims were barred by the public duty doctrine. Thus, *Jordan* is inapplicable to the question of whether the public duty doctrine applies to claims against the State. Plaintiffs make no argument that the holding and reasoning of *Jordan* fall within one of the exceptions to the public duty doctrine.

public duty doctrine applied to bar wrongful death claim against county and against director and employee of the county animal control shelter for failing to protect plaintiff from dogs which defendants knew were dangerous), *disc. rev. denied*, 334 N.C. 622, 435 S.E.2d 338 (1993). The Court of Appeals has also applied the doctrine to a state agency. *See Humphries v. N.C. Dep't of Correction*, 124 N.C. App. 545, 547, 479 S.E.2d 27, 28 (1996) (holding that the doctrine barred claim against Department of Correction for alleged negligence in the supervision of a probationer), *disc. rev. improvidently allowed*, 346 N.C. 269, 485 S.E.2d 293 (1997). While this Court has not heretofore applied the doctrine to a state agency or to a governmental function other than law enforcement, we do so now.

The policies underlying recognition of the public duty doctrine in *Braswell* support its application here. In *Braswell* we explained that the doctrine was necessary to prevent "an overwhelming burden of liability" on governmental agencies with "limited resources." *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901. We stated:

> "The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort . . . would inevitably determine how the limited police resources . . . should be allocated and without predictable limits."

Id. at 371, 410 S.E.2d at 901 (quoting *Riss v. City of New York*, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968)). Just as we recognized the limited resources of law enforcement in *Braswell*, we recognize the limited resources of defendants here. Just as we there "refuse[d] to judicially impose an overwhelming burden of liability [on law enforcement] for failure to prevent every criminal act," *id.* at 370-71, 410 S.E.2d at 901, we now refuse to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees. "[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all." *Grogan*, 577 S.W.2d at 6 (emphasis added).

Further, we do not believe the legislature, in establishing the Occupational Safety and Health Division of the Department of Labor in 1973, intended to impose a duty upon this agency to each *individual* worker in North Carolina. Nowhere in chapter 95 of our General Statutes does the legislature authorize a private, individual right of action against the State to assure compliance with OSHANC standards. Rather, the most the legislature intended was that the Division prescribe safety standards and secure some reasonable compliance through spot-check inspections made "as often as practicable." N.C.G.S. § 95-4(5) (1996). "In this way the safety conditions for work[ers] in general would be improved." *Nerbun v. State*, 8 Wash. App. 370, 376, 506 P.2d 873, 877 (holding that Washington Department of Labor did not owe an absolute duty to individual workers and concluding that the Washington legislature intended only that the Department act on behalf of workers in general), *disc. rev. denied,* 82 Wash. 2d 1005 (1973).

[3] Because we hold that the legislature intended the public duty doctrine to apply to claims against the State under the Tort Claims Act, we now apply the doctrine to the facts of this case. The general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals. *See Braswell*, 330 N.C. at 370, 410 S.E.2d at 901; *see also DeFusco v. Todesca Forte, Inc.*, 683 A.2d 363, 365 (R.I. 1996) (recognizing that with certain exceptions, "[t]he public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons"). Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for a failure to carry out its statutory duties. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Absent a duty, there can be no liability. *Kientz*, 245 N.C. at 240, 96 S.E.2d at 17.

In *Braswell* this Court recognized two exceptions to the public duty doctrine "to prevent inevitable inequities to certain individuals." *Braswell,* 330 N.C. at 371, 410 S.E.2d at 902. It explained that exceptions to the doctrine exist: (1) where there is a special relationship between the injured party and the governmental entity; and (2) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. *Id.* These exceptions are narrowly construed and

applied. *Id.* at 372, 410 S.E.2d at 902; *see also Sinning*, 119 N.C. App. at 519, 459 S.E.2d at 74.

Plaintiffs assert that defendants owed each claimant a duty under N.C.G.S. § 95-4 to inspect the Imperial Foods Products plant. This statute provides that the Commissioner of Labor is "charged with the duty" to visit and inspect "at reasonable hours, as often as practicable," all of the "factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State." N.C.G.S. § 95-4(5). It also imposes on the Commissioner a duty to enforce these inspection laws and request prosecution of any violations found. N.C.G.S. § 95-4(6). It creates no private cause of action for individual claimants for violations of OSHANC.

Although N.C.G.S. § 95-4 imposes a duty upon defendants, that duty is for the benefit of the public, not individual claimants as here. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Plaintiffs' claims thus fall within the public duty doctrine, and to state claims for actionable negligence, plaintiffs must allege facts placing the claims within one of the exceptions to the doctrine. They make no such "special relationship" or "special duty" allegations. The claims therefore must fail. *See id.* at 371, 410 S.E.2d at 902.

The dissent asserts that we have eviscerated the Tort Claims Act, nullified it, rendered it obsolete, left it purposeless, absolved the State of all liability, and barred all negligence claims against the State. These assertions are hyperbolic and overwrought. A myriad of reported and unreported cases, covering a great variety of fact situations, have allowed recovery against the State under the Tort Claims Act. Nothing in this opinion even hints at the overruling of those cases. Absent legislative change, the Act functions and will continue to function as it has for almost half a century. We simply hold, with sound reason and substantial grounding in the law of both this and other jurisdictions, that in this limited new context, not heretofore confronted by this Court, the Act was not intended to and does not apply absent a special relationship or special duty.

For the reasons stated, the Court of Appeals erred in affirming the Industrial Commission's denial of defendant's motions to dismiss. The decision of the Court of Appeals is therefore reversed, and the case is remanded to the Court of Appeals for further remand to the Industrial Commission for entry of an order of dismissal.

REVERSED AND REMANDED.

Justice ORR dissenting.

The majority opinion erroneously takes a limited and obscure common law concept, the public duty doctrine, which has traditionally applied only to municipalities and their law enforcement responsibilities, and expands the doctrine's application to effectively eviscerate the Tort Claims Act. As a result, the right of individuals to sue the State for negligent acts committed by the State, a right expressly conveyed by the General Assembly, is nullified without the support of any precedential authority permitting such an indulgence. Therefore, I dissent for the reasons which follow.

The recognition of the public duty doctrine in this country is traced to an 1855 decision of the United States Supreme Court. *South v. Maryland*, 59 U.S. 396, 15 L. Ed. 433 (1855). The case involved a negligence suit brought by plaintiffs to recover against a sheriff and his sureties on an official bond for failure to keep the peace and protect the plaintiffs. The Court stated:

> Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.

Id. at 403, 15 L. Ed. at 435. The Court went on to examine several earlier British decisions and concluded that because no special right was alleged, the cause of action failed.

In reviewing this seminal decision and other authorities, I can find no common law basis for the majority taking the public duty doctrine beyond the original bounds of local law enforcement. In *South*, where the doctrine first originated, the public duty doctrine was applied to address only municipalities and law enforcement. This was also the case in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), where this Court first adopted the public duty doctrine. In *Braswell*, the doctrine was again only applied to factors involving a municipality and law enforcement. There, Justice Meyer, writing for a unanimous Court, explained:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals.

Id. at 370, 410 S.E.2d at 901. Neither *South* nor *Braswell* justify the majority's sudden expansion or enlargement of the doctrine to situations beyond local law enforcement. No mention is made or reference cited by the majority which authorizes this extension, and no common law authority is offered. This judicial amplification, therefore, is not justified, and to the extent that other state jurisdictions have bent and skewed the common law to expand the doctrine, we cannot, and should not, follow such an ill-advised course.

Prior to the Tort Claims Act, the State and its agencies were immune from tort liability under the doctrine of sovereign immunity. *Gammons v. N.C. Dep't of Human Resources*, 344 N.C. 51, 54, 472 S.E.2d 722, 723-24 (1996). This common law doctrine of immunity extended protection to government entities for liability for injuries caused by government acts no matter how wanton or reckless the government's conduct. *Davis v. Messer*, 119 N.C. App. 44, 52, 457 S.E.2d 902, 907, *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 508 (1995); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985). When the General Assembly enacted the Tort Claims Act in 1951, it partially waived or eliminated the State's sovereign immunity by allowing actions to be brought against the State in cases where negligence was committed by its employees in the course of their employment. *Gammons*, 344 N.C. at 54, 472 S.E.2d at 723-24. The purpose and effect of the Act was to remove the blanket immunity traditionally enjoyed by the State under the English common law and permit injured persons to recover against the State for negligent acts, *Lyon & Sons, Inc. v. N.C. State Bd. of Educ.*, 238 N.C. 24, 27, 76 S.E.2d 553, 555 (1953), or omissions, *Phillips v. N.C. Dep't of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986) (1977 amendment to the Act extended State's liability to include negligent omisisons). To ensure this, the legislature made the Act expressly provide that the State is liable "under circumstances where [it], if a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C.G.S. § 143-291(a) (1996).

In the case *sub judice*, plaintiffs assert negligence claims against the State for its alleged failure to inspect the Imperial Foods Products plant. The public duty doctrine, as enunciated in *Braswell*, does not apply in this case because here: (1) the suit is against the State, not a municipality as in *Braswell*; and (2) the suit involves failure to inspect, not failure to provide police protection as in *Braswell*. Enlarging the doctrine as the majority does in this case means that it will be extended beyond its traditional realm of protecting local law

enforcement and will apply to circumstances outside those identified in *Braswell*. The public duty doctrine, moreover, should not be applied here because, unlike in *Braswell*, this suit was brought under the Tort Claims Act. The public duty doctrine should not be used to *grant the State immunity* when the express intent of the Tort Claims Act was to *remove immunity* and make the State liable for its wrongs. Granting immunity to the State under the public duty doctrine makes the Tort Claims Act virtually obsolete. Thus, not only does *Braswell* not justify extending immunity, but the specific language and underlying policy of the Tort Claims Act precludes such an expansion.

The majority, however, attempts to justify its decision on the grounds that the public duty doctrine applies because: (1) The Tort Claims Act requires the State to be treated like a private person and private persons do not have public duties; (2) The Tort Claims Act incorporates the common law and therefore incorporates the public duty doctrine; (3) The *Braswell* policies support application of the doctrine; and (4) Under OSHANC, the General Assembly never intended for a duty to be imposed. All of these arguments are untenable.

First, it is patently unreasonable to interpret the Act's requirement that the State be treated like a private person as absolving the State of all liability. The very reason for this language is to eliminate the common law doctrine of sovereign immunity. The intent is to allow an individual to assert a suit against the State, the same suit an individual could assert against a private person or entity. The legislative intent of the Act was not to take this right away, especially since there was no liability to take away when this language was chosen and the Act adopted. If the language concerning treatment like a private person had been intended to mean what the majority says it means, i.e., that the State receives immunity, the Act would have no purpose. If that had been the case, the legislature could have just left sovereign immunity in place.

In addition to clashing with the intent of the Act, the majority's interpretation of this language also approves an oblique reading of the Act which necessitates a kind of acrobatic reasoning. The majority asserts that the legislative request to treat the State as a private person really means that the State has immunity. This does not make sense. The legislature did not intend to be so obtuse as to ostensibly take immunity away from the State, yet by including language requir-

ing treatment like a private person, grant it back that very same immunity under the public duty doctrine. Such reasoning would require the Court to read between the lines and discover a whole line of reasoning in the one sentence innocuously addressing treatment like a private person. If the legislature had intended to grant the State immunity by requiring that it be treated like a private person it could have simply said such.

The majority's second argument, that the Act incorporates the public duty doctrine because it incorporates the common law, is also erroneous. As previously noted, the public duty doctrine originated in the United States Supreme Court case *South v. Maryland*, 59 U.S. 396, 15 L. Ed. 433 (1855). Thereafter, "the public duty doctrine was widely accepted by most state courts." *Ezell v. Cockrell*, 902 S.W.2d 394, 397 (Tenn. 1995). When most states abolished sovereign immunity by statute, the doctrine came under attack. *Id.* at 398. Some state courts abolished the doctrine, arguing that it was simply sovereign immunity under another guise and to apply it was inconsistent with statutes that eliminated immunity. *Id.* Other states, such as Georgia, limited the application of the public duty doctrine to apply only in situations involving police protection. *Hamilton v. Cannon*, 267 Ga. 655, 482 S.E.2d 370 (1997).

In North Carolina, the common law tradition of the public duty doctrine was never extended by this Court beyond its limited application to municipalities and law enforcement. Second, the North Carolina legislature has never adopted or recognized the public duty doctrine. In fact, this Court only recognized the doctrine for the first time in 1991, and only then, the Court recognized the defense in the most narrow of terms. To argue, as the majority does, that by enacting the Tort Claims Act in 1951, the Legislature somehow incorporated the expansive public duty doctrine enunciated by the majority is at best, simply wrong.

In its third argument, the majority asserts that the *Braswell* rationale of preventing enormous liability on agencies with limited resources applies here as well. This is misplaced. First, damages are capped under the Tort Claims Act. The "General Assembly amended N.C.G.S. § 143-291(a) so that damages are capped at $150,000 for causes arising on or after 1 October 1994." *Parham v. Iredell County Dept. of Social Services*, 127 N.C. App. 144, ——, 489 S.E.2d 610, 613 (1997). Thus, the majority's fear of an "overwhelming burden of liability" has already been directly addressed by the General Assembly

which has chosen, in its legislative capacity, to limit liability as it deemed necessary.

Also, the potential for liability and circumstances in *Braswell* and in this case are very different. In *Braswell*, there was a potential for overwhelming and unlimited liability because the plaintiff was claiming that the police failed to protect her from an unpredictable criminal act. If the police could be liable for such failures, the city would endure enormous liability for all criminal acts it allegedly failed to prevent. In this case, we are dealing with inspections which are required to be carried out on a regular, predictable basis. Here, the duty to perform is clearly set out and can be accomplished. It is feasible. Also, although there may be the inclination to protect the State from suit, this case does not involve determining how "limited police resources should be allocated," as was the issue in *Braswell*. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 901. Instead, this case is more similar to what we differentiated in *Braswell*, where we stated that dealing with police resources was "quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided." *Id.* at 371, 410 S.E.2d at 901-02. Thus, the policies articulated in *Braswell* are also inapplicable.

The fourth and final argument offered by the majority is that OSHANC did not impose a duty to conduct investigations. This is incorrect because N.C.G.S. § 95-4 provides that the Commissioner of Labor is "*charged with the duty*" to visit and inspect the factories for violations. It is unlikely that the legislature intended inspections only "as often as practicable," as the majority asserts, when it used such express language and included an extended list of requirements or actions that the Commissioner was required to take in order to fulfill this mandated duty.

It must be emphasized that the legislature, by removing sovereign immunity, made a policy decision to allow negligence suits against the state under circumstances and limitations imposed by the Tort Claims Act. Likewise, to the extent the legislature wants to limit lawsuits in the future which are similar to the one before us, it can certainly amend the Act—or abolish it altogether and reimpose sovereign immunity. It is unnecessary and inappropriate for this Court to become the protector of the legislative treasury by undoing what the representatives of the public voted to accomplish.

Finally, it should be noted that other commentators have recognized the many valid, cogent arguments which have been made

against extending the public duty doctrine to cases such as this one. As one author noted in his critique of the doctrine:

> [f]irst, the application of the doctrine allows governmental entities to use the shield of sovereign immunity when the legislature no longer mandates such immunity. Second, the application of the doctrine requires that plaintiffs injured by a negligent official suffer solely because of the governmental status of the tortfeasor. Third, the application of the doctrine promotes incompetence by providing no meaningful incentive for the governmental entity to provide the services of optimal quality. Fourth, even with the elimination of the doctrine, plaintiffs must still prove breach of duty, causation, and damages; a vigorous task just like in any other negligence action. Finally, the wide availability of liability insurance allows a governmental entity limited to pecuniary exposure while still compensating the injured individual.

Frank Swindell, *Municipal Liability for Negligent Inspections* in Sinning v. Clark—*A "Hollow" Victory for the Public Duty Doctrine,* 18 Campbell L. Rev. 241, 250-51 (1996). Moreover, other writers have noted that many "jurisdictions [have] abrogated the doctrine of sovereign immunity because of the degree of injustice it caused." John Cameron McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine,* 32 Vill. L. Rev. 505, 529 (1987). By resurrecting sovereign immunity in the guise of the public duty doctrine, the majority perpetuates this injustice and disregards the mandate of the Tort Claims Act to protect injured citizens from government negligence.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. T.D.R.

No. 172PA97

(Filed 6 February 1998)

1. Infants or Minors § 141 (NCI4th)— jurisdiction over juvenile—transfer to superior court for trial as adult—order immediately appealable

The Court of Appeals erred by holding that an order entered by the district court transferring jurisdiction over a juvenile to superior court for trial as an adult pursuant to N.C.G.S. § 7A-608

is subject to appellate review by the Court of Appeals only "after entry of a final judgment by the superior court." Rather, a juvenile transfer order entered by the district court is a "final" order of the court in the juvenile matter within the meaning of N.C.G.S. § 7A-666(2) so that such order is immediately appealable to the Court of Appeals. The case of *In re Green*, 118 N.C.App. 336, 453 S.E.2d 191 is overruled to the extent that it may be read as holding to the contrary.

2. Infants or Minors § 99 (NCI4th); Criminal Law § 586 (NCI4th Rev.)— juvenile defendant—superior court—flagrant violation of rights—dismissal of indictment

Once the district court has transferred jurisdiction over a juvenile to the superior court, the superior court has authority, on motion of the juvenile defendant, to review criminal pleadings filed against the defendant in superior court and to dismiss those charging instruments if defendant's rights were "flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C.G.S. § 15A-954(a)(4).

3. Infants or Minors § 99 (NCI4th)— juvenile—transfer to superior court for trial—right to hearing

When read *in pari materia*, N.C.G.S. §§ 7A-608, -609, and -610 were intended by our legislature to provide a juvenile the right to a hearing on the issue of whether his case should be transferred to the superior court for trial as in the case of an adult and the rights, among others, to be represented by counsel in accordance with N.C.G.S. § 7A-584, to testify as a witness in his own behalf, to call and examine witnesses, and to produce other evidence in his own behalf.

4. Appeal and Error § 471 (NCI4th)— abuse of discretion defined

An abuse of discretion is established only upon a showing that a court's actions are manifestly unsupported by reason; further, any ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. Any such abuse of discretion is *a fortiori* "gross" or "manifest" as those terms have been used in prior cases of the appellate courts of this state, there being but one type of abuse of discretion.

5. Criminal Law § 246 (NCI4th Rev.)— motion for continuance—discretion of court—appellate review

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and the trial court's ruling thereon will not be disturbed unless it is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision. However, if the motion to continue is based on a constitutional right, the trial court's ruling thereon presents a question of law that is fully reviewable on appeal.

6. Criminal Law § 276 (NCI4th Rev.); Infants or Minors § 99 (NCI4th)— juvenile defendant—hearing on transfer to superior court—denial of further continuance—no abuse of discretion or constitutional error

The district court did not abuse its discretion or commit any constitutional error in denying a juvenile defendant's motion for a further continuance of his hearing on whether jurisdiction of rape and burglary charges should be transferred to superior court for trial of defendant as an adult in order that independent psychological evaluation could be performed and offered as evidence at the hearing where the district court allowed both defendant and the State to be heard on the motion to continue before ruling; defendant offered no explanation as to why the three months he had to prepare for the hearing was insufficient time for him to secure any necessary evidence; defendant submitted no affidavits to the district court indicating any fact that might be proved if the continuance were granted; and the district court had continued the hearing date more than once and entered orders assisting defendant in gathering evidence when requested.

7. Infants or Minors § 99 (NCI4th)— juvenile defendant—probable cause hearing—transfer issue—statutory and actual notice—continuance properly denied

The district court did not err in denying a continuance of a transfer hearing on the ground that the juvenile defendant did not have notice that the issue of transfer of jurisdiction to the superior court would be considered at the probable cause hearing since the applicable statutes give notice that, upon a finding of probable cause, either the juvenile or the prosecutor may make a motion for transfer of jurisdiction to the superior court and that the district court may immediately proceed to a ruling on such

motion, and statements by defendant's counsel indicated that defendant had notice in fact that the hearing on the issue of transfer of jurisdiction would or might be held immediately upon a finding of probable cause.

8. Infants or Minors § 99 (NCI4th)— juvenile defendant—transfer of jurisdiction to superior court—improper remand of jurisdiction to district court

The superior court erred by vacating indictments against a juvenile and purportedly remanding jurisdiction to the district court on the basis of its findings and conclusion that there was no competent expert evidence before the district court on the issue of the availability of rehabilitative services for defendant as a juvenile where an expert witness for the State testified on this issue; defendant failed to object to her testimony or to request that the court make findings of fact; there was sufficient evidence to support a finding that the witness was an expert; and it will be presumed that the court found the witness to be an expert before admitting her testimony even though there was no specific finding to this effect.

On appeal of right pursuant to N.C.G.S. § 7A-30(1) of an order of the Court of Appeals, 125 N.C. App. 209, 483, S.E.2d 193 (1997), vacating an order entered on 7 February 1997 by LaBarre, J., in Superior Court, Durham County. On 8 May 1997, the Supreme Court allowed discretionary review of additional issues. Heard in the Supreme Court 14 October 1997.

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

Kevin P. Bradley for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, by Sandy S. Ma and Deborah K. Ross, Children's Law Center, by Phillip H. Redmond, Jr., amici curiae.

MITCHELL, Chief Justice.

By juvenile petitions filed 22 August 1996, defendant, then fifteen years old, was alleged to be delinquent by reason of his having committed first-degree rape and first-degree burglary. A hearing was held pursuant to N.C.G.S. §§ 7A-608 and -609 in District Court, Durham County, on 3 December 1996 before the Honorable Carolyn D. Johnson, District Court Judge. Defendant waived his right to present

evidence and stipulated that probable cause did exist. Defendant then requested a two-week continuance in order that independent psychological evaluations could be performed and offered as evidence concerning the issue of whether his case should be transferred to Superior Court for his trial as an adult. The District Court denied the continuance and then proceeded to take evidence on the question of transfer. At the conclusion of the hearing, the District Court entered an order finding probable cause as to both rape and burglary and transferring jurisdiction over defendant to Superior Court for defendant's trial as an adult.

On 16 December 1996, defendant was indicted by the grand jury of Durham County for first-degree rape and first-degree burglary. Subsequently, on 21 January 1997, defendant was indicted for first-degree kidnapping.

On 15 January 1997, defendant filed a motion in Superior Court, Durham County, to dismiss the indictments against him and to remand jurisdiction of his case to the Juvenile District Court. On 24 January 1997, a hearing on defendant's motion to dismiss was held in the Superior Court, Durham County, before the Honorable David Q. LaBarre. On 29 January 1997, defendant filed an amended motion to dismiss. On 7 February 1997, the Superior Court entered an order making findings and concluding *inter alia* that "[t]he District Court . . . [had] denied the Juvenile-Defendant Due Process of law and fundamental fairness by its refusal to hear or consider the juvenile's evidence with regard to the appropriateness of retaining jurisdiction in the District Court Division." The order went on to vacate and dismiss the indictments against defendant and to remand jurisdiction to the District Court for a new hearing as to whether the District Court should retain jurisdiction or transfer jurisdiction over the juvenile to the Superior Court.

On 10 February 1997, the State filed a petition in the Superior Court, Durham County, for a temporary stay of its 7 February 1997 order. On 13 February 1997, the State filed a notice of appeal to the Court of Appeals. On 19 February 1997, the State filed in the Court of Appeals a petition for writ of supersedeas and motion for temporary stay. A temporary stay was entered by the Court of Appeals on 27 February 1997. On 28 February 1997, the Superior Court entered an order concluding that it lacked jurisdiction because of the filing of the notice of appeal with the Court of Appeals and denying the State's motion for reconsideration.

On 10 March 1997, the State filed a petition for writ of certiorari with the Court of Appeals. On 26 March 1997, the Court of Appeals entered an order as follows:

> Because orders of the district court transferring the jurisdiction over a juvenile to superior court pursuant to N.C. Gen. Stat. 7A-608 (1995) are subject to review only by [the Court of Appeals] after entry of a final judgment by the superior court, the superior court is without authority to review transfer orders. The order entered 7 February 1997 by Judge David Q. LaBarre, reviewing the district court's order transferring jurisdiction over the juvenile to the superior court, is hereby vacated. The matter is remanded to Superior Court, Durham County, for reinstatement of the indictments dismissed in that order and for further proceedings.

(Citation omitted.)

Defendant filed a notice of appeal of right with this Court asserting that this case directly involves a substantial constitutional question. His petition for discretionary review as to additional issues was allowed by this Court on 8 May 1997.

Defendant contends on this appeal that the Superior Court had authority under N.C.G.S. § 15A-954 to review the indictments against him and to dismiss them if it found that defendant's constitutional rights had been "flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." Before we can address this argument directly, however, it is necessary that we first address the order of the Court of Appeals which is before us.

Defendant expressly based his motion in the Superior Court to dismiss the criminal charges against him upon the authority of N.C.G.S. § 15A-954, and the Superior Court entered its order dismissing the indictments on the authority of this statute. Nevertheless, the order of the Court of Appeals vacating the order of the Superior Court did not address the issue of the Superior Court's authority to review indictments. Instead, the Court of Appeals addressed the question of whether the Superior Court had authority to directly review District Court orders transferring jurisdiction over juveniles pursuant to N.C.G.S. § 7A-608. The Court of Appeals held that such orders are subject to review only by the Court of Appeals and only after entry of a final judgment by the Superior Court on the criminal

charges against the defendant who is to be tried as an adult. This issue was not before the Court of Appeals and is before this Court only by virtue of the appeal from the order of the Court of Appeals addressing the issue. Nevertheless, we must first address this issue before reaching the issues addressed by the parties.

[1] Although the Court of Appeals followed its own precedents, it erred in holding that it is only after the entry of a final judgment by the Superior Court in a criminal case against a juvenile that the juvenile may appeal the earlier order of the District Court transferring jurisdiction. We conclude that N.C.G.S. § 7A-666 authorizes an immediate direct appeal to the Court of Appeals of a juvenile transfer order. The statute expressly provides:

> Upon motion of a proper party as defined in G.S. 7A-667, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. . . . A final order shall include:
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> . . . .
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> (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken[.]

N.C.G.S. § 7A-666(2) (1995). Because the juvenile transfer order terminates the jurisdiction of the District Court by transferring jurisdiction to the Superior Court, a juvenile transfer order entered by the District Court is a final order within the meaning of the statute. The transfer order in effect "determines" the District Court juvenile proceeding and prevents any further judgment of the District Court from which appeal might be taken. Although upon entry of a transfer order the Superior Court obtains jurisdiction over the case for trial and related matters, it does not have authority to conduct an appellate review of the District Court transfer order. Proper appellate jurisdiction lies with the Court of Appeals—not with the Superior Court—for direct appellate review of District Court orders transferring jurisdiction over juveniles to the Superior Court.

That part of the order of the Court of Appeals concluding that appellate jurisdiction to directly review juvenile transfers lies only with the Court of Appeals was correct. However, we find no authority for the Court of Appeals' conclusion in its order that juvenile transfer petitions entered by the District Court pursuant to N.C.G.S. § 7A-608 are subject to appellate review by the Court of Appeals only "after entry of a final judgment by the superior court." As we have

concluded that juvenile transfer orders entered by the District Court are "final" orders of the court in the juvenile matter within the meaning of N.C.G.S. § 7A-666(2), we further conclude that such orders are immediately appealable to the Court of Appeals. To the extent that it may be read as holding to the contrary, *In re Green*, 118 N.C. App. 336, 453 S.E.2d 191 (1995), is overruled. Therefore, the Court of Appeals erred in its conclusion in the present case that the juvenile transfer order was not immediately appealable to the Court of Appeals.

[2] We next turn to the issue raised on appeal by defendant, which was before the Court of Appeals but was not addressed in its order in the present case. The juvenile defendant argues that the Superior Court had the authority under N.C.G.S. § 15A-954 to review and dismiss the criminal indictments against him and to remand his case to the District Court for a new hearing on the issue of whether jurisdiction over his case should be transferred to the Superior Court. Although we have concluded that the Superior Court did not have appellate jurisdiction to directly review the District Court's transfer order, we nevertheless conclude that the Superior Court had authority, on motion of defendant, to review the indictments against defendant and to dismiss those charging instruments if defendant's rights were "flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C.G.S. § 15A-954(a)(4) (1997). To the extent the Court of Appeals' order in the present case may be read to imply that the Superior Court may not review criminal pleadings filed against a juvenile in Superior Court, that order is in error. Criminal pleadings against a juvenile in such situations are neither more nor less subject to review by the Superior Court than criminal pleadings against an adult.

By another argument, defendant contends that the Superior Court's order vacating the indictments against him and remanding his case to District Court was correct. He contends that this is so because the District Court violated his rights to due process of law and to the law of the land by transferring jurisdiction over him to the Superior Court without granting him an opportunity to present evidence. The Court of Appeals appears to have vacated the order of the Superior Court on the mistaken assumption that the Superior Court had conducted direct appellate review of the District Court's transfer order. Instead, we conclude that the Superior Court conducted an appropriate review of the proceedings in District Court that ulti-

mately resulted in the indictments against defendant, which review was authorized by N.C.G.S. § 15A-954. The Court of Appeals did not address the issue raised by defendant in this argument. Accordingly, it would be proper for this Court to remand this case to the Court of Appeals for it to consider and decide whether the Superior Court erred in its exercise of the jurisdiction granted it under N.C.G.S. § 15A-954. Nevertheless, in the interest of judicial economy, we now address that issue which was properly before the Court of Appeals and is properly before this Court.

The procedure for finding probable cause and transferring a juvenile to Superior Court for trial as an adult is governed by three provisions of the Juvenile Code. N.C.G.S. §§ 7A-608 to -610 (1995). The authority of the District Court to transfer jurisdiction over a juvenile to Superior Court for trial as in the case of an adult is provided by N.C.G.S. § 7A-608 as follows:

> The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.

Further, N.C.G.S. § 7A-609 provides that the District Court "shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 13 years of age or older when the offense was allegedly committed." N.C.G.S. § 7A-609(a). However, "[c]ounsel for the juvenile may waive in writing the right to the hearing and stipulate to a finding of probable cause." *Id.* At the probable cause hearing, the juvenile must be represented by counsel in accordance with N.C.G.S. § 7A-584 and may testify as a witness in his own behalf, call and examine other witnesses, and produce other evidence in his behalf. N.C.G.S. § 7A-609(b).

[3] Although the State argues that the rights accorded a juvenile by N.C.G.S. § 7A-609 apply only to the District Court's determination of probable cause, we conclude that the legislature intended that such rights also be accorded the juvenile with regard to the District Court's consideration and decision as to whether to transfer jurisdiction over the juvenile to Superior Court for trial as an adult. N.C.G.S. § 7A-610 appears clearly to contemplate that the decision as to whether to transfer jurisdiction ordinarily will be made as a part of the

same hearing at which probable cause is determined. Under N.C.G.S. § 7A-608, if the alleged felony constitutes a Class A felony and the District Court finds probable cause, the District Court is required to transfer the case to Superior Court for trial and would do so automatically as part of the order finding probable cause. Under N.C.G.S. § 7A-610, if probable cause is found and a transfer of jurisdiction to Superior Court is not required by reason of the alleged crime being a Class A felony, the prosecutor or the juvenile may immediately move that the case be transferred to Superior Court for trial as in the case of an adult. N.C.G.S. § 7A-610(a). The District Court may then immediately proceed to determine whether the needs of the juvenile or the best interest of the State will be served by transfer of the case to Superior Court. *Id.* We simply do not believe that the legislature intended that the rights accorded the juvenile by N.C.G.S. § 7A-609 would apply only with regard to the District Court's determination of probable cause and not to its decision to transfer the case, since the District Court is authorized to make both those determinations in a single hearing and, in the great run of cases, does so.

Additionally, to hold that a juvenile did not have the right to a hearing and to produce evidence in his own behalf on the issue of transfer of jurisdiction to the Superior Court for his trial as an adult would unnecessarily raise substantial questions as to the constitutionality of our procedures for conducting the transfer hearing contemplated by the statutes under consideration here. *See Breed v. Jones*, 421 U.S. 519, 528-29, 44 L. Ed. 2d 346, 355 (1975) (noting that the Supreme Court's response to the gap between the originally benign conception of the juvenile court system and its realities "has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions"); *see also In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970); *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527 (1967). Where one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question. *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977); *In re Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465-66, 223 S.E.2d 323, 328-29 (1976); *cf. Kent v. United States*, 383 U.S. 541, 557, 16 L. Ed. 2d 84, 95 (1966) (statutory construction "in the context of constitutional principles relating to due process and the assistance of counsel"). Accordingly, we conclude that when read *in pari materia*, N.C.G.S. §§ 7A-608, -609, and -610 were intended by our legislature to provide a juvenile the right to a hearing on the issue of whether his case should be transferred to the

Superior Court for his trial as in the case of an adult and the rights, among others, to be represented by counsel in accordance with N.C.G.S. § 7A-584, to testify as a witness in his own behalf, to call and examine witnesses, and to produce other evidence in his own behalf.

We next turn to the application of the foregoing principles to the facts presented by the record in this case. In the present case, the juvenile petitions were filed against the juvenile defendant, T.D.R., on 22 August 1996. Thereafter, continuances resulting from no fault on the part of the juvenile or the State prevented the holding of the probable cause hearing required by N.C.G.S. § 7A-609 until 3 December 1996—more than three months after the juvenile petitions had been filed. At the hearing, counsel for the juvenile waived the right to a hearing on the issue of probable cause and stipulated to a finding of probable cause. Counsel for defendant then requested a continuance of the hearing until 17 December 1996 in order to obtain forensic psychological evaluations of defendant and to gather evidence concerning treatment alternatives if the District Court retained jurisdiction over the juvenile. The State objected to the motion for continuance, and the District Court proceeded to take evidence on the issue of transfer. The district attorney put on evidence concerning the manner in which the victim alleged that the juvenile defendant had forcibly broken into her home, armed with a knife. The district attorney also presented evidence that defendant forced the victim to enter the bedroom of the home at knifepoint and take off her clothes and that defendant attempted to have sex with her. The district attorney then stated, "Your Honor, that would be all for the foundation of evidence for the Court."

Counsel for defendant renewed defendant's motion for a continuance to be allowed to gather evidence to present at a later time as to whether the District Court should retain jurisdiction. The district attorney then called Carolyn Cordasco, a coordinator of the Adolescent Sex Offender Program for Durham County Mental Health. She testified that she had worked exclusively with adolescent sex offenders for three years. She further testified:

> I've spent approximately twelve years with sex offenders and I spent five years in the prison system in Kansas, starting sex offender programs and working there, and then five years here in North Carolina. And I started the adult sex offender program and then went to Central Prison for the last couple of years to work with violent offenders and rapists in a combination program.

> [DISTRICT ATTORNEY:] Okay. So you would say over the last twelve years this has been your specialty?
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> [MS. CORDASCO:] Absolutely.

The district attorney then asked if Ms. Cordasco had heard the evidence presented at the hearing concerning the factual basis of the charges against the juvenile defendant. She indicated that she had. The following colloquy then occurred between the district attorney and the witness:

> [DISTRICT ATTORNEY:] And in the consideration, this juvenile was fifteen years old. What would your opinion or could you give one—do you have enough information to give an opinion regarding the nature of this act and the feasibility of this juvenile being treated as a juvenile or by the nature of this act, in your opinion, do you believe he would—is a threat to the community and should be transferred as an adult and treated as an adult? If you can answer that.
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> [MS. CORDASCO:] I listened to the facts that the detective presented and based on my experience, working with both adults and juveniles and working in North Carolina's juvenile and adult system, it's, you know, my opinion that this young man committed a very sophisticated sexual crime based on the use of a weapon. It was obviously planned. I mean, he had a bandana. He was out there. He also interjected putting his arm around her neck, which at any time, I don't know if he actually cut her air off, but that certainly is very frightening because the victim would not know would he [sic] do that. And then putting her in a closet—in a dark closet. All these things are very, very sophisticated for someone so young.
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> In the juvenile system they do not have the capacity to treat this serious an offense. The adult system does. Unfortunately he would go into the youth system first and he would have to wait until he was twenty-two to get sex offender treatment. However, I do think the crime, in and of itself, puts him at extremely high risk to re-offend. There's usually a time thing. He apparently, from what I hear, has done fairly good in the community. But I think he's a very high risk for re-offending and I don't think the juvenile system—not my program, nor the one at Dillon or at Swannanoa—would be equipped to handle this serious of a crime.

> He also needs some time within—away from the community, within the system, to be seasoned enough to even be amenable to this kind of treatment.

Counsel for defendant then cross-examined the witness. During cross-examination, Ms. Cordasco testified that based on her twelve years' experience working with men who rape, such men were usually given standard psychological tests to reveal depression or psychosis, but that she did not know of any test that would assist in predicting the possibility of such a person's reentry into the community or the risks he posed to the community.

Counsel for defendant offered no evidence at the conclusion of the evidence for the State. The District Court then ruled as follows:

> On what I've already heard, I have to consider that if T.D.R. were to remain in the Juvenile Court jurisdiction and [be] sent to C.A. Dillon or some other training school, I believe that at age eighteen he would be released, whether he had improved or he had not improved, whether he had been treated or not.
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> And with the—just with the evidence that I have now, I feel that we have been about as thorough and lenient as we can be on him. I'm going to have him transferred to Superior Court.

The District Court denied the motion and entered an order finding probable cause and transferring jurisdiction over the juvenile defendant to the Superior Court and giving the reasons for the transfer. In its order, the District Court stated that the needs of the juvenile, or the best interests of the State, or both, would be served by transfer of the case to Superior Court. The order also stated as reasons for the transfer that

> [t]he attorney for the juvenile waived probable cause after having received laboratory results which the juvenile's attorney had processed. The Court finds that juvenile services would not be adequate to rehabilitate the juvenile and/or protect the community. The fact that this juvenile would automatically be released from Division of Youth Services at age 18 weighs heavily on the Court & would be inappropriate in this case to retain at the juvenile level.

Thereafter, the grand jury of Durham County indicted defendant for the crimes charged. The juvenile defendant then moved under

N.C.G.S. § 15A-954(a) that the Superior Court dismiss the indictments and remand the case against him to the District Court "for a full and meaningful transfer hearing." After reviewing the transcript of the hearing before the District Court and other documents in the District and Superior Court files, the Superior Court made findings and conclusions and ordered that the indictments against defendant be vacated. Defendant contends that the Superior Court properly entered this order. For the following reasons, we disagree.

In one of its conclusions of law in support of its order, the Superior Court concluded that "[t]he District Court in this case denied the Juvenile-Defendant Due Process of law and fundamental fairness by its refusal to hear or consider the juvenile's evidence with regard to the appropriateness of retaining jurisdiction in the District Court Division." This conclusion by the Superior Court does not find support either in the Superior Court's findings of fact or in the transcript of the hearing held by the District Court on the issue of transfer. The only finding by the Superior Court related to this issue was that the juvenile defendant had been denied the opportunity to present evidence contradicting the expert testimony of the State's witness, Ms. Cordasco. Specifically, the Superior Court found that "[c]ounsel was denied an opportunity to do so by [the denial of] a two-week continuance." This finding was in response to the only argument made by defendant before the Superior Court and before this Court as to why his constitutional rights were violated.

Defendant did not contend before the Superior Court, and does not argue before this Court, that the District Court refused to hear or consider any evidence he sought to introduce. The transcript of the District Court hearing does not reflect that defendant was ever prevented from introducing evidence. Instead, the transcript reveals that at each point at which defendant could have offered any evidence he had on the issue of transfer, defendant, through counsel, renewed his motion for a continuance to gather such evidence. The argument defendant made before the Superior Court and here is that the District Court's order violated his constitutional rights by denying his motion for a continuance of the hearing to gather evidence.

[4] Whether to allow or deny a motion to continue any legal proceeding is a matter ordinarily addressed to the sound discretion of the trial court, and its ruling is not reversible on appeal absent an abuse of discretion. *State v. Jones*, 342 N.C. 523, 530, 467 S.E.2d 12, 17 (1996). We recognize that numerous decisions of the appellate

courts of this state have indicated that, in such situations, the appealing party must demonstrate a "gross abuse" or "manifest abuse" of discretion. We further recognize that our use of such phrases has created some confusion as to whether there is more than one standard for, or type of, abuse of discretion; there is not. Our use of phrases such as "gross abuse" and "manifest abuse" of discretion originated in earlier cases, before the term "abuse of discretion" had been given any definitive meaning. *E.g.*, *State v. Gibson*, 229 N.C. 497, 50 S.E.2d 520 (1948); *State v. Farrell*, 223 N.C. 321, 26 S.E.2d 322 (1943). More recently, however, we have given a more complete and definite meaning to the legal term "abuse of discretion" by holding that an abuse of discretion is established only upon a showing that a court's actions "are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985). Further, we have emphasized that any "ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* Any such abuse of discretion is *a fortiori* "gross" or "manifest" as those terms have been used in prior cases of the appellate courts of this state. There is but one type of abuse of discretion.

[5] For clarity, we reemphasize that a motion for continuance is ordinarily addressed to the sound discretion of the trial court. In such cases, the trial court's ruling will not be disturbed unless it is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision. *Id.*; *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. Mutakbbic*, 317 N.C. 264, 273, 345 S.E.2d 154, 158 (1986). However, if the motion to continue is based on a constitutional right, the trial court's ruling thereon presents a question of law that is fully reviewable on appeal. *Jones*, 342 N.C. at 530, 467 S.E.2d at 17; *State v. Smith*, 310 N.C. 108, 112, 310 S.E.2d 320, 323 (1984). Here, defendant has argued, as he argued in the Superior Court, that the District Court's denial of his motion for a continuance to gather evidence on the issue of whether jurisdiction over him should have been transferred to the Superior Court denied him the constitutional right of presenting evidence on his own behalf.

[6] Defendant contends that the denial of his motion for a continuance prevented his introducing evidence in his own behalf because he simply did not have adequate time to gather such evidence. The

record indicates that defendant gave no reason at the hearing before the District Court as to why the time he had been allowed to gather evidence and prepare for its presentation had not been sufficient. The record indicates that defendant was on notice of the allegations against him from the date of the filing of the juvenile petitions on 22 August 1996. The holding of a probable cause hearing was delayed in part because of the District Court's accommodation of defendant's request that his own experts be permitted to conduct DNA testing on the State's evidence prior to a determination of probable cause. The State relinquished custody of its as-yet-unanalyzed evidence for such testing by defendant's experts in response to a court order. A probable cause hearing was set for 18 November 1996. On 4 November 1996, defendant moved for a continuance of that hearing. The District Court granted his motion and continued the probable cause hearing until 3 December 1996.

Defendant made no further motion for a continuance until after he had appeared at the 3 December 1996 hearing and stipulated that probable cause existed. His motion to continue was made orally at that time. Defendant offered no explanation as to why the more than three months from 22 August 1996 until 3 December 1996 had not been a sufficient time for him to secure any necessary evidence. Further, defendant submitted no affidavits to the District Court indicating any fact that might be proved by any witness if the continuance were granted.

This Court has stated that "before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). Here, the District Court allowed both defendant and the State to be heard on the motion to continue before ruling. No evidence was offered with regard to the motion. In light of the fact that defendant had more than three months to prepare and that the District Court continued the hearing date more than once and entered orders assisting defendant in gathering evidence when requested, we conclude that the District Court did not abuse its discretion or commit any constitutional error in denying defendant's motion for a further continuance. *See Jones*, 342 N.C. at 531, 467 S.E.2d at 18 (denial of continuance not error or abuse of discretion where defendant's oral motion to continue to secure psychiatric evaluation was made on the date set for trial, was not supported by affidavit, and did not set forth detailed proof to establish grounds for further delay); *State v. McCullers*, 341 N.C. 19,

32-33, 460 S.E.2d 163, 171 (1995) (same); *State v. Branch*, 306 N.C. 101, 105, 291 S.E.2d 653, 657 (1982) (same); *State v. Searles*, 304 N.C. 149, 155, 282 S.E.2d 430, 434 (1981) (same); *State v. Cradle*, 281 N.C. 198, 208, 188 S.E.2d 296, 303 (same), *cert. denied*, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972).

[7] Defendant further argues that the District Court erred in denying a continuance because he did not have notice that the issue of transfer of jurisdiction to Superior Court would be considered at the probable cause hearing. We disagree. The applicable statutes themselves give notice that upon a finding of probable cause, either the juvenile or the prosecutor may make a motion for transfer of jurisdiction to the Superior Court and that the District Court may immediately proceed to a ruling on such motion. N.C.G.S. §§ 7A-608, -610(a). Further, the transcript of the hearing reveals that defendant had notice in fact that the hearing on the issue of transfer of jurisdiction would or might be held immediately upon a finding of probable cause. Counsel for defendant implicitly acknowledged being on such notice when she stated during the hearing, "[W]e are waiving probable cause at this time and we're going to ask, Judge, that we have a continuance of the transfer hearing until December 17th." Additionally, after the District Court had announced that it would enter an order transferring defendant to the jurisdiction of the Superior Court, counsel for defendant indicated actual prior notice that the issue of transfer would be considered by stating:

> Your Honor, I know you've made your ruling on this and I would ask you to reconsider for this one reason. Ms. Cordasco testified that one of the things they look for when they have people coming to their program is an MMPI and some of the same testing that he's going through right now. We don't have—we've not had an opportunity to present any evidence to show whether or not there is anything in the juvenile system that could help him and we would have recommendations from our forensic psychologist that could tell the Court and give the Court more of a basis in which whether or not this thing should be transferred to adult court.
>
> We understand this is a serious crime and we understand we have waived probable cause *and that's one of the things we took a chance on when we waived it. . . .*

(Emphasis added.) This argument by defendant is without merit.

[8] The Superior Court also based its order vacating the indictments against defendant and purporting to remand jurisdiction to the District Court upon another ground. The Superior Court concluded as a matter of law that the District Court order transferring jurisdiction "was not supported by competent evidence" to the extent that it was based upon the reason that there was "a lack of rehabilitative services for this juvenile in the Juvenile Court Division." This conclusion by the Superior Court is not supported by the transcript of the District Court hearing or by any other document that was before the Superior Court. Instead, it seems that the Superior Court's conclusion was based on its disagreement with the testimony of the State's expert and with the District Court's action based on that evidence. Therefore, the Superior Court erred in this conclusion.

The State's expert, Ms. Cordasco, testified in detail as to her lengthy experience and qualifications. Defendant never objected to her testimony and never requested that the court make any findings of fact. *Cf. State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984) (trial court did not err in permitting witness to testify as an expert without making findings of fact as to her qualifications where defendant did not specifically request that the court make such findings). In the absence of a request by defendant for the trial court to make a finding concerning the qualifications of a witness as an expert, it is not necessary that the record show an express finding on this issue—the finding being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness. *State v. Perry*, 275 N.C. 565, 169 S.E.2d 839 (1969). This is particularly true where, as here, there is ample evidence to support a finding that the witness is an expert or where, as here, defendant does not object to the witness' being found to be an expert. *State v. Mitchell*, 283 N.C. 462, 196 S.E.2d 736 (1973) (evidence to support a finding that the witness was an expert); *Perry*, 275 N.C. 565, 169 S.E.2d 839 (no objection to witness' being treated as an expert). Where, as here, there was sufficient evidence to support a finding that the witness was an expert, it is presumed that the court found the witness to be an expert before admitting the testimony, notwithstanding the absence of a specific finding to this effect. *Olan Mills, Inc. v. Cannon Aircraft Executive Terminal, Inc.*, 273 N.C. 519, 160 S.E.2d 735 (1968). Therefore, the Superior Court erred in its findings and conclusion to the effect that there was no competent expert evidence before the District Court on the issue of the availability of rehabilitative services for defendant as a juvenile and that the order of the District Court must be vacated for that reason.

For the foregoing reasons, the order of the Superior Court vacating and dismissing the indictments against defendant and purporting to remand jurisdiction to the District Court was in error and must be reversed. However, the order of the Court of Appeals did not reverse the order of the Superior Court. Instead, the Court of Appeals, proceeding on the mistaken assumption that the Superior Court acted without jurisdiction, vacated the order of the Superior Court. The Court of Appeals erred in vacating the order of the Superior Court rather than reversing that order.

As previously explained in this opinion, once the District Court has transferred jurisdiction over a juvenile to the Superior Court, the Superior Court has complete jurisdiction, including jurisdiction and authority to hear and dispose of motions to dismiss the charges stated in the criminal pleadings against the defendant in the Superior Court. N.C.G.S. § 15A-954(a). Here, the Superior Court had jurisdiction; it simply committed reversible error. Therefore, the order of the Court of Appeals also must be reversed.

For the foregoing reasons, the order of the Court of Appeals vacating the order of the Superior Court is reversed. The order of the Superior Court vacating and dismissing the indictments against defendant and purporting to remand jurisdiction over the juvenile defendant to the District Court is also reversed. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Durham County, for reinstatement of the indictments against defendant and for further proceedings not inconsistent with this opinion.

ORDER OF THE COURT OF APPEALS: REVERSED;

ORDER OF THE SUPERIOR COURT: REVERSED AND REMANDED FOR REINSTATEMENT OF INDICTMENTS AND FURTHER PROCEEDINGS.

STATE OF NORTH CAROLINA v. TERRY WAYNE MICKEY

No. 303A95

(Filed 6 February 1998)

1. Criminal Law § 1129 (NCI4th Rev.)— Fair Sentencing Act—conspiracy to murder—aggravating factor—inducement of another—same evidence not used for conviction and sentence

The trial court did not err when imposing a sentence under the Fair Sentencing Act for conspiracy to commit first-degree murder by finding the statutory aggravator that defendant induced another to commit the offense. Although defendant contended that the trial court must have used the same evidence that the jury relied upon in finding the agreement element of conspiracy, the State introduced evidence tending to prove inducement in addition to that tending to prove agreement and the court did not need to rely on evidence necessary to prove the crime when finding the aggravating factor.

2. Criminal Law § 1227 (NCI4th Rev.)— Fair Sentencing Act—mitigating factor—no record of convictions—not found—peremptory instruction in capital phase

There was no prejudicial error when the trial court sentenced defendant under the Fair Sentencing Act for conspiracy to commit first-degree murder without finding the mitigating factor that he had no record of criminal convictions after peremptorily instructing the jury in the capital sentencing hearing to find the nonstatutory mitigating circumstance that defendant had no prior criminal convictions. The trial court ordinarily is not required to find the same mitigating factors in felony sentencing as were previously found by a jury in capital sentencing, and the burden under the Fair Sentencing Act is on defendant. Defendant here never produced any evidence of the factor and it will not be inferred from an otherwise silent record. There was error in the capital sentencing hearing in that the only support for the peremptory instruction was defense counsel's assertion at the sentencing charge conference, which was not probative; however, the error was in defendant's favor.

3. Search and Seizure § 56 (NCI4th)— items seized from murder scene—plain view—admissible

The trial court did not err in a capital first-degree murder prosecution (life sentence) by admitting into evidence items seized at the murder scene where the lead investigator on the scene ordered the seizure of evidence in the bedroom where the body was found; officers seized a bloodstained mattress and box springs; after the mattress and box springs were removed, officers found bullets on top of several pornographic magazines addressed to someone other than defendant; and the officers seized the bullets, magazines, and a credit card issued to someone not a member of the household which was on a desk eight feet from the body. Uncontroverted evidence indicated that the officers were lawfully securing the scene of a homicide and seizing evidence directly and obviously related thereto when they inadvertently discovered additional evidence which, by its nature and under the circumstances, was likely to lead to the identity of the killer or a material witness. The seizure was lawful under the plain view exception.

4. Evidence and Witnesses § 292 (NCI4th)— crimes for which defendant not charged—relevant to conspiracy—admissible

The trial court did not err in a prosecution for first-degree murder and conspiracy to commit murder by denying defendant's motion to exclude evidence of theft and unlawful use of credit cards, prior misconduct for which defendant had not been charged. Evidence of defendant's financial dealings with his co-conspirator was relevant to understanding the leverage defendant exerted in inducing and conspiring with him to commit murder, and, because defendant's use of stolen credit cards was important to understanding the nature of the conspiracy and the later murder, there is no basis for concluding that the trial court abused its discretion in ruling that the risk of prejudice did not outweigh the probative value.

5. Evidence and Witnesses § 3189 (NCI4th)— murder and conspiracy—statement of testifying witness to officer—admitted in part

The trial court did not err in a prosecution for first-degree murder and conspiracy to murder by admitting an unsworn statement to an investigating officer where the witness testified that

defendant had solicited him to commit the murder and that he had sold defendant the murder weapon, and his earlier statement to investigators, with portions removed, was admitted to corroborate the trial testimony. Although defendant argues that the removed portions were inconsistent with the testimony and that the trial court denied him the impeachment value of the inconsistencies, the removed portions would be more accurately characterized as new or additional facts. Most of the removed portions pertained to matters about which the witness was not asked on the witness stand and would have been more prejudicial to defendant than the witness's trial testimony or the statement as introduced. One removed portion was arguably inconsistent with the witness's testimony, but its value for purposes of impeachment would have been negligible.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Stanback, J., on 2 February 1995 in 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 the judgment sentencing him to imprisonment for twenty years for conspiracy to commit first-degree murder was allowed 1 July 1997. Heard in the Supreme Court 8 September 1997.

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

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

MITCHELL, Chief Justice.

Defendant was indicted on 5 August 1992 for first-degree murder and conspiracy to commit first-degree murder. He was tried capitally at the 7 November 1994 Criminal Session of Superior Court, Randolph County, Judge A. Leon Stanback presiding. The jury found defendant guilty of both charges. At the conclusion of a separate capital sentencing proceeding, the jury recommended a sentence of life imprisonment for the first-degree murder conviction. The trial court sentenced defendant to imprisonment for life for the murder conviction and imposed a consecutive sentence of twenty years' imprisonment on the conspiracy conviction.

The State's evidence tended to show *inter alia* that in the early morning hours of 29 June 1992, defendant's first cousin, Chris Cook,

entered defendant's home, where he shot and killed defendant's wife, Melissa Cooper Mickey. Defendant Terry Mickey had hired and conspired with Cook to perform the killing for $10,000. Cook ultimately confessed to the murder and implicated defendant.

Defendant and Melissa had been separated in 1985 or 1986 and later reconciled. Defendant had lived with another woman during their separation. Defendant later met Cindi Rinaldi, a co-worker at the post office, and began a relationship with her. Defendant told Rinaldi that he was planning to divorce his wife but that an attorney had advised that he wait until his bills were paid.

Defendant solicited Joe Ray to murder defendant's wife about eight months before she was killed. Ray refused to participate. Defendant asked Ray if his nephew would kill defendant's wife, and Ray said no. Defendant then asked Ray to get a gun for him, which Ray did.

Defendant's cousin, Chris Cook, was in the Marine Corps stationed at Virginia Beach when defendant phoned to ask if he knew of a way to raise $50,000. At one point, Cook and defendant planned to rob a drug dealer to raise money, but they did not go through with the plan.

In 1990 or 1991, Cook learned that defendant was making purchases and cash advances using credit cards he had stolen from the mail while he was a postal employee. Defendant sometimes gave Cook cash advances drawn on the stolen credit cards. Defendant also gave Cook a video cassette recorder and, in June 1991, an engagement ring for Cook's fiancée, paying for the purchases of those items with the stolen credit cards.

Cook was discharged from the Marine Corps on 3 September 1991. He broke up with his fiancée in January or February 1992 and pawned the ring, which defendant later redeemed from the pawn shop. In June 1992, defendant offered Cook $5,000 to kill defendant's wife Melissa. Cook refused the offer. Defendant repeated his offer to Cook on 14 June 1992. Defendant reminded Cook of all the cash and gifts he had given him. Cook continued to refuse the offer and tried to avoid defendant. Defendant went to Cook's house and promised to pay $5,000 before the killing and $5,000 after defendant received $50,000 from an insurance policy defendant had taken out on Melissa several months earlier. Cook finally agreed to defendant's scheme to kill Melissa.

Defendant and Cook met at defendant's house on Sunday, 28 June 1992, to plan the murder. Defendant's children were at the beach with Melissa's parents, and he stated that he wanted the killing done that night or the next morning. Defendant met Cook at about 2:45 a.m. and took him to defendant's home. Defendant gave Cook a ski mask, surgical gloves, and a .38-caliber revolver loaded with six rounds of ammunition. Defendant told Cook to wait thirty to forty-five minutes before killing Melissa so defendant could establish an alibi.

Cook entered the house through a door left unlocked by defendant by prior arrangement and found Melissa lying in bed. He shot Melissa in the right jaw. She writhed her way to the far side of the bed. Cook went around the bed, where, firing through a pillow to muffle the sound, he shot her in the back of the head and through the back. He ran from the house, removed the mask and gloves, and hid the gun and mask under a pile of rocks. Cook then called his roommate for a ride home from a convenience store, where he was seen by witnesses. Cook told his roommate that he had been at a construction site early that morning. He claimed that because they had run out of supplies, he was jogging home when he fell and hurt himself.

When Cook arrived at his home, he washed his clothes and contacted his employer, Tim Edwards, to establish an alibi. He wanted Edwards to say that he had been working at one of Edwards' job sites early that morning. Thinking that Cook had gotten into some minor trouble, Edwards agreed to the scheme. Edwards later disavowed Cook's alibi when Edwards was questioned by investigators and realized that Cook wanted an alibi for the morning of the murder.

Melissa Mickey's friends and co-workers at L&M Floor Covering had become concerned that she had not come to work by the time defendant phoned and asked for her at 10:00 to 10:30 a.m. Annette Owens went to defendant and Melissa's home to look for Melissa. She found Melissa's car in the garage but did not find Melissa. She discussed her concerns with her co-workers and Garland Lawson, the store owner. Lawson contacted the Lenoir County Sheriff's Department to have a deputy check the house. Lawson met Deputy Greer at the house, and they went through it together. They found Melissa's body in a kneeling position on the floor at the side of the bed, with one elbow lying on the mattress. Lawson and Deputy Greer left the house, called for assistance, and waited outside.

Detective Sergeant Jeff Wilhoit arrived and helped secure the murder scene. Detective Don Andrews, the lead investigator, went

into the house and observed evidence in the master bedroom. Andrews ordered the seizure of evidence from the master bedroom. Officers seized evidence, including the bloodstained mattress and box springs, bullets found on top of several pornographic magazines, addressed to someone other than defendant, and the magazines themselves. The magazines and bullets were found under the bed after the mattress and box springs were removed. Officers also seized a credit card issued to someone not a member of the household which was lying on top of a roll-top desk.

In his first assignment of error, defendant contends that when imposing a sentence under the Fair Sentencing Act in excess of the presumptive sentence for his conspiracy conviction, the trial court erroneously found the statutory aggravating factor that defendant induced others to participate in the commission of the offense and erroneously failed to find the statutory mitigating factor that defendant had no record of criminal convictions. N.C.G.S. § 15A-1340.4 (1988) (repealed effective 1 October 1994). The Fair Sentencing Act applied to crimes committed before 1 October 1994; because the conspiracy in question here took place prior to that date, defendant was sentenced under this statute. Under the Fair Sentencing Act, "the sentencing judge must find and weigh aggravating and mitigating factors before imposing a sentence greater than the presumptive sentence set by the statute." *State v. Flowers*, 347 N.C. 1, 41, 489 S.E.2d 391, 414, at *22 (1997). We address defendant's two arguments in support of this assignment of error in turn.

[1] First, defendant argues that the trial court erroneously found the statutory aggravator that defendant induced Cook to participate in the offense. He contends that the trial court must have used the same evidence that the jury relied upon in finding the agreement element of the crime of conspiracy when the trial court later found the aggravating factor of inducement. Defendant contends that the only evidence supporting the inducement aggravator was identical to the evidence supporting the agreement element of the conspiracy. More specifically, defendant avers that evidence of his solicitation of Cook's participation was the only evidence supporting the jury's finding of the agreement element of the conspiracy charge and the only evidence supporting the trial court's finding the inducement aggravator in sentencing. We disagree.

A sentence is aggravated to account for a defendant's culpable conduct that goes beyond what was necessary to commit the crime for which he is being sentenced. *State v. Thompson*, 318 N.C. 395,

397-98, 348 S.E.2d 798, 800 (1986). The evidence used to establish an element of a crime cannot then be used to prove an aggravating factor of the same crime. *State v. Hayes*, 323 N.C. 306, 312, 372 S.E.2d 704, 707-08 (1988). However, evidence tending to show inducement and evidence tending to show agreement are not necessarily one and the same. *State v. Wilson*, 338 N.C. 244, 257, 449 S.E.2d 391, 399 (1994). In this case, the State introduced evidence in addition to that tending to prove the agreement element of the conspiracy, which additional evidence tended to prove inducement. The State produced evidence that defendant tried on several occasions to persuade Cook to kill his wife. Defendant offered to pay Cook. He went to Cook's home to try to talk him into killing his wife. He also reminded Cook of past favors in an effort to make him feel guilty and obligated. This evidence supported the finding that defendant induced Cook to enter the conspiracy and to kill Melissa.

Other evidence supported the jury's finding of the agreement element of the crime of conspiracy. Independent evidence tending to show agreement included evidence that defendant agreed to drive Cook to defendant and Melissa's house; defendant brought a gun, mask, and gloves for Cook; and defendant told Cook which door would be unlocked. Also, agreement could be inferred from the fact that Cook did in fact kill defendant's wife. Therefore, the trial court did not need to rely on evidence necessary to prove the crime when finding the inducement aggravating factor. The trial court properly found the aggravating factor that defendant induced Cook to kill his wife.

[2] Second, defendant argues in support of this assignment of error that, in sentencing him for the conspiracy, the trial court should have found the statutory mitigating factor that he had no record of criminal convictions. N.C.G.S. § 15A-1340.4(a)(2)(a). Defendant points out that in its capital sentencing instructions to the jury, the trial court peremptorily instructed the jury to find the nonstatutory mitigating circumstance that defendant had no prior criminal convictions. Defendant reasons that because of this instruction in the capital sentencing proceeding, the trial court was required to find the same mitigator when sentencing him under the Fair Sentencing Act for the felonious conspiracy. We disagree.

Under the Fair Sentencing Act, the trial court was required to consider the statutorily enumerated mitigating factors it found to exist. Furthermore, the trial court "must find a mitigating factor when the evidence is uncontradicted, substantial, and manifestly credible."

State v. Tucker, 329 N.C. 709, 725, 407 S.E.2d 805, 815 (1991). The burden was on defendant to produce such evidence and to prove the factor by a preponderance of the evidence. *Id.* However, the trial court ordinarily is not required to find the same mitigating factors in felony sentencing as were previously found by a jury in capital sentencing. *Id.*

In the instant case, defendant never produced any evidence of the statutory mitigating factor that defendant had no record of criminal convictions. Instead, defendant asserts on appeal that the finding of an analogous mitigator in the capital sentencing proceeding constitutes evidence of the mitigator for felony sentencing purposes. We will not infer from an otherwise silent record that defendant had no record of criminal convictions. *See State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995); *State v. Williams*, 274 N.C. 328, 163 S.E.2d 353 (1968). Defendant failed to produce evidence supporting the mitigator. Therefore, the fact that the trial court failed to find a mitigating factor in the felony sentencing proceeding under the Fair Sentencing Act that is analogous to the mitigating circumstance found by the jury in the capital sentencing proceeding is not error.

There was error related to the mitigator in question here, but it occurred in the trial court's capital sentencing instructions to the jury. There, the trial court peremptorily instructed the jury to find the nonstatutory mitigating circumstance that defendant had no record of criminal convictions. However, during the capital sentencing proceeding, the only support for that mitigating circumstance was defense counsel's assertion of it during the sentencing charge conference; thus, no evidence was introduced in this regard. In *State v. Thompson*, we said that the State's mere assertion that an aggravating factor exists does not require the court to find the factor in sentencing. *State v. Thompson*, 309 N.C. 421, 424-25, 307 S.E.2d 156, 159 (1983). Here, defendant's mere assertion that a mitigating factor exists was not probative of its existence. *State v. Jones*, 309 N.C. 214, 221, 306 S.E.2d 451, 456 (1983). The trial court erred in peremptorily instructing the jury at the capital sentencing proceeding to find this mitigating circumstance in the absence of evidence to support the finding. However, this error operated in favor of defendant in the capital sentencing proceeding and may well have caused the jury to reach its recommendation of a life sentence rather than the death penalty. For this reason, the error does not entitle defendant to a new sentencing hearing on the conspiracy charge. This assignment of error is overruled.

[3] In his next assignment of error, defendant contends that the trial court erred by admitting into evidence some of the items seized at the murder scene. He contends that this evidence was not a proper product of the plain view exception to the warrant requirement. Defendant argues that the seizure of a credit card found on top of a desk just eight feet from the victim's body constituted an improper seizure not justified under the plain view exception. Defendant further argues that the seizure of several pornographic magazines addressed to someone other than defendant that were discovered under the bed after the mattress and box springs were properly seized and on which two bullets were found did not fall within the plain view exception. We disagree.

Initially, " '[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' " *State v. Scott*, 343 N.C. 313, 328, 471 S.E.2d 605, 614 (1996) (quoting *Elkins v. United States*, 364 U.S. 206, 222, 4 L. Ed. 2d 1669, 1680 (1960)). In the present case, we examine a search initially permitted under the exigent circumstances exception, the scope of which was incrementally expanded to include seizures under the plain view exception.

As explained by the United States Supreme Court, a seizure is lawful under the plain view exception when the officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause. *Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112 (1990); *see State v. Church*, 110 N.C. App. 569, 430 S.E.2d 462 (1993). The North Carolina General Assembly has imposed an additional requirement, not mandated by the Constitution of the United States, that the evidence discovered in plain view must be discovered *inadvertently*. N.C.G.S. § 15A-253 (1988). *See generally Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112 (rejecting the plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564 (1971), which indicated that discovery of evidence under the plain view exception must be inadvertent).

In the present case, defendant has not challenged the officers' right to secure the murder scene or seize evidence obviously related to the murder, such as the victim's body and the bloodstained mattress. Defendant concedes that the investigators were lawfully in the

bedroom carrying out these duties. We conclude that when investigators were securing the bedroom in which the murder victim was found, it would have been immediately apparent to them that the items bearing names other than the victim's or defendant's could be evidence of a crime, in that they were likely to reveal the identity of the killer or a material witness.

Defendant's contention that *Arizona v. Hicks* controls here and compels exclusion of the evidence is erroneous. In *Hicks*, officers lawfully entered the defendant's apartment to search for the shooter, additional victims, and weapons, after a bullet was fired through the defendant's floor, injuring a man below. *Arizona v. Hicks*, 480 U.S. 321, 323, 94 L. Ed. 2d 347, 353 (1987). One of the officers noticed some expensive stereo equipment in the defendant's otherwise squalid apartment. *Id.* Acting only on reasonable suspicion, the officer moved the equipment to gain access to the serial numbers, recorded the serial numbers, and reported them to headquarters. *Id.* at 323-24, 94 L. Ed. 2d at 353. After being informed that the equipment had been stolen in an armed robbery, he seized the equipment. *Id.* The Supreme Court of the United States concluded that by moving the equipment, the officer had conducted a new search separate and apart from the search permitted by the exigent circumstances exception for "the shooter, victims, and weapons that was the lawful objective of his entry into the apartment." *Id.* at 235, 94 L. Ed. 2d at 354. The Court held that this new search was not supported by probable cause and that the evidence it yielded must be suppressed.

In the present case, uncontroverted evidence indicated that the officers were lawfully securing the scene of a homicide and seizing evidence directly and obviously related thereto when they inadvertently discovered additional evidence which, by its nature and under the circumstances, was likely to lead to the identity of the killer or a material witness. The seizure of such evidence under these circumstances was lawful under the plain view exception. Defendant's assignment of error is overruled.

[4] Defendant next complains that the trial court erred when it denied his motion to exclude evidence of his prior misconduct—the theft and unlawful use of credit cards—for which he had not been charged. Defendant argues that the relevance of this evidence was questionable and that its value was outweighed by the danger of unfair prejudice and needless presentation of cumulative evidence. We disagree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1983). Evidence of defendant's financial dealings with Chris Cook was relevant to understanding the leverage he exerted against Cook in inducing and conspiring with him to commit murder. Such evidence tending to show how defendant induced Cook was relevant to a determination of guilt on both charges. Here, the evidence tended to help the jury understand the friendship between defendant and Cook and how defendant exploited their friendship to induce Cook to commit murder. Specifically, the evidence tended to show that defendant used stolen credit cards to obtain cash and goods which he gave Cook and that he later reminded Cook of this fact to bring pressure upon him to agree to the murder. These mechanics of the conspiracy and murder were facts of consequence to the determination of guilt.

Furthermore, this Court has consistently held that Rule 404(b) is a "general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The evidence in the instant case was properly admitted to prove more than defendant's propensity to commit an offense of the nature of the crime charged. *Id.* A jury could reasonably find that defendant's use of stolen credit cards to give money and other presents to Cook tended to establish one reason for Cook's eventual agreement to defendant's request to murder the victim and for Cook's entering into the conspiracy with defendant.

Defendant also contends that the probative value of the evidence was outweighed by its prejudicial nature and because it was a needless presentation of cumulative evidence. "Evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1983) (emphasis added). The determination to exclude evidence on these grounds is left to the sound discretion of the trial court. *State v. Wilson*, 345 N.C. 119, 478 S.E.2d 507 (1996). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986). Defendant's use of stolen

credit cards was important to understanding the nature of the conspiracy and the later murder. Therefore, we see no basis for concluding that the trial court's ruling constituted an abuse of discretion. This assignment of error is overruled.

[5] Defendant's last assignment of error is that the trial court erred when it admitted into evidence, for purposes of corroboration, a witness' unsworn extrajudicial statement. Defendant objected to the admission of Joe Ray's unsworn statement to an investigating officer. Defendant contends that the statement was a prior inconsistent statement, until the inconsistent portions were removed. At trial, Ray testified that he sold the murder weapon to defendant and that defendant had solicited him to commit the murder. Ray's earlier statement to investigators, with certain parts removed, was then admitted to corroborate his trial testimony. Defendant argues that the portions of Ray's statement which were removed were inconsistent with his testimony and would have cast doubt on the credibility of his testimony. Defendant also argues that by admitting the statement with the inconsistent portions removed, the trial court denied him the impeachment value of the statement's inconsistencies with Ray's sworn trial testimony. He contends that Ray's credibility was thus improperly enhanced by a sanitized version of his actual statement, when the full statement actually contradicted Ray's testimony at trial.

For evidence to be admissible as corroborative, it "must tend to add weight or credibility to the witness's testimony." *State v. Farmer*, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993). That corroborative evidence contains new or additional facts does not make it inadmissible. *Id.* However, contradictory statements may not be admitted under the guise of corroboration. *Id.*

In the present case, most of the removed portions of the statement which defendant contends were inconsistent with Ray's testimony would be more accurately characterized as "new or additional facts." Most of the removed portions pertained to matters about which Ray was not asked on the witness stand and would have been more prejudicial to defendant than either Ray's trial testimony or Ray's prior statement as introduced at trial. One removed statement, however, is arguably inconsistent with Ray's testimony. At trial, Ray testified that he had never been inside defendant's house. In his prior statement to the investigating officer, he said that he once went to defendant's house and stood about three feet inside the living room door.

This Court has stated that:

> A trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect. *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981). Even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice. N.C.G.S. § 15A-1443(a) (1983).

State v. Herring, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). However, if the erroneous evidentiary ruling violates a right of the defendant guaranteed by the Constitution of the United States, the State has the burden of showing that the error is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *see State v. Swindler*, 339 N.C. 469, 476, 450 S.E.2d 907, 912 (1994). Assuming *arguendo* that the evidence here was improperly admitted and implicated a right of the defendant under the Constitution of the United States, we nevertheless conclude that its value for purposes of impeachment would have been negligible. Therefore, the admission of the statement into evidence, as redacted by the trial court, was harmless beyond a reasonable doubt. This assignment of error is overruled.

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

NO ERROR.

SHARON CREECH AND TRAVIS CREECH, GUARDIANS AD LITEM OF JUSTIN CREECH, MINOR v. EVELYN H. MELNIK, M.D.

No. 539A96

(Filed 6 February 1998)

1. Cancellation and Rescission of Instruments §§ 10, 11 (NCI4th); Contracts § 47 (NCI4th)— implied contract not to sue—avoidance—mutual mistake—unilateral mistake caused by other party

In a medical malpractice action against defendant pediatrician based on her alleged failure to properly care for a newborn child during the two hours following his transfer to the intensive

care nursery immediately after his birth, the trial court erred by entering summary judgment for defendant based on her defense of an implied contract not to sue her since the jury could find that any contract not to sue was avoided by a mutual mistake of fact where the parties forecast evidence from which a reasonable jury could find that plaintiffs' attorney's disinterest in defendant as a party-defendant was the result of his reliance on her repeated representations denying her involvement in the child's care during the crucial period following his birth, and that defendant's representations were false but were the result of an honest mistake on her part caused by a lapse of memory due to the large number of children she treated on a daily basis at the hospital. Furthermore, the jury could also find that any implied contract not to sue was avoided on the ground that defendant had reason to know that plaintiffs' attorney's belief that defendant was not involved was a mistake or that she caused that mistake where the evidence forecast by the parties would permit the jury to find that defendant knew that she treated the child at the critical time in question but falsely assured plaintiffs' attorney to the contrary.

2. Estoppel § 18 (NCI4th)— equitable estoppel—knowingly creating false impression—absence of clean hands

In a medical malpractice action against defendant pediatrician based on her alleged failure to properly care for a newborn child during the two hours following his transfer to the intensive care nursery immediately following his birth, the trial court erred by entering summary judgment for defendant on the ground of equitable estoppel where the evidence forecast by the parties would permit the jury reasonably to find that plaintiffs' attorney's assurances to defendant that he had no reason to consider her a potential defendant were premised upon her lack of involvement in the child's care and that defendant knew or should have known that her denials of involvement had created a false impression in the attorney's mind and that she had caused and encouraged it by reassuring him that she played no role in the child's care. The doctrine of equitable estoppel could not be applied in defendant's favor if the jury finds that defendant knowingly misrepresented her involvement and knew that plaintiffs' attorney relied on this misrepresentation in making his assurances to her.

Appeal of right by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 124 N.C. App.

502, 477 S.E.2d 680 (1996), affirming the order of summary judgment for defendant entered by Gore, J., on 8 June 1995 in Superior Court, Columbus County. Heard in the Supreme Court 13 October 1997.

Wade E. Byrd for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, William H. Moss, and James Y. Kerr, II, for defendant-appellee.

MITCHELL, Chief Justice.

The questions presented for review are whether the Court of Appeals erred in affirming the trial court's order for summary judgment in favor of defendant on the grounds of breach of implied contract and equitable estoppel. Since we find there are genuine issues of material fact as to both issues, we reverse the decision of the Court of Appeals.

The parties agree that plaintiffs' minor son, Justin Creech, was born at Southeastern General Hospital in Lumberton on 23 September 1980. At birth, Justin's vital signs were not stable, and he was transferred to the intensive care nursery. As a result of oxygen deprivation, Justin suffers from brain damage, blindness, quadriplegia, cerebral palsy, profound mental retardation, and microcephaly.

Although the forecasts of evidence of the parties are in conflict on many points, they forecast substantial evidence from which a jury could find, but would not be required to find, the following facts. Defendant, Dr. Evelyn H. Melnik, is a neonatologist, a pediatrician specializing in the care of newborn infants. When Justin was born on 23 September 1980, Dr. Melnik was the director of newborn nurseries at Southeastern General Hospital. Because Justin's vital signs were not stable at the time of his birth, Dr. Melnik was called to resuscitate him. Justin was then transferred to the intensive care nursery. Plaintiffs concede that Dr. Melnik's resuscitation of Justin was not a cause of his injuries. Plaintiffs claim, however, that Dr. Melnik failed to care for Justin properly for approximately two hours—2:30 p.m. to 4:30 p.m. on 23 September 1980—following Justin's admission to the intensive care nursery. Plaintiffs allege that this failure resulted in Justin's condition significantly worsening.

In his initial investigation of the events surrounding Justin's birth and immediate aftercare, plaintiffs' attorney, Mr. W. Paul Pulley, focused on obstetrical negligence in the delivery room. He obtained

hospital records that were unclear in several respects concerning the circumstances surrounding Justin's birth. The records did indicate, however, that Dr. Melnik had been present during Justin's birth. Because Dr. Melnik had not participated in the obstetrical care that was the subject of Mr. Pulley's investigation but had been in the delivery room and resuscitated Justin, Mr. Pulley contacted Dr. Melnik by telephone to determine what she could remember about the circumstances of Justin's birth. Mr. Pulley told Dr. Melnik that he was investigating the circumstances of Justin's birth and was interested in the role performed by Linda May, a nurse-midwife who, according to hospital records, had performed the delivery. Mr. Pulley asked Dr. Melnik if she would help him understand the records. She agreed to meet with Mr. Pulley and asked him to bring the records with him. Thereafter, Mr. Pulley met with Dr. Melnik at her office. He went over the medical records with her and asked her questions about the typical role of a nurse-midwife. During that meeting, he told Dr. Melnik that his focus was upon the obstetrical care in the case and that he had no reason to consider her as a potential defendant.

During her initial meeting with Mr. Pulley, Dr. Melnik reviewed the medical records he had brought and made statements to the effect that negligent pediatric care during the hours immediately following Justin's birth could have contributed to his condition. In particular, she noted that no tests of blood gases had been taken until 7:00 p.m. As a result, Justin did not receive enough oxygen, which caused him to suffer from neonatal asphyxia. To that point, Mr. Pulley had regarded Dr. Melnik as a possible eyewitness to obstetrical negligence, but her comments during this initial meeting caused him to expand the scope of his inquiry to include pediatric records.

During their initial meeting, Dr. Melnik told Mr. Pulley that she had had nothing to do with Justin's care on 23 September 1980 following her resuscitation of him in the delivery room. She stated that Dr. Edmund Coley had provided Justin's pediatric care until the day after his birth, when she became involved. The medical records in Mr. Pulley's possession tended to support her statement, as the only record in his possession showing that she had been in the nursery was dated 24 September 1980, the day after Justin's birth. Dr. Melnik also stated that had she been treating Justin, she would have ordered tests of blood gases, which probably would have resulted in his receiving a higher concentration of oxygen. She stated that Dr. Coley probably had not done this because he had not seen Justin and had not realized his condition. Dr. Melnik sent Mr. Pulley a bill in the

amount of $450.00 for three hours' consultation time as a result of their first meeting, which was paid in full.

As a result of his meeting with Dr. Melnik, Mr. Pulley reexamined the medical records, which revealed that Dr. Coley had signed the pediatric records immediately after delivery. Based on the records and Dr. Melnik's statement that the pediatric care had been inadequate, Mr. Pulley brought a suit on behalf of plaintiffs against Dr. Coley and others, alleging that Dr. Coley had failed to provide Justin with proper pediatric care from the time immediately following his birth until approximately 7:30 p.m. Because Dr. Melnik had said she had nothing to do with Justin's care during that critical period of time, Mr. Pulley did not consider joining her as a defendant in that lawsuit.

In his answers to interrogatories in plaintiffs' action against him, Dr. Coley stated that on 23 September 1980, the date of Justin's birth, Dr. Melnik had undertaken Justin's pediatric care from the time of his delivery until 4:30 p.m. At that time, Dr. Coley assumed responsibility until Dr. Melnik took over Justin's primary care. In light of Dr. Coley's contradiction of Dr. Melnik's earlier statement that she had not been involved in Justin's post-delivery pediatric care on 23 September 1980, Mr. Pulley called her to ask her reaction. She continued to state that Dr. Coley had been in charge of Justin's care from the time of his delivery until 4:30 p.m. and that she had not been involved. Mr. Pulley continued to believe her statements and to seek evidence that Dr. Coley had been involved in Justin's care during the hours immediately following his birth. During a later conversation, Dr. Melnik asked Mr. Pulley whether she was a potential defendant. Mr. Pulley responded that she had told him that she had not had anything to do with Justin's care in the hours after his birth, and "I don't know of any reason we can be suing you."

Sometime later, Thelma Jean Reeves, a nurse at Southeastern General Hospital, gave a deposition in which she testified that in those instances where Dr. Melnik had been present at the delivery of a child who needed medical attention, it had been Dr. Melnik's customary practice to follow the child into the nursery. Ms. Reeves further testified that, although Dr. Coley's signature was on an order written at 2:30 p.m. on 23 September 1980, Dr. Melnik could have given the order orally, with Dr. Coley having signed it at some time after 4:30 p.m. Following Ms. Reeves' deposition, Mr. Pulley contacted Dr. Melnik and told her the substance of Ms. Reeves' testimony. At that time, he advised Dr. Melnik that she had potential mal-

practice exposure and recommended that she notify her malpractice carrier and retain an attorney. Thereafter, he sent her a copy of Ms. Reeves' deposition.

A few weeks later, Dr. Melnik's deposition was taken. Her testimony was consistent with the statements she had given Mr. Pulley since their first meeting. She continued to deny any responsibility for Justin's care between 2:30 p.m. and 4:30 p.m. on 23 September 1980. She also indicated that Justin had been taken off oxygen support at 2:45 p.m. without blood gases having been taken and that this was contrary to sound medical practice. She stated that had adequate ventilator support been provided at 2:30 p.m., it would have improved Justin's condition.

Dr. Coley was deposed and denied any involvement in Justin's care before 4:20 p.m. on 23 September 1980. He said that although his signature was on an order written at 2:30 p.m., he had merely countersigned the order, which appeared to have originated in the delivery room. Dr. Coley testified that Dr. Melnik had been in charge of Justin's care from 2:30 p.m. until 4:30 p.m. He also testified that he had found an order in the records of another child in the nursery that had been signed by Dr. Melnik at 3:25 p.m. on 23 September 1980, which tended to confirm her presence in the nursery during the critical period in Justin's care.

In light of Dr. Coley's testimony and other evidence, plaintiffs moved to amend their complaint in the action against Dr. Coley to add Dr. Melnik as a party-defendant. That motion was denied, and the case against Dr. Coley and others was eventually settled.

We repeat that the foregoing is a statement of facts that a jury could reasonably find from the evidence forecast by the parties. We reemphasize, however, that a jury would not be required to make such findings and that, in many instances, substantial evidence to the contrary was also forecast.

Plaintiffs subsequently commenced the present action against Dr. Melnik on 12 October 1990. Dr. Melnik then filed her answer raising numerous defenses, including breach of an implied contract not to sue and equitable estoppel. Both of these defenses were based on her contention that Mr. Pulley had promised that plaintiffs would not sue her. On 18 November 1994, Dr. Melnik filed a motion for summary judgment. By order entered on 8 June 1995, the trial court granted summary judgment in favor of defendant, Dr. Melnik, based on two of

her defenses—breach of an implied contract not to sue and equitable estoppel. The Court of Appeals, with Judge Johnson dissenting, affirmed the order of the trial court.

Plaintiffs contend that the Court of Appeals erred in affirming the trial court's order entering summary judgment for defendant on each of the affirmative defenses because the parties' forecasts of evidence raised a genuine issue of material fact as to each defense. We agree.

The party moving for summary judgment is entitled to judgment as a matter of law only when there is no genuine issue of material fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). To overcome a motion for summary judgment, the nonmoving party must then "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Before summary judgment may be entered, it must be clearly established by the record before the trial court that there is a lack of any triable issue of fact. *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E.2d 189, 193 (1972). In making this determination, the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized. *Id.* Further, any doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated.

I. Breach of Contract

[1] Plaintiffs first argue that the trial court erroneously entered summary judgment in favor of defendant based on her defense of an implied contract not to sue her. This Court has noted that a contract implied in fact arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts. *Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980). Such an implied contract is as valid and enforceable as an express contract. *Id.* Except for the method of proving the fact of mutual assent, there is no difference in the legal

effect of express contracts and contracts implied in fact. *Id.* "Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact." *Id.* It is essential to the formation of any contract that there be "mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Id.* at 218, 266 S.E.2d at 602. Mutual assent is normally established by an offer by one party and an acceptance by the other, which offer and acceptance are essential elements of a contract. *Id.* With regard to contracts implied in fact, however, "one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance." *Id.*

An implied contract, like any other contract, is "subject to avoidance by a showing that its execution resulted from fraud or mutual mistake of fact." *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723 (1981). "This rule of contract law is founded on the proposition that there can be no contract without a meeting of the minds. . . ." *Id.* at 270, 276 S.E.2d at 723. In circumstances where there is mutual mistake, the requisite "meeting of the minds" does not occur. *Cheek v. Southern Ry. Co.*, 214 N.C. 152, 156, 198 S.E. 626, 628 (1938). When there has been no meeting of the minds on the essentials of an agreement, no contract results. *Id.* Therefore, a contract may be avoided on the ground of mutual mistake of fact when there is a mutual mistake of the parties as to an existing or past fact that is material and enters into and forms the basis of the contract or is "of the essence of the agreement." *MacKay v. McIntosh*, 270 N.C. 69, 73, 153 S.E.2d 800, 804 (1967).

As previously discussed in this opinion, the parties have forecast evidence from which a reasonable jury could find that Mr. Pulley's disinterest in Dr. Melnik as a party-defendant was the result of his reliance on her repeated representations denying her involvement in Justin's care during the crucial period immediately following the child's birth. The parties also forecast evidence from which a reasonable jury could find that Dr. Melnik's representations were false but were the result of an honest mistake on her part caused by a lapse of memory due to the large number of children she treated on a daily basis at the hospital. The evidence forecast by the parties would then permit a jury also to reasonably find that the mistake was common to both parties and was material and formed the basis of any representation by Mr. Pulley that defendant, Dr. Melnik, would not be considered as a potential party-defendant. Should a jury make such findings, it would be required to find that any implied contract not to sue was

avoided on the ground of a mutual mistake of fact. Therefore, summary judgment for defendant was not proper.

The evidence forecast by the parties would also support a reasonable finding that Dr. Melnik knew that her representations that she had not been involved in Justin's care at any critical time were false and that, as a result, Mr. Pulley's mistake was a unilateral mistake. We have at times indicated that there can be no relief from a unilateral mistake. *See, e.g., Tarlton v. Keith*, 250 N.C. 298, 305, 108 S.E.2d 621, 625 (1959). More recently, however, we have pointed out that the requirement that the mistake be mutual is not without exceptions. *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 136, 217 S.E.2d 551, 560 (1975). "The mistake of one party is sufficient to avoid a contract when the other party had reason to know of the mistake or caused the mistake." *Howell v. Waters*, 82 N.C. App. 481, 487-88, 347 S.E.2d 65, 69 (1986), *disc. rev. denied*, 318 N.C. 694, 351 S.E.2d 747 (1987). If a jury should find from the substantial evidence forecast by the parties that Dr. Melnik knew she had treated Justin at the critical time in question but had falsely assured Mr. Pulley to the contrary, the jury could also find that she had reason to know that his belief that she was not involved was a mistake or that she caused that mistake. In that event, any implied contract not to sue her would be avoided. For this reason also, summary judgment for defendant on the ground of an implied contract not to sue was improper.

II. Equitable Estoppel

[2] Plaintiffs next contend that the trial court erroneously entered summary judgment in favor of defendant on the ground of equitable estoppel. For the reasons discussed herein, we conclude that the parties have forecast evidence raising genuine issues of material fact as to whether the doctrine of equitable estoppel may be applied in favor of defendant in this case.

Where there is but one inference that can be drawn from the undisputed facts of a case, the doctrine of equitable estoppel is to be applied by the court. *Hawkins v. M&J Fin. Corp.*, 238 N.C. 174, 185, 77 S.E.2d 669, 677 (1953). However, in a case such as this, where the evidence raises a permissible inference that the elements of equitable estoppel are present, but where other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury, upon proper instructions from the trial court. *Meachan v. Montgomery County Bd. of Educ.*, 47 N.C. App. 271, 278, 267 S.E.2d 349, 353 (1980).

One who seeks equity must do equity. *Gaston-Lincoln Transit, Inc. v. Maryland Cas. Co.*, 285 N.C. 541, 546-47, 206 S.E.2d 155, 159 (1974). The fundamental maxim, "He who comes into equity must come with clean hands," is a well-established foundation principle upon which the equity powers of the courts of North Carolina rest. The maxim applies to the conduct of a party with regard to the specific matter before the court as to which the party seeks equitable relief and does not extend to that party's general character. *See Tobacco Growers Co-op. Ass'n v. Bland*, 187 N.C. 356, 360, 121 S.E. 636, 638 (1924). The conduct of both parties must be weighed in the balance of equity, and the party claiming estoppel, no less than the party sought to be estopped, must have conformed to strict standards of equity with regard to the matter at issue. *In re Will of Covington*, 252 N.C. 546, 549, 114 S.E.2d 257, 260 (1960) (quoting *Hawkins*, 238 N.C. at 177, 77 S.E.2d at 672).

From the evidence forecast by the parties, a jury could reasonably find that defendant knew Mr. Pulley's assurances to her were premised upon her lack of involvement in Justin's care. The evidence as forecast by the parties would also support a reasonable jury finding that defendant knew or should have known that her denials of involvement had created a false impression in Mr. Pulley's mind and that she had caused and encouraged it by reassuring him that she played no role in Justin's care. Since the parties have forecast evidence that would permit a jury to conclude that defendant knowingly misrepresented her involvement and knew that Mr. Pulley relied on this misrepresentation in making his assurances to her, then a jury could also find that defendant is not entitled to the protection afforded by the doctrine of equitable estoppel. Should a jury find that defendant knowingly created such a false impression in Mr. Pulley's mind, the doctrine of equitable estoppel could not be applied in her favor. *See Hawkins*, 238 N.C. at 179, 77 S.E.2d at 673. Thus, the order of summary judgment for defendant based on equitable estoppel was improper.

We emphasize that our opinion in this case should in no way be taken as an expression of opinion as to what the evidence actually introduced at any future trial of this case will tend to show or the weight or credibility any such evidence should be given. Also, we have discussed only one set of facts a jury could find to exist if evidence as forecast by the parties at this summary judgment stage of the proceedings is in fact forthcoming at trial. We recognize that the evidence actually introduced at the trial of this case may well support

other or contrary reasonable findings of fact by a jury. However, summary judgment is particularly inappropriate where issues such as motive, intent, and other subjective feelings and reactions are material and where the evidence is subject to conflicting interpretations. *Smith v. Currie*, 40 N.C. App. 739, 742, 253 S.E.2d 645, 647, *disc. rev. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979).

For the foregoing reasons, we conclude that the trial court erred in ordering summary judgment for defendant on the grounds of an implied contract not to sue and equitable estoppel. Therefore, 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, Columbus County, for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CHARLES LYNWOOD JOHNSON v. SOUTHERN INDUSTRIAL CONSTRUCTORS, INC.

No. 282PA97

(Filed 6 February 1998)

Workers Compensation § 85 (NCI4th)— subrogation lien—determination by court—future benefits—not included

The trial court was without jurisdiction to determine the subrogation amount of a workers' compensation lien pursuant to N.C.G.S. § 97-10.2(j) where plaintiff was a worker injured by a falling crane; he began receiving workers' compensation and filed a tort suit against defendant, a third party, alleging that his injuries had been caused by the negligence of one of defendant's employees; plaintiff received a verdict and judgment of $219,052 plus interest and costs; plaintiff's employer and workers' compensation insurance carrier filed a subrogation lien; the trial court found that the total of all workers' compensation benefits paid plus the present value of future payments was $300,506.46, so that the tort award was insufficient for the subrogation lien and the court would therefore have authority to determine the amount of the lien; and the court then concluded that it was fair and equitable to reduce the lien to $25,000. The issue of assumed future benefits was considered and decided contrary to plaintiff

in *Hieb v. Lowery*, 344 N.C. 403. Furthermore, although subsection (f)(1)(c) of the statute refers to benefits "to be paid," it is clear from the provisions of N.C.G.S. § 97-10.2 and the cases which have construed it that it was and is the intent of the legislature that non-negligent employers are to be reimbursed for those amounts they pay to employees who are injured by the negligence of third parties, and that employees are not intended to receive double recoveries. Since the tort judgment obtained from defendant was sufficient to compensate the workers' compensation subrogation claim at the time of the trial court's order, the court lacked jurisdiction to determine the subrogation amount.

Justice FRYE 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, 126 N.C. App. 103, 484 S.E.2d 574 (1997), vacating and remanding an order entered on 3 March 1995 by Sumner, J., in Superior Court, Nash County. Heard in the Supreme Court 19 November 1997.

Taft, Taft & Haigler, P.A., by Thomas F. Taft and R. Alfred Patrick, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George W. Dennis III and John R. Green, Jr., for unnamed party-appellants Siemens Energy & Automation, Inc., and Zurich-American Insurance Company.

LAKE, Justice.

This is a workers' compensation case presenting the question of whether a superior court may assert its jurisdiction over the jurisdiction of the Industrial Commission, pursuant to the provisions of N.C.G.S. § 97-10.2(j), by adding assumed future workers' compensation benefits to those currently paid by the employer, to establish that an employee's recovery from a third-party tort-feasor was insufficient to compensate the employer's subrogation lien, and thus allow the trial court to determine the amount and distribution of such lien. The Court of Appeals held that the trial court was correct in including assumed future benefits in determining the insufficiency of the third-party judgment to compensate the subrogation lien, and thus the trial court by this methodology had jurisdiction and the authority to set

the amount of the employer's subrogation lien under this statutory provision. We hold that the trial court may not by this means assert its jurisdiction over the jurisdiction of the Industrial Commission, and accordingly, we reverse the Court of Appeals.

On 17 October 1988, the plaintiff, an employee of Siemens Energy & Automation, Inc. (Siemens), suffered a herniated disk in his back when struck by a falling jib crane in the course of his employment. Siemens denied negligence on its part, but admitted the compensability of plaintiff's injury under the North Carolina Workers' Compensation Act, and through its insurance carrier, Zurich-American Insurance Company (Zurich), began providing compensation for plaintiff's medical expenses and temporary total disability benefits, pursuant to Commission approval, in the amount of $256.00 per week.

On 7 August 1991, plaintiff filed suit against third-party tortfeasor, Southern Industrial Constructors, Inc., the defendant, alleging his injuries were proximately caused by the negligence of one of defendant's employees. Plaintiff prevailed at trial, and pursuant to jury verdict, judgment was entered against defendant in the amount of $219,052.20, plus interest and court costs in the amounts of $55,405.12 and $3,538.28, respectively.

On 22 December 1994, plaintiff filed a motion requesting that the trial court determine the amount of the subrogation lien filed by Siemens and Zurich pursuant to N.C.G.S. § 97-10.2(j). On 4 January 1995, Siemens and Zurich requested distribution of the third-party recovery by order of the Industrial Commission pursuant to N.C.G.S. § 97-10.2(f)(1). On 3 March 1995, pursuant to plaintiff's motion, the trial court, following a hearing, entered an order including, in part, the following findings of fact:

> 4. Zurich-American has asserted its statutory lien during the course of the third-party negligence action; the lien includes both medical expenses and indemnity payments. The lien totaled $121,853.83 on January 27, 1995 and increases by the sum of $256.00 each week.
>
> . . . .
>
> 8. The plaintiff has experienced continuous physical pain and mental suffering since the accident.
>
> . . . .

10. Since the trial of this case was concluded, the plaintiff has been evaluated by [a psychologist] who has determined the plaintiff is "totally disabled from employment at any exertional level in the national economy and that such employment in the future is not foreseen . . . ."

11. [Plaintiff's] physical and mental condition prevent him from returning to gainful employment. It is anticipated he will continue to receive workers' compensation indemnity benefits for the rest of his life.

12. [Plaintiff] was 47 years of age at the time of trial and his life expectancy is 27.38 years. Workers['] compensation benefits to be paid in the future at the rate of $256.00 per week total $364,482.56. [A forensic economist] has determined the present value of the future payments is $178,908.63 using a 6% discount rate.

13. The total present value of the workers' compensation lien is $300,506.46 which includes the total amount of all payments made for medical expenses and indemnity through January 20, 1995 and the present value of all future indemnity payments.

14. The award of $219,052.20 is exceeded by the total lien of $300,506.46 and is insufficient to compensate the subrogation claim of Zurich-American.

Upon these findings, the trial court concluded that it had authority, pursuant to the provisions of N.C.G.S. § 97-10.2(j), to determine the amount of the workers' compensation lien of Siemens and its insurance carrier, Zurich; that it was fair and equitable to reduce the workers' compensation lien to the total sum of $25,000.00 to be paid to Zurich, with the remaining sum of $252,995.60 from the judgment against the defendant (the third-party tort-feasor) to be made available for payment of court costs, attorney fees and damages to the plaintiff; and the court so ordered. Siemens and Zurich, as unnamed parties in this action, filed notice of appeal to the Court of Appeals, which upheld the jurisdictional determination and premise of the trial court, but vacated and remanded "for further hearing and specific findings of fact." *Johnson v. Southern Indus. Constructors*, 126 N.C. App. 103, 116, 484 S.E.2d 574, 581 (1997). The petition of these parties for discretionary review was allowed by this Court on 23 July 1997.

The plaintiff contends that the provisions of N.C.G.S. § 97-10.2(j) give the trial court the jurisdiction and authority to set the amount of the subrogation lien in this case. Section 97-10.2(j) provides in pertinent part:

> Notwithstanding any other subsection in this section, in the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to . . . the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard . . . , the judge shall determine, in his discretion, the amount, if any, of the employer's lien.

N.C.G.S. § 97-10.2(j) (1991).

As this Court has stated, it is clear that the two events under this statute "which will trigger the authority of a judge to exercise discretion in determining or allocating the amount of lien or disbursement are (1) a judgment insufficient to compensate the subrogation claim of the workers' compensation insurance carrier or (2) a settlement." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 326 (1996). Plaintiff argues that the trial court's jurisdiction and discretion to set the amount of the subrogation lien were triggered in this case because plaintiff's assumed *future benefits* should be included with the compensation benefits he has already been paid when ascertaining the amount of the subrogation lien, and thereby, with this composite, the judgment obtained from the third party would be insufficient to satisfy the lien. We decline to accept this proposition.

Indeed, this Court has already considered and decided this issue contrary to this premise in *Hieb*. *Hieb* was a case substantially similar to the circumstances in the case *sub judice*, involving the amount or sufficiency of the third-party judgment to satisfy the subrogation claim. In *Hieb*, it was argued that the plaintiff was "permanently and totally disabled and therefore receiving lifetime benefits," *id.* at 409, 474 S.E.2d at 327, and considering the compensation benefits then paid, "plaintiffs contend it is substantially certain that the workers' compensation lien will exceed the amount of available funds in the future," *id.* This Court specifically held in *Hieb* that plaintiff's "judgment is greater than the amount of St. Paul's lien at the time of Judge Sitton's order and therefore is not 'insufficient to compensate the

subrogation claim.' " *Id.* at 410, 474 S.E.2d at 327. Likewise, in the case *sub judice*, since the judgment obtained from defendant is sufficient to compensate the subrogation claim of Siemens and Zurich *at the time of* the trial court's order, the trial court was without jurisdiction to determine the subrogation amount pursuant to N.C.G.S. § 97-10.2(j).

Plaintiff further contends that subjection (j) of this statute must be read *in pari materia* with N.C.G.S. § 97-10.2(f)(1)(c). *Pollard v. Smith*, 324 N.C. 424, 426, 378 S.E.2d 771, 773 (1989). Subsection (f)(1)(c) provides that the employer shall be reimbursed by order of the Commission from the proceeds of the recovery from the third party 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." N.C.G.S. § 97-10.2(f)(1)(c). Therefore, plaintiff argues that the trial court should consider and determine the future benefits "to be paid" in determining pursuant to subsection (j) whether a judgment obtained is insufficient. We also decline to adopt this proposed construction of N.C.G.S. § 97-10.2.

It is clear from our decisions that subsection (j) is to be viewed in light of this entire statute, *Pollard v. Smith*, 324 N.C. at 426, 378 S.E.2d at 772, which sets forth the overall procedure for determining the respective rights to compensation and subrogation between the employee, the employer and any third-party tort-feasor, and that this is entirely the province of the Commission except in the limited circumstance set forth in subsection (j). We note specifically that subsection (e) provides at length for the appropriate disbursement of the funds available, by way of reduction of damages, subrogation and contribution, all in avoidance of unjust, excessive or double recovery; and subsection (f) provides a specific order of priority for disbursement of the third-party judgment proceeds *by the Commission* where the employer has admitted liability for benefits "or if an award final in nature" has been entered by the Commission. This includes the reimbursement to the employer in subparagraph (f)(1)(c) for all benefits "paid or to be paid" under the award of the Commission. We further note in this regard that in the case *sub judice*, the plaintiff, pursuant to Commission approval, has been receiving temporary total disability benefits, whereas in *Hieb*, the plaintiff was permanently and totally disabled and was receiving lifetime benefits. The Commission, as intended by the legislature, is far better equipped, by its established procedures, practice and expertise, to make the determinations and dispensations contemplated by subsections (e)

and (f), with respect to the variables of future workers' compensation benefits, than is the already amply burdened superior court system.

The construction advocated by plaintiff would necessarily expand the scope and applicability of subsection (j) and at the same time severely restrict the scope and applicability of subsection (f). It is entirely conceivable that under plaintiff's interpretation of subsection (j), virtually any award by the Commission extending into the future could be so projected as to render any judgment against a third party insufficient to compensate the subrogation claim. Subsection (j) provides in pertinent part, "in the event that a judgment is obtained which *is* insufficient to compensate the subrogation claim" (emphasis added), and this wording clearly indicates that the comparison between the compensation benefits paid and the judgment is to be made at the precise time the "judgment is obtained." Plaintiff's proposed construction would require that this language of the statute be amended to read "in the event that a judgment is obtained which is *or may in time become* insufficient . . . ," and this would constitute an impermissible rewriting of this statute by this Court.

With respect to interpreting the Workers' Compensation Act, this Court has warned against any inclination toward judicial legislation, and in the words of Justice Ervin, speaking for this Court, " '[j]udges must interpret and apply statutes as they are written.' " *Andrews v. Nu-Woods, Inc.*, 299 N.C. 723, 726, 264 S.E.2d 99, 101 (1980) (quoting *Montague Bros. v. W.C. Shepherd Co.*, 231 N.C. 551, 556, 58 S.E.2d 118, 122 (1950)). This Court has long distinguished between liberal construction of statutes and impermissible judicial legislation or the act of a court in " 'ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.' " *Deese v. Southeastern Lawn & Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982) (quoting *Rice v. Denny Roll & Panel Co.*, 199 N.C. 154, 157, 154 S.E. 69, 70 (1930)).

In its acquiescence in the plaintiff's proposed interpretation of subsection (j), in conjunction with subsection (f)(1)(c) of this statute, the Court of Appeals notes the following comments from Professor Larson:

> A complication that, in the nature of things, cannot be avoided is the fact that at the time of distribution of the third-party recovery the extent of the carrier's liability for future benefits often is unknown. Indeed, this would happen in almost every

> serious case in which the compensation payments are periodic and the third-party recovery is reasonably prompt.
>
> A well-drawn statute will anticipate this problem and spell out the steps to meet it.

2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 74.31(e), at 514-15 (1996). The Court of Appeals, while correctly noting this complication with respect to consideration of benefits "to be paid", as provided in subsection (f)(1)(c) for disbursement by order of the Industrial Commission, undertakes to apply this to subsection (j) and thus allow our superior courts to expand their jurisdiction by undertaking, as the trial court did in this case, the type of extensive evidentiary hearing heretofore reserved exclusively for the expertise of the Commission. For the reasons stated herein, we do not perceive this to be the intent of the legislature by its enactment of N.C.G.S. § 97-10.2(j).

The concept and provisions of the Workers' Compensation Act as a whole, and specifically the language of N.C.G.S. § 97-91, make it clear, as this Court has held, that the legislature intended for the Industrial Commission to have broad and exclusive jurisdiction, except in narrow, specific instances, to determine the amounts of compensation "to be paid" to injured workers and the appropriate disposition and remedies with respect to all parties involved, including frequently third parties. *See Morse v. Curtis*, 276 N.C. 371, 172 S.E.2d 495 (1970); *Cox v. Pitt County Transp. Co.*, 259 N.C. 38, 129 S.E.2d 589 (1963). Exceptions to the Commission's jurisdiction, such as that found in N.C.G.S. § 97-10.2(j), should be construed so as to accomplish and be consistent with the overall purposes of the Act, which includes limiting employers' financial liability and preventing double recoveries to employees. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 484 S.E.2d 566 (1997). In *Radzisz*, this Court recently stated:

> 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).

Radzisz, 346 N.C. at 89, 484 S.E.2d at 569.

It is clear from the provisions of N.C.G.S. § 97-10.2, including specifically subsection (j) thereof, and the cases which have construed it, that it was and is the intent of the legislature that non-negligent employers are to be reimbursed for those amounts they pay to employees who are injured by the negligence of third parties, and that employees are not intended to receive double recoveries. The rulings of the trial court and the Court of the Appeals in the case *sub judice* would effect the opposite. We therefore hold that since the judgment for plaintiff against the third-party tort-feasor in this case, in the amount of $219,052.20, *is* greater than the amount of the lien *at the time of* the trial court's order and is thus not "insufficient to compensate the subrogation claim," the trial court did not have jurisdiction to determine the amount of the lien pursuant to N.C.G.S. § 97-10.2(j).

For the reasons stated herein, we reverse the decision of the Court of Appeals.

REVERSED.

Justice FRYE dissenting.

Simply stated, the issue in this case is whether "the subrogation claim of the Workers' Compensation Insurance Carrier" includes benefits "to be paid by the employer under award of the Industrial Commission" for purposes of determining, pursuant to N.C.G.S. § 97-10.2(j), whether the judgment obtained by the employee against a third-party tort-feasor is "insufficient" to compensate that claim. As I read the majority opinion, which reverses the superior court and the Court of Appeals, it holds that the subrogation claim includes only benefits already paid at the time of the judgment obtained by the employee against the tort-feasor and does not include any amounts

"to be paid" by the employer under an award by the Industrial Commission.

Under N.C.G.S. § 97-10.2(j), if an employee obtains a judgment against a third-party tort-feasor "which is insufficient to compensate the subrogation claim" of the workers' compensation carrier, the presiding superior court judge, upon application of either party, may determine the amount, if any, of the employer's lien. What this means is that, notwithstanding the fact that the subrogation claim exceeds the amount of the judgment, the superior court may, in its discretion, set the lien at an amount that is less than the subrogation claim.

In the instant case, the presiding superior court judge determined, pursuant to his authority under N.C.G.S. § 97-10.2(j), that the judgment obtained by plaintiff was insufficient to compensate the subrogation claim and, in his discretion, reduced the subrogation amount, that is, "determine[d] . . . the amount . . . of the employer's lien." N.C.G.S. § 97-10.2(j) (1991). This comports with the purpose of subsection (j) which is to allow the injured employee to receive a portion of the recovery obtained in his lawsuit against the negligent third party. The Court of Appeals agreed that the superior court proceeded correctly under N.C.G.S. § 97-10.2(j), but remanded the case for further hearing and specific findings of fact. The majority now reverses the Court of Appeals, holding "that the trial court may not by this means assert its jurisdiction over the jurisdiction of the Industrial Commission."

The majority relies on *Hieb v. Lowery*, 344 N.C. 403, 474 S.E.2d 323 (1996), to support the conclusion that plaintiff's future benefits may not be included when ascertaining the amount of the workers' compensation carrier's claim for purposes of triggering N.C.G.S. § 97-10.2(j). Although I dissented in *Hieb*, I am bound by the decision of the Court in that case. However, I do not believe *Hieb* is controlling in the instant case. The relevant issue in *Hieb* was whether the word "judgment" in N.C.G.S. § 97-10.2(j) referred to the amount awarded by the trial court or to the proceeds actually available to satisfy the judgment. This Court settled the question by according judgment its "plain meaning," holding that the jury verdict of over $1.2 million, as modified, constituted the judgment rather than the $475,000 in insurance proceeds that were actually available to satisfy the judgment.

In this case there is no dispute as to the amount of the judgment. Rather, we are called upon to determine what constitutes the work-

ers' compensation carrier's "subrogation claim." The Workers' Compensation Act, chapter 97 of the North Carolina General Statutes, does not define the term "subrogation claim." However, where the employer has filed a written admission of liability for benefits or a final award has been entered by the Industrial Commission, the insurance carrier's right to subrogation, authorized by N.C.G.S. § 97-10.2(g), is determined by the employer's right, under N.C.G.S. § 97-10.2(f)(1)(c), to reimbursement "for all benefits . . . paid or *to be paid* by the employer under award of the Industrial Commission." N.C.G.S. § 97-10.2(f)(1)(c) (emphasis added). Therefore, to the extent that the workers' compensation insurance carrier will pay benefits in the future, the carrier will have a "subrogation claim" for those payments against any amount obtained by settlement, judgment, or otherwise from a third-party tort-feasor. This claim entitles the insurance carrier to pursue its right to a lien "[i]n any proceeding against or settlement with the third party." N.C.G.S. § 97-10.2(h).

The carrier's right to subrogation does not cease to accrue at the precise moment that the judgment is obtained. Rather, it continues as to all benefits *to be paid* in the future by the employer under award of the Industrial Commission. It is therefore inequitable to deny the existence of that component of the subrogation claim when comparing it with the judgment for purposes of determining the judgment's sufficiency under N.C.G.S. § 97-10.2(j). Because I conclude that the meaning of "subrogation claim" under N.C.G.S. § 97-10.2(j) includes amounts "to be paid" by the workers' compensation carrier as well as those which have already been paid at the time the judgment is obtained, I must agree with the Court of Appeals that the trial court properly considered benefits "to be paid" in determining the insufficiency of the third-party judgment to compensate the subrogation claim. For this reason, I cannot join the majority opinion.

Justice WEBB joins in this dissenting opinion.

VIRGINIA COBO, EXECUTRIX OF THE ESTATE OF MICHAEL COBO v. ERNEST A. RABA, M.D.

No. 127A97

(Filed 6 February 1998)

Physicians, Surgeons, and Other Health Care Professionals § 120 (NCI4th)— medical malpractice—psychiatrist—patient engaging in unprotected homosexual conduct—contributory negligence

The trial court erred by refusing to instruct the jury on the issue of contributory negligence in a medical malpractice action arising from defendant's treatment of plaintiff's decedent for depression where plaintiff's decedent, Dr. Cobo, had a history of depression; sought treatment from defendant and was treated for dysthymia, a form of depression, consistently with his prior diagnosis and treatment; the treatment had no connection to Dr. Cobo's AIDS, which ultimately caused his death; plaintiff's own expert admitted that homosexual conduct is unrelated to depression and that he was aware of no medical literature linking these conditions; there is no evidence that his unprotected homosexual activities were caused by, or related to, his depression; Dr. Cobo testified that he began having homosexual relations at age twenty, engaged in unprotected homosexual relations for more than ten years before he sought defendant's treatment, admitted that his contraction of AIDS was caused by his own conduct and told defendant that he thought his unprotected sex with a drug-addicted prostitute in a San Francisco bathhouse had probably caused his infection; and further acknowledged that he engaged in unprotected homosexual sex easily on a monthly basis in the early 1980s and that it takes only one time to contract AIDS. The jury could have reasonably determined, based on application of its own common knowledge and the expert testimony, that the restrictions Dr. Cobo placed on his treatment (including refusing medication and demanding that no notes be taken), his unremitting alcohol and drug abuse, his actions in ignoring and contravening his doctor's recommendations to seek treatment for his HIV status for three years, and his continued unprotected homosexual conduct constituted sufficient evidence that Dr. Cobo's actions were negligent, contributed to, and proximately caused each of the injuries of which he complained, particularly his physical injury.

Appeal by plaintiff 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. 320, 481 S.E.2d 101 (1997), finding error in a judgment entered by Hight, J., on 5 July 1994 in Superior Court, Durham County, and ordering a new trial. Heard in the Supreme Court 16 October 1997.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for plaintiff-appellant.

Ragsdale, Liggett & Foley, by George R. Ragsdale and David K. Liggett; and Anderson, Johnson, Lawrence, Butler & Brock, by Lee B. Johnson, for defendant-appellee.

Law Office of Martin A. Rosenberg, by Martin A. Rosenberg, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

Golding, Meekins, Holden, Cosper & Stiles, by Elaine Cohoon Miller, on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

LAKE, Justice.

This is a medical malpractice case which presents the single issue of whether the asserted affirmative defense of plaintiff's contributory negligence should have been submitted to the jury. The Court of Appeals majority concluded the trial court committed reversible error by refusing to instruct on and submit this issue to the jury for its determination. For the reasons stated herein, we affirm the decision of the Court of Appeals.

At trial, the jury answered the single liability issue of defendant's negligence in plaintiffs' favor and awarded plaintiff, Dr. Michael Cobo, $850,000 in damages. On 15 June 1994, the trial court entered judgment against the defendant, Dr. Ernest Raba, in that amount. Defendant appealed to the Court of Appeals, which, in a divided panel, ordered a new trial. Prior to the decision of the Court of Appeals, Dr. Cobo died. His wife, Virginia Cobo, as Executrix of the Estate of Michael Cobo, was substituted as plaintiff in this action. The plaintiff executrix now appeals to this Court from the dissent below.

The record reflects the following evidence was before the trial court. The defendant was and is a practicing psychiatrist in Durham, North Carolina. Dr. Cobo began to see defendant as a

patient for his psychiatric problems in 1980 when he moved to Durham to accept a job at Duke University Medical School. Dr. Cobo had a history of psychiatric counseling and had previously been diagnosed and treated for depression with an antidepressant drug which produced adverse side effects. During Dr. Cobo's first visit with defendant, Dr. Cobo stated that he did not want to be treated with medication because his previous treatment with medication had "affected him badly" and had not been helpful. Since Dr. Cobo refused to give defendant a complete medical history, defendant conducted extensive psychological testing under the guidance of Dr. William Burlingame, a practicing psychologist. Defendant diagnosed Dr. Cobo as suffering from dysthymia, a form of depression less severe than major depression. Together, defendant and Dr. Cobo decided that since Dr. Cobo refused to be treated with medication, Dr. Cobo would be treated with psychoanalysis four times a week. Dr. Barry Ostrow, a board-certified psychiatrist with extensive experience, testified that dysthymia was the correct diagnosis and that psychoanalysis was the proper course of treatment for Dr. Cobo. Dr. Cobo's previous psychiatrists, Dr. Sam Bojar and Dr. O. Townsend Dann also treated and diagnosed Dr. Cobo in exactly the same manner. The psychoanalysis continued until December 1988. Throughout the patient-physician relationship, Dr. Cobo refused medication; required 6:00 a.m. appointments to avoid anyone seeing him with a psychiatrist; and demanded that defendant take no notes during the treatment sessions in order to protect Dr. Cobo's identity and confidentiality in the event his marriage fell apart and his wife filed a lawsuit against him.

The evidence before the jury further reflected that Dr. Cobo had engaged in high-risk behavior, including drug abuse, alcohol abuse and unprotected homosexual sex, for most of his adult life. Before seeking defendant's medical assistance, Dr. Cobo had multiple unprotected homosexual encounters with paid prostitutes. In 1981, Dr. Cobo's unprotected homosexual encounters increased, as he testified, to "easily a monthly basis" through 1986. Dr. Cobo acknowledged that "anyone in the early '80s who opened up a Newsweek magazine would know of the risk" of unprotected sex and admitted that he may have contracted acquired immunodeficiency syndrome (AIDS) after unprotected sex with a prostitute in San Francisco in the early 1980s. Defendant advised Dr. Cobo that he "was making some very dangerous choices [regarding sexual partners and homosexual activity] and recommended they stop," and defendant dis-

cussed with Dr. Cobo the risk of sexually transmitted diseases. Defendant also warned Dr. Cobo of the effects of drug and alcohol abuse and specifically with regard to their adverse impact on his psychoanalysis treatment. Although Dr. Cobo was an infectious disease expert and knew his behavior was dangerous, he continued these high-risk activities.

In December 1986, Dr. Cobo tested positive for human immunodeficiency virus (HIV). Defendant prescribed medication to treat Dr. Cobo's anxiety and depression and continued psychoanalysis treatment sessions. Defendant recommended that Dr. Cobo seek medical treatment for HIV, but his advice went unheeded until November 1989 when Dr. Cobo was diagnosed with full-blown AIDS. In December 1988, the doctor-patient relationship was mutually terminated, and Dr. Cobo was treated by another psychiatrist, who prescribed an antidepressant medication which improved Dr. Cobo's condition. At the time of trial, Dr. Cobo was in poor condition and testified by video deposition.

At trial, Dr. John Monroe, plaintiff's expert witness in the field of psychiatry, testified that Dr. Cobo was suffering from major depression, which was a "biologic disregulation" that has to do with "chemical imbalances." Dr. Monroe also testified that there is no relationship between Dr. Cobo's homosexual activity and the treatment rendered for his depression. Dr. Monroe further testified that he was aware of no medical literature which indicates that major depression contributes to homosexual activity.

On 20 December 1991, Dr. Cobo and his wife, Virginia Cobo, filed a complaint against defendant seeking damages for physical injury, psychological injury, emotional distress, loss of standing in the medical community and damage to his relationship with his family. Plaintiffs alleged that defendant was negligent in that he "failed to prescribe appropriate medications"; "continued to treat Michael Cobo with psychotherapy when he knew, or ought to have known, that it was either an ineffective or less effective method of treating Michael Cobo's psychiatric condition"; and "failed to keep notes on his sessions with Dr. Cobo in order to follow the course and effect, or lack thereof, of his therapy."

Defendant filed his answer and asserted as an affirmative defense that Dr. Cobo was contributorily negligent. Specifically, in this regard, defendant alleged that Dr. Cobo "voluntarily sought and continued with psychoanalytic treatment for his condition over a period

of several years when he knew or should have known that there were a variety of other treatments available which were not psychoanalytically based"; "deliberately, intentionally, recklessly, carelessly and knowingly engage[d] in homosexual activities and alcohol and substance abuse which exposed him to physical, psychological, social and professional injury"; and "failed and refused to seek specialized medical treatment for his HIV."

At the charge conference, defendant requested that the trial court instruct the jury on contributory negligence, but this was denied. The trial court submitted the following single issue of negligence to the jury: "Was the plaintiff . . . injured by the negligence of the defendant?" The trial court instructed the jury to answer this issue "yes" if it determined that Dr. Cobo had met his burden of proving *either* negligent diagnosis *or* negligent treatment. The jury thus rendered a general verdict answering "yes" as to this one liability issue. The trial court also instructed on the statute of limitations for personal injury and on damages, but these issues are not before this Court.

We hold that in light of the evidence before the jury, the trial court should have instructed on the issue of contributory negligence. In this state, a plaintiff's right to recover in a personal injury action is barred upon a finding of contributory negligence. *Brewer v. Harris*, 279 N.C. 288, 298, 182 S.E.2d 345, 350 (1971). The trial court must consider any evidence tending to establish plaintiff's contributory negligence in the light most favorable to the defendant, and if diverse inferences can be drawn from it, the issue must be submitted to the jury. *Atkins v. Moye*, 277 N.C. 179, 184, 176 S.E.2d 789, 793 (1970). If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court. *Boyd v. Wilson*, 269 N.C. 728, 730, 153 S.E.2d 484, 486 (1967). Therefore, any evidence that Dr. Cobo was contributorily negligent in that he failed to use ordinary care to protect himself from the asserted injury, or that his behavior was a proximate cause of his injury, would dictate the submission of this issue to the jury.

This Court has held that "[i]n order for a contributory negligence issue to be presented to the jury, the defendant must show that plaintiff's injuries were proximately caused by his own negligence." *McGill v. French*, 333 N.C. 209, 217, 424 S.E.2d 108, 113 (1993). "[I]t is not necessary that plaintiff be *actually aware* of the unreasonable danger of injury to which his conduct exposes him. Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or

dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980).

We hold that the record in the case *sub judice* provides substantial evidence from which the jury could have determined that Dr. Cobo's injuries were proximately caused by his own negligence, including ignoring and actually initiating unreasonable dangers which would have been apparent to an ordinary, prudent person. The evidence indicates that Dr. Cobo's only physical injury was AIDS, which was proximately caused by engaging in unprotected homosexual intercourse, and which he admits he contracted because his "judgment at that time was clouded and poor and self-destructive." Evidence that Dr. Cobo's conduct was unreasonably dangerous includes: his repeated refusal to follow defendant's advice with regard to his continued unprotected homosexual intercourse, his alcohol and drug abuse; and his substantial delay in seeking treatment for HIV. Further evidence of Dr. Cobo's negligence includes the indicated restrictions placed on treatment in refusing to allow defendant to prescribe medication for the chronic depression and in refusing to allow defendant to take notes during the treatment sessions. Additionally, as a highly educated medical doctor and infectious disease expert, Dr. Cobo was actually aware that his unprotected homosexual conduct was unreasonably dangerous.

Expert testimony, although useful, is not needed in all medical malpractice cases to establish proximate causation on the issue of contributory negligence when the jury, based on its own common knowledge and experience, is able to understand and judge the patient's actions. *McGill*, 333 N.C. at 219, 424 S.E.2d at 114. In *McGill*, this Court noted that a patient has an active responsibility for his own care and well-being. *Id.* at 220, 424 S.E.2d at 115. The Court held that a patient's failure to keep his appointments and failure to report symptoms constituted sufficient evidence of negligence for a jury to find these actions were the proximate cause of his injuries. *Id.* Likewise, in this case, the jury could have reasonably determined, based on application of its own common knowledge and the expert testimony, that the indicated restrictions Dr. Cobo placed on his treatment, his unremitting alcohol and drug abuse, his actions in ignoring and contravening his doctor's recommendations to seek treatment for his HIV status for three years and his continued unprotected homosexual conduct constituted sufficient evidence that Dr. Cobo's actions were negligent and contributed to and proximately

caused each of the injuries of which he complained, particularly his physical injury.

Plaintiff contends that Dr. Cobo's actions in this regard do not constitute a proper factual basis for the submission of the issue of contributory negligence to the jury. She contends that Dr. Cobo's alcohol abuse, drug abuse and unprotected homosexual conduct occurred subsequent to the alleged misdiagnosis and implementation of treatment and were part and parcel of the condition for which he sought treatment. Therefore, plaintiff contends, Dr. Cobo's injury could have been avoided if he had been correctly diagnosed and appropriate treatment had been initiated by defendant. Contributory negligence as a defense is inapplicable "where a patient's conduct provides the occasion for care or treatment that, later, is the subject of a malpractice claim, or where the patient's conduct contributes to an illness or condition for which the patient seeks the care or treatment on which a subsequent medical malpractice [claim] is based." David M. Harney, *Medical Malpractice* § 24.1, at 564 (3d ed. 1993). However, in the case *sub judice*, the evidence clearly indicates that the activities of Dr. Cobo asserted as contributory negligence took place prior to and contemporaneously with defendant's treatment and that Dr. Cobo directly contravened defendant's specific advice during the course of treatment. Further, we find no evidence that Dr. Cobo's malady, AIDS, was in any way caused by depression, the condition for which Dr. Cobo sought treatment from defendant.

The evidence shows Dr. Cobo had a history of depression; sought treatment from defendant for this condition; and consistent with prior diagnosis and treatment, was treated for dysthymia, a form of depression. The treatment rendered by defendant for dysthymia had absolutely no connection to Dr. Cobo's AIDS, which ultimately caused his death. Plaintiff's own expert, Dr. Monroe, admitted that homosexual conduct is unrelated to depression and that he was aware of no medical literature linking these conditions. Furthermore, there is no evidence that Dr. Cobo's unprotected homosexual activities were caused by, or related to, his depression. Dr. Cobo testified that he began having homosexual relations at the age of twenty and engaged in unprotected homosexual relations for more than ten years before he sought defendant's treatment. Dr. Cobo admitted that his contraction of AIDS was caused by his own conduct, and he told defendant that he thought his unprotected sex with a drug-addicted prostitute in a San Francisco bathhouse had probably caused his infection. Dr. Cobo further acknowledged that he engaged in unpro-

tected homosexual sex "easily on a monthly basis" in the early 1980s and that it takes only "one time" to contract AIDS. In *McGill*, this Court concluded that passive conduct by the plaintiff in failing to keep his appointments was sufficient to constitute contributory negligence. *McGill*, 333 N.C. at 220, 424 S.E.2d at 115. In the instance case, Dr. Cobo's conduct was clearly active and related directly to his physical complaint. While the record here does not show, and we thus cannot speculate, whether the verdict as to defendant's negligence was based on diagnosis or treatment or both, we conclude the record does show evidence of Dr. Cobo's conduct in both areas sufficient to require an instruction on and submission of the issue of contributory negligence to the jury.

Based upon the foregoing, there was sufficient evidence from which the jury could have inferred that Dr. Cobo's injuries were proximately caused by his own negligence. The trial court thus erred in refusing to instruct the jury on the issue of contributory negligence. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

STEVE MULLIS AND BLAINE SCOTT MULLIS v. HARRY SECHREST AND CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

No. 283A97

(Filed 6 February 1998)

1. Public Officers and Employees § 68 (NCI4th); Schools § 176 (NCI4th)— negligence claim—school teacher—official capacity—governmental immunity

An action against defendant high school teacher to recover damages for injuries received by an industrial arts student in an accident in a shop classroom was a suit against defendant teacher solely in his official capacity as an agent of defendant board of education where plaintiffs failed to specify whether they were suing defendant teacher in his individual or official capacity; the complaint alleged that defendant teacher was employed by defendant board of education as a teacher; plaintiffs set forth only one claim for relief in their complaint; and after defendants were allowed to amend their answer to allege that both defend-

ants were entitled to governmental immunity because the board of education had not purchased a contract of insurance that covered exposure of $1 million or less, plaintiffs sought to amend their complaint only by adding an allegation that defendant board of education had waived immunity that might cover it and defendant teacher by the purchase of liability insurance and did not attempt to amend their complaint to specify whether they intended to sue defendant teacher in his individual or official capacity or both. Therefore, where it was determined that the board of education is entitled to governmental immunity from suit for the first $1 million in damages which may be awarded, defendant teacher, in his official capacity, is entitled to governmental immunity to that same extent.

2. **Public Officers and Employees § 68 (NCI4th)— suit against public officer or employee—allegations of capacity**

Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a public officer or employee liable by including words such as "in his official capacity" or "in his individual capacity" after a defendant's name. In addition, allegations as to the extent of liability claimed should provide further evidence of capacity, and the prayer for relief should indicate whether plaintiff seeks to recover damages from a defendant individually or as agent of the governmental entity.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 91, 484 S.E.2d 423 (1997), affirming in part and vacating in part an order entered by Caviness, J., on 9 August 1995 in Superior Court, Mecklenburg County. On 23 July 1997, this Court allowed discretionary review of additional issues. Heard in the Supreme Court 15 December 1997.

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., John S. Arrowood, and Fred B. Monroe, for plaintiff-appellees.

Smith Helms Mulliss & Moore, L.L.P., by James G. Middlebrooks, for defendant-appellant Sechrest.

ORR, Justice.

This is an action to recover damages for an injury sustained by plaintiff Blaine Mullis on 18 October 1990. At the time of the accident, Blaine was sixteen years old and a junior at Garinger High School. On

the day of the accident, Blaine's industrial arts or "shop" class was attending a student assembly. Blaine left the assembly without the permission of his instructor, defendant Sechrest, and returned to the shop classroom. Although the door was locked, another student, also working in the classroom unsupervised, let Blaine into the classroom. Blaine then began to construct a wooden "rabbit box" using a Rockwell tilting arbor saw, more commonly known as a table saw. Blaine failed to position the safety guard in place over the saw blade while operating the saw. Subsequently, while attempting to cut a board with the saw, the board bucked upwards, causing Blaine to sever the fingers and thumb on his left hand.

After the accident, medical personnel were able to reattach Blaine's fingers; however, his thumb was ultimately amputated. In July 1991, Blaine underwent a procedure at Duke University in which a toe was removed from his foot and attached to his left hand to serve as a substitute for his thumb. Despite this procedure, Blaine continues to suffer a permanent partial disability to his left hand as a result of this accident. Plaintiff Steve Mullis, Blaine's father, is also a party to this suit because he is responsible for Blaine's medical bills and expenses.

On 18 November 1992, plaintiffs filed this action against "Harry Sechrest and the Charlotte[-]Mecklenburg Board of Education." In their only claim for relief, plaintiffs allege that defendant Board "provided, permitted and directed the operation of a Rockwell tilting arbor saw . . . in its industrial arts class." Plaintiffs further allege that defendant Sechrest, a teacher employed by defendant Charlotte-Mecklenburg Board of Education, negligently failed to give adequate instructions regarding the proper use of the table saw and failed to adequately warn of the inherent dangers of its use. Plaintiffs also allege defendants provided an unsafe saw.

Defendants filed an answer on 25 January 1993, denying any negligence on the part of defendants; moving to dismiss the complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6); and asserting contributory negligence as a defense. On 29 April 1994, defendants filed a motion to amend their answer to allege that both defendants were entitled to governmental immunity because the Board had "not purchased liability insurance for claims of the kind and level asserted here." The trial court allowed this motion on 14 July 1994.

Subsequently, on 18 July 1995, defendants submitted a motion for judgment on the pleadings or, in the alternative, partial summary

judgment. Plaintiffs then filed a motion to amend their initial complaint on 28 July 1995. By this motion, plaintiffs sought to add an allegation that defendant Board had waived any immunity that might cover it and defendant Sechrest by purchasing liability insurance. After a hearing, the trial court entered an order allowing plaintiffs' motion to amend their complaint and denying defendants' motion for judgment on the pleadings. The order also granted partial summary judgment on the basis of governmental immunity for defendant Board for all claims determined to be $1,000,000 or less and granted summary judgment for defendant Sechrest on the ground that "he is a public officer immune from suit by the plaintiffs."

Plaintiffs then appealed to the Court of Appeals, which held (1) that the trial court did not abuse its discretion in allowing defendants to amend their answer to assert the defense of governmental immunity, (2) that the trial court did not err in determining that the Board was entitled to sovereign immunity for all claims of $1,000,000 or less, and (3) that the trial court erred in holding that defendant Sechrest was entitled to summary judgment "because he is a public officer immune from suit by the plaintiffs." Defendant Sechrest subsequently filed a notice of appeal to this Court based upon the dissent below and a petition for discretionary review of additional issues. On 23 July 1997, we allowed defendant Sechrest's petition for discretionary review of additional issues.

[1] Both the trial court and the Court of Appeals focused on the issue of whether defendant Sechrest was entitled to public-officer immunity. However, the threshold issue to be determined in this case is whether defendant Sechrest is being sued in his official capacity, individual capacity, or both. In his brief, defendant Sechrest contends that the Court of Appeals erred in determining that the plaintiffs brought suit against him in his individual capacity, rather than in his official capacity. Defendant Sechrest notes that if the plaintiffs sued him "in his official capacity, he is entitled to governmental immunity to the same extent as the Board." We agree with defendant Sechrest and, accordingly, reverse the Court of Appeals.

The initial complaint in this case was filed on 18 November 1992 and failed to specify in the caption whether plaintiffs were suing defendant Sechrest in his individual or official capacity. An amended complaint was also submitted and similarly failed to specify whether plaintiffs were suing defendant Sechrest in his individual or official capacity. In *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed. 2d 114

(1985), the United States Supreme Court stated that where the complaint does not clearly specify whether the defendants are being sued in their individual or official capacities, "[t]he 'course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed." *Id.* at 167 n.14, 87 L. Ed. 2d at 122 n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 469, 83 L. Ed. 2d 878, 884 (1985)).

This Court recently examined the distinction between official and individual capacity claims in *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997), in which we stated:

> "The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities."

Id. at 110, 489 S.E.2d at 887 (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67, at 7 (Inst. Of Gov't, Univ. Of N.C. at Chapel Hill), Apr. 1995 [hereinafter "Law Bulletin"]). As Brown-Graham and Koeze further explained:

> It is true that it is often not clear in which capacity the plaintiff seeks to sue the defendant. In such cases it is appropriate for the court to either look to the allegations contained in the complaint to determine plaintiff's intentions or assume that the plaintiff meant to bring the action against the defendant in his or her official capacity.

Law Bulletin at 7; *see Yeksigian v. Nappi*, 900 F.2d 101, 104 (7th Cir. 1990) (court employs presumption against personal liability in the absence of clear expression that plaintiff intends to sue defendants in their individual capacities).

Based on *Meyer*, our analysis begins with answering the "crucial question" of what type of relief is sought. Here, plaintiffs are seeking to recover monetary damages for pain and suffering, future medical

expense, and permanent disability. As stated above, if money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the governmental entity or from the pocket of the individual. Accordingly, it is appropriate to consider the course of the proceedings and allegations contained in the pleading to determine the capacity in which defendant is being sued.

In the present case, a review of the course of proceedings and the allegations contained in the complaint leads us to conclude that this suit was brought against defendant Sechrest solely in his official capacity. First, as noted above, plaintiffs failed to specify whether they were suing defendant Sechrest in his individual or official capacity. Additionally, in the section of the complaint identifying "Parties, Capacity, Jurisdiction and Venue," plaintiffs allege that defendant Sechrest is "an adult citizen and resident of Mecklenburg County, North Carolina, and is employed by the Charlotte[-]Mecklenburg Board of Education as a teacher." This allegation establishes that defendant Sechrest is an agent of defendant Board.

Further, plaintiffs set forth only one claim for relief in their complaint. In the beginning of their claim for relief, plaintiffs allege that "the Defendant Charlotte[-]Mecklenburg School System provided, permitted and directed the operation of a Rockwell tilting arbor saw, model #34-399 in its industrial arts class." Later in the complaint, plaintiffs specifically allege that defendant Sechrest negligently failed to give reasonable or adequate instructions or warnings concerning the dangers inherent in the use of the saw and provided a machine that was unsafe. However, we note that it was necessary to allege defendant Sechrest's negligence in the complaint because he was acting as an agent of defendant Board in performing his duties. *See Moore v. City of Creedmoor,* 345 N.C. 356, 481 S.E.2d 14 (1997). The fact that there is only one claim for relief is also indicative of plaintiffs' intention to sue defendant Sechrest in his official capacity, as an agent of defendant Board.

Finally, focusing on the course of proceedings in the present case, it is important to note that on 29 April 1994, defendants filed a motion to amend their answer to allege that both defendants were entitled to governmental immunity because the Board had not purchased a contract of insurance that covered exposures of $1,000,000 or less. This motion was allowed by the trial court on 14 July 1994. Subsequently, on 28 July 1995, plaintiffs filed a motion to amend their

complaint. In their motion, plaintiffs state that "[b]y this Motion, Plaintiffs seek to amend their Complaint by adding an allegation that Defendant Charlotte[-]Mecklenburg Board of Education (the "School Board") has waived any immunity that might cover it and Defendant Harry Sechrest by purchasing liability insurance." Although the defense of immunity had been raised by defendants, plaintiffs did not attempt to amend their complaint to specify whether they intended to sue defendant Sechrest in his individual or official capacity, or both. In fact, by their reference to liability insurance, plaintiffs' intent appears to be to sue defendant Sechrest solely in his official capacity.

"[I]n 1972 this State abandoned Code pleadings in favor of notice pleadings." *Watkins v. Hellings*, 83 N.C. App. 430, 433, 350 S.E.2d 590, 592 (1986), *rev'd on other grounds*, 321 N.C. 78, 361 S.E.2d 568 (1987). This change allowed a more liberal approach to pleading, while still ensuring that the opposing party would have adequate notice of the issues in order to present a proper defense. As stated by this Court, "[u]nder the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Pyco Supply Co. v. American Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988). Thus, in order for defendant Sechrest to have an opportunity to prepare a proper defense, the pleading should have clearly stated the capacity in which he was being sued.

[2] It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity. These simple steps will allow future litigants to avoid problems such as the one presented to us by this appeal.

Taken as a whole, the amended complaint, along with the course of proceedings in the present case, indicate an intent by plaintiffs to sue defendant Sechrest in his official capacity. As we have previously noted, official-capacity suits are merely another way of pleading an action against the governmental entity. *Moore*, 345 N.C. at 367, 481

S.E.2d at 21. The immunity available to the Board of Education has already been determined and is not before us on appeal. In the opinion below, the Court of Appeals held that the Board of Education is entitled to governmental immunity from suit for the first $1,000,000 in damages which may be awarded. Similarly, defendant Sechrest, in his official capacity, is entitled to governmental immunity to that same extent.

Based on our holding above, it is not necessary for us to address the remaining issue which is whether defendant Sechrest is entitled to assert public-officer immunity.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. EDWARD RONALD BEATTY

No. 255A97

(Filed 6 February 1998)

1. Kidnapping and Felonious Restraint § 18 (NCI4th)—armed robbery—binding of victim's wrists—kicking victim in back—additional restraint supporting kidnapping

There was sufficient evidence of restraint of one victim separate and apart from that inherent in an armed robbery of a restaurant to support defendant's conviction of second-degree kidnapping of this victim where the evidence tended to show that the robbers, including defendant, put duct tape around the victim's wrists, forced him to lie on the floor, and kicked him in the back twice. When defendant bound this victim's wrists and kicked him in the back, he increased the victim's helplessness and vulnerability beyond what was necessary for him and his comrades to rob the restaurant, and such actions constituted sufficient additional restraint to satisfy the restraint element of kidnapping under N.C.G.S. § 14-39.

2. Kidnapping and Felonious Restraint § 18 (NCI4th)—armed robbery—threatened use of firearm—no additional restraint supporting kidnapping

There was insufficient evidence of restraint of a second victim separate and apart from that inherent in an armed robbery of

a restaurant to support defendant's conviction of second-degree kidnapping of this victim where the evidence showed only that one of the robbers approached the victim, pointed a gun at him, and stood guarding him during the robbery, the victim did not move during the robbery, and the robbers did not injure him in any way. The only evidence of restraint of this victim was the threatened use of a firearm, which was an inherent, inevitable feature of the robbery and insufficient to support a conviction for kidnapping under N.C.G.S. § 14-39.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 126 N.C. App. 225, 491 S.E.2d 564 (1997), finding no error in a jury trial that resulted in judgments of imprisonment entered on 25 May 1995 by Steelman, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 17 December 1997.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Danielle M. Carman and Daniel R. Pollitt, Assistant Appellate Defenders, for defendant-appellant.

WHICHARD, Justice.

On 23 May 1994 a Mecklenburg County grand jury indicted defendant Edward Ronald Beatty for robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, felonious breaking and entering, safecracking, first-degree kidnapping, two counts of second-degree kidnapping, and possession of a firearm by a convicted felon. The trial court severed the charge of possession of a firearm by a convicted felon and later dismissed the charge of safecracking. The remaining charges were tried during the 22 May 1995 Mixed Session of Superior Court, Mecklenburg County.

The jury found defendant guilty as charged, except that assault with a deadly weapon with intent to kill was reduced to assault with a deadly weapon inflicting serious injury, and breaking and entering was submitted and found as entering only. The trial court arrested judgment on the conviction for first-degree kidnapping and sentenced defendant to imprisonment of thirty years for the robbery with a dangerous weapon, ten years for felonious assault, ten years

for entering, and fifteen years for each of the second-degree kidnappings, all sentences to be served consecutively.

Defendant appealed to the Court of Appeals asserting, *inter alia*, that his kidnapping convictions should be vacated because there was insufficient evidence of restraint separate and apart from that inherent in the crime of robbery with a dangerous weapon to support those convictions. The Court of Appeals majority disagreed. Judge Wynn dissented in part on the ground that "the restraint in this case was an inherent and inevitable feature of the commission of the armed robbery" and thus could not support a conviction for second-degree kidnapping. Defendant appeals based upon Judge Wynn's dissent. For reasons that follow, we affirm with regard to defendant's conviction for the second-degree kidnapping of victim Koufaloitis, and we reverse with regard to defendant's conviction for the second-degree kidnapping of victim Poulos.

The State's evidence tended to show that on 19 March 1994 defendant met a group of men at a party. They decided to rob South 21, a drive-in restaurant in Charlotte, North Carolina. When they approached the restaurant, the owner, Nicholas Copsis, stood just outside near an open door. The robbers approached this door, put a gun to Copsis' head, and told him to go inside and open the safe.

Once inside, the robbers saw restaurant employees Hristos Poulos and Tom Koufaloitis. Poulos was on his knees washing the floor at the front, and Koufaloitis stood three to four feet from the safe cleaning the floor in the back. One robber put a gun to Poulos' head and stood beside him during the robbery. An unarmed robber put duct tape around Koufaloitis' wrists and told him to lie on the floor.

Copsis did not open the safe on his first attempt. One robber said, "Let's go. We're taking too long. Hurry up." Another shot Copsis twice in the legs. Copsis then opened the safe. The robbers took more than $2,000 and fled. The robbery took approximately three to four minutes.

Defendant contends that his convictions for second-degree kidnapping must be vacated because the State presented insufficient evidence of restraint separate from that inherent in the robbery. He asserts that such evidence is necessary to satisfy the requirements of N.C.G.S. § 14-39, the kidnapping statute, as interpreted by this Court in *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). *See*

also State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) (applying *Fulcher* interpretation of N.C.G.S. § 14-39 in the context of a robbery with a dangerous weapon).

N.C.G.S. § 14-39(a) provides in pertinent part that a person is guilty of kidnapping if he or she

> 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 . . . 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 . . . .

N.C.G.S. § 14-39(a) (1993) (amended 1994). In *Fulcher* this Court recognized that certain felonies, such as robbery with a dangerous weapon, cannot be committed without some restraint of the victim; and it held that "restraint, which is an inherent, inevitable feature of such other felony," could not form the basis of a kidnapping conviction. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. The Court stated that the legislature did not intend N.C.G.S. § 14-39 "to permit the conviction and punishment of the defendant for both crimes." *Id.* The Court further noted that "[t]o hold otherwise would violate the constitutional prohibition against double jeopardy." *Id.*

The State contends that *Fulcher* was based upon a now-outmoded understanding of the Double Jeopardy Clause of the United States Constitution. It argues that under modern double jeopardy analysis, this Court's interpretation and application of N.C.G.S. § 14-39 in *Fulcher* is unnecessary and should be overruled. This Court did not decide *Fulcher solely* on constitutional grounds, however. Rather, it interpreted the kidnapping statute under the "cardinal principle of statutory construction . . . that the intent of the Legislature is controlling," *id.* at 520, 243 S.E.2d at 350, stating:

> We are of the opinion, and so hold, that G.S. 14-39 was *not intended by the Legislature* to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes.

Id. at 523, 243 S.E.2d at 351 (emphasis added). The interpretation of a criminal statute by the highest court of the state that enacted it is

generally regarded as an integral part of the statute. *See Gupton v. Builders Transp.*, 320 N.C. 38, 43-44, 357 S.E.2d 674, 678 (1987). This Court's long-standing interpretation in *Fulcher* of legislative intent in the enactment of N.C.G.S. § 14-39 has become an integral part of the kidnapping statute, and it thus remains the appropriate focus for analysis of the kidnapping convictions here.

As noted, under N.C.G.S. § 14-39 as construed and applied in *Fulcher*, a person cannot be convicted of kidnapping when the only evidence of restraint is that "which is an inherent, inevitable feature" of another felony such as armed robbery. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. "The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself.' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446). Here, the robbers, including defendant, restrained two victims, Koufaloitis and Poulos, and defendant was convicted of one count of second-degree kidnapping for each restraint. We address each in turn.

[1] The evidence of defendant's restraint of victim Koufaloitis supports a finding that the robbers, including defendant, put duct tape around the victim's wrists, forced him to lie on the floor, and kicked him in the back twice. Because the binding and kicking were not inherent, inevitable parts of the robbery, these forms of restraint "exposed [the victim to a] greater danger than that inherent in the armed robbery itself." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446; *see also Pigott*, 331 N.C. at 210, 415 S.E.2d at 561 (holding that when the defendant bound the victim's hands and feet, he exposed the victim to a greater danger than that inherent in the armed robbery and therefore upholding the defendant's kidnapping conviction); *Fulcher*, 294 N.C. at 524, 243 S.E.2d at 352 (holding that binding of victims' hands was *not* an inherent and inevitable feature of rape and therefore upholding the defendant's kidnapping convictions based upon that restraint). When defendant bound this victim's wrists and kicked him in the back, he increased the victim's helplessness and vulnerability beyond what was necessary to enable him and his comrades to rob the restaurant. *See Pigott*, 331 N.C at 210, 415 N.C. at 561. Such actions constituted sufficient additional restraint to satisfy the restraint element of kidnapping under N.C.G.S. § 14-39, and the Court of Appeals properly found no error in defendant's conviction for the second-degree kidnapping of victim Koufaloitis.

[2] With regard to victim Poulos, the evidence shows only that one of the robbers approached the victim, pointed a gun at him, and stood guarding him during the robbery. The victim did not move during the robbery, and the robbers did not injure him in any way. In order to commit a robbery with a dangerous weapon under N.C.G.S. § 14-87(a), defendant had to possess, use, or threaten to use a firearm while taking personal property from a place of business where persons were in attendance. The only evidence of restraint of this victim was the threatened use of a firearm. This restraint is an essential element of robbery with a dangerous weapon under N.C.G.S. § 14-87, and defendant's use of this restraint exposed the victim to no greater danger than that required to complete the robbery with a dangerous weapon. We thus hold that threatening victim Poulos with a gun was an inherent, inevitable feature of the robbery and is insufficient to support a conviction for kidnapping under N.C.G.S. § 14-39. The Court of Appeals therefore erred in finding no error in defendant's conviction for the second-degree kidnapping of victim Poulos.

For the reasons stated, we affirm the Court of Appeals with regard to defendant's conviction for the second-degree kidnapping of victim Koufaloitis, and we reverse the Court of Appeals with regard to defendant's conviction for the second-degree kidnapping of victim Poulos. We remand the case to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for entry of an order arresting judgment on defendant's conviction for the second-degree kidnapping of victim Poulos.

AFFIRMED IN PART, REVERSED IN PART.

DOUGLAS H. McMILLIAN AND MARGARET S. McMILLIAN v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY

No. 104PA97

(Filed 6 February 1998)

Insurance § 509 (NCI4th)— UM coverage—reduction by workers' compensation benefits

The Court of Appeals incorrectly reversed the trial court in a declaratory judgment action to determine coverage under insurance policies where plaintiff Douglas McMillian was a passenger

in a car owned and operated by a fellow employee; both were acting in the course and scope of their employment; a car driven by an uninsured motorist collided with the car and injured plaintiff; plaintiff applied for and received workers' compensation benefits and brought personal injury actions against the driver of the car in which he was riding and the uninsured driver of the other car; defendants provide UM insurance to plaintiffs and UIM coverage to the driver of the other car; the workers' compensation policy was paid for by his employer and the UM policies were paid for by persons other than his employer; the automobile policies contained limitations requiring that any amount payable be reduced by sums paid or payable under workers' compensation law; plaintiffs instituted this action to determine coverage; and the trial court concluded that the combined coverages of the automobile policies should be reduced by the workers' compensation benefits already paid, which exceeded the coverages, so that coverage was not provided. Although earlier cases held that the UM carrier was not allowed to reduce its coverage when the employee/plaintiff purchased the UM policy herself or when the purchaser of the UM/UIM coverage was not the same entity that purchased the workers' compensation coverage, nothing in N.C.G.S. § 20-279.21(e) suggests that the legislature intended for the reduction to apply only if the automobile policy was bought by the same entity that purchased the workers' compensation coverage or that the reduction be applicable only to business policies and not to personal policies. Defendant UM carriers are entitled to reduce coverage by the amount of workers' compensation benefits received by plaintiff. To the extent that *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, and its progeny are inconsistent with this holding, they are overruled.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 247, 480 S.E.2d 437 (1997), reversing declaratory judgment in favor of defendants by Greeson, J., at the 30 October 1995 Civil Session of Superior Court, Rockingham County. Heard in the Supreme Court 11 September 1997.

Robert S. Hodgman and Associates, by Robert S. Hodgman and Todd P. Oxner, for plaintiff-appellees.

Henson & Henson, L.L.P., by Perry C. Henson, Jr., and Rachel Scott Decker, for defendant-appellant N.C. Farm Bureau Mutual Ins. Co.

Smith Helms Mulliss & Moore, L.L.P., by Stephen P. Millikin, for defendant-appellant Allstate Ins. Co.

Morgan & Reeves, by Robert B. Morgan, and Robert R. Gardner on behalf of Nationwide Mutual Ins. Co., amicus curiae.

Baker & Jones, P.A., by H. Mitchell Baker, III, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

PARKER, Justice.

The issue in this case is whether defendant insurance companies are authorized under N.C.G.S. § 20-279.21(e) to reduce uninsured motorist ("UM") coverage under their respective policies by the amount plaintiff Douglas McMillian has received for his injuries from workers' compensation. We hold that the reduction is authorized by the statute.

On 2 April 1990 plaintiff Douglas H. McMillian was a passenger in a car owned and operated by James L. Boswell, a fellow employee at Winn-Dixie, while both were acting within the course and scope of their employment. Another car, driven by uninsured motorist Emanuel Canty, Jr., collided with Boswell's car, injuring McMillian. McMillian applied for and received workers' compensation benefits, which as of 9 June 1993 totaled in excess of $78,000. McMillian brought a personal injury action against both Boswell and Canty. Margaret S. McMillian, plaintiff's wife, joined in this action to assert her claim for loss of consortium. The action as to Boswell was dismissed since Boswell was immune from liability for ordinary negligence by a fellow employee. The action against Canty was still pending at the time the parties filed briefs in this Court.

At the time of the accident, defendant Allstate Insurance Company ("Allstate") provided UM insurance coverage to plaintiffs for bodily injury and property damage in the amount of $25,000. Defendant North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") provided UM and underinsured motorist ("UIM") insurance coverage to Boswell for bodily injuries in the amount of $50,000. Both policies contained the following limit of liability provision: "Any amount otherwise payable for damages under this coverage shall be reduced by all sums . . . [p]aid or payable because of the bodily injury under any of the following or similar law[s] . . . workers' compensation law."

Plaintiffs instituted this declaratory judgment action to determine the coverage available under both their own automobile policy and the policy issued to Boswell. The action was heard on stipulated facts and exhibits. On 25 January 1996 the trial court entered a judgment concluding that plaintiffs were entitled to pursue claims for UM insurance under both the Allstate and the Farm Bureau policies but that the combined coverages of $75,000 were to be reduced by the $78,000 in workers' compensation benefits already paid to Mr. McMillian. Hence neither policy provided coverage to plaintiffs for the damages asserted.

On appeal the Court of Appeals reversed the trial court, holding that N.C.G.S. § 20-279.21(e) did not authorize the UM coverage to be reduced by the amount of workers' compensation benefits paid and that plaintiffs were entitled to recover the UM policy limits from Allstate and Farm Bureau. *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 125 N.C. App. 247, 254, 480 S.E.2d 437, 441 (1997). In reaching this decision, the Court of Appeals distinguished *Brantley v. Starling*, 336 N.C. 567, 444 S.E.2d 170 (1994), on the basis that *Brantley* involved a business UM policy paid for by the employer and issued by the same carrier which carried the workers' compensation coverage; whereas, the policies in the present case were personal policies paid for by plaintiffs and Boswell individually and issued by carriers different from the workers' compensation carrier. *Id.* We find no support for such distinctions in N.C.G.S. § 20-279.21(e) and reverse the decision below.

Article 9A of chapter 20 of the General Statutes, the Motor Vehicle Safety and Financial Responsibility Act ("Act"), represents a comprehensive legislative scheme requiring automobile operators to be financially responsible thereby protecting people injured by negligent operators. The Act specifically recognizes the interplay between workers' compensation and third party liability and provides:

> Such motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workers' compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

N.C.G.S. § 20-279.21(e) (1993).

This Court initially addressed the reduction allowed under N.C.G.S. § 20-279.21(e) in *Manning v. Fletcher*, 324 N.C. 513, 379

S.E.2d 854 (1989), where the plaintiff, who was injured in an automobile accident while acting in the course and scope of his employment, was covered under both a workers' compensation policy purchased by the employer and by a UM/UIM policy also paid for by the employer. This Court held that N.C.G.S. § 20-279.21(e) authorized the UIM carrier to reduce its coverage by the amount paid to the insured as workers' compensation benefits. *Id.* at 518, 379 S.E.2d at 857. In reaching this conclusion, we stated: "By reason of its location in the statute and its reference to a 'motor vehicle liability policy,' we deduce a legislative intent that the exclusion permitted by subsection (e) be applicable to all subsections of N.C.G.S. § 20-279.21(b), including the uninsured and underinsured coverages defined therein." *Id.* at 517, 379 S.E.2d at 856.

Thereafter, the Court of Appeals decided *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. rev. denied*, 327 N.C. 484, 396 S.E.2d 614 (1990), in which the insured who was injured within the course and scope of her employment was, like the plaintiff in *Manning*, covered by both workers' compensation and a UM policy. However, the UM policy in *Ohio Casualty* was purchased by the employee individually rather than by the employer. The Court of Appeals distinguished *Manning* on that ground and concluded that N.C.G.S. § 20-279.21(e) is directed only at business automobile liability policies secured for the benefit of employees by employers who also provide workers' compensation coverage. *Id.* at 136-37, 392 S.E.2d at 651. Thus, the Court of Appeals held that N.C.G.S. § 20-279.21(e) did not allow the UM carrier to reduce its coverage when the employee/plaintiff purchased the UM policy herself. *Id.*

Subsequent to *Ohio Casualty* the Court of Appeals when presented with cases factually similar to *Ohio Casualty* applied the same analysis, disallowing the reductions to the UM/UIM carrier on the basis that the purchaser of the UM/UIM coverage was not the same entity that purchased the workers' compensation coverage. *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 435 S.E.2d 826 (1993); *Bailey v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 47, 434 S.E.2d 625 (1993); *Bowser v. Williams*, 108 N.C. App. 8, 422 S.E.2d 355 (1992); *Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1990), *aff'd in part, rev'd in part on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991).

In *Brantley*, 336 N.C. 567, 444 S.E.2d 170, the premiums for the workers' compensation coverage were paid by the corporate

employer, S.K. Bowling, Inc., but the UIM policy in question was issued to the employer S.K. Bowling individually. The plaintiffs in *Brantley* argued that in *Manning* the reduction was allowed because the employer had provided both workers' compensation and UIM coverage. Accordingly, the plaintiffs contended, for the defendants to have the benefit of the reduction permitted for workers' compensation payment by N.C.G.S. § 20-279.21(e), defendants had to establish that the same entity provided both coverages. *Id.* at 572, 444 S.E.2d at 172. We rejected that argument in *Brantley*, and we reject it now.

Nothing in N.C.G.S. § 20-279.21(e) suggests that the legislature intended that a reduction applies only if the automobile policy was bought by the same entity that purchased the workers' compensation coverage and that the reduction does not apply if the automobile policy was bought by someone else. Likewise, nothing in N.C.G.S. § 20-279.21(e) suggests that the legislature intended that a reduction be applicable only to "business" automobile policies and not to "personal" automobile policies. As we said in *Brantley*,

> [n]either the language of the statute nor the policy provision includes such a requirement [that the same entity provide both UM/UIM coverage and workers' compensation coverage]. Without reference to the source of the coverages, the statute states that a motor vehicle liability policy need not insure against loss covered by workers' compensation.

Id.

In this case Mr. McMillian is covered by both a workers' compensation policy paid for by his employer and by UM policies paid for by persons other than his employer. We hold that under the clear wording of N.C.G.S. § 20-279.21(e), the limit of liability provision in defendants' policies at issue in this action is authorized and defendant UM carriers are entitled to reduce coverage to Mr. McMillian by the amount of workers' compensation he has already received. We thus reverse the decision below. Further, to the extent that *Ohio Casualty* and its progeny are inconsistent with our holding herein, they are hereby overruled.

Having determined that no UM coverage is available under the policies to satisfy the damages asserted by Mr. McMillian, we note that similarly neither policy provides coverage to Mrs. McMillian for her derivative loss of consortium claim.

For the reasons stated herein, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA v. ROBERT EARL CHANCE

No. 247PA96

(Filed 6 February 1998)

1. Constitutional Law § 318 (NCI4th)— representation of defendant on appeal—compliance with *Anders v. California*

Defendant's counsel on appeal from a first-degree murder conviction complied with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, where she filed a brief stating that she could not in good faith argue any assignments of error, sent the record and transcript of the trial to defendant and advised him that she had assigned as error that there was insufficient evidence to convict defendant of first-degree murder, and advised defendant further that he could file a brief with the Supreme Court making whatever arguments he desired to make.

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

It is frivolous to argue that there was insufficient evidence to support defendant's conviction of first-degree murder where the evidence tended to show that defendant entered the home of his mother-in-law carrying a 12-gauge shotgun and shot his wife to death in front of two witnesses without any threat from his wife to him.

On writ of certiorari from a judgment entered by Griffin, J., on 25 April 1995 in Superior Court, Martin County, sentencing the defendant to life imprisonment for first-degree murder. Calendared for argument in the Supreme Court 9 September 1997; determined on the briefs without oral argument.

Michael F. Easley, Attorney General, by Teresa L. Harris, Associate Attorney General, for the State.

Regina A. Moore for defendant-appellant.

Robert Earl Chance, defendant, pro se.

WEBB, Justice.

The defendant appeals from a sentence of life in prison imposed after he was convicted of first-degree murder in a case in which the State did not seek the death penalty. The evidence favorable to the State showed that the defendant shot his wife to death with a 12-gauge shotgun in the presence of two witnesses.

[1] The defendant's attorney has filed a brief in which she says she "has diligently researched the issues and cannot, in good faith, argue any grouping of exceptions or assignments of error." She has also sent the record and transcript of the trial to the defendant and advised him that she has assigned as error that there was insufficient evidence to convict the defendant of first-degree murder. She has advised the defendant further that he may file a brief with this Court making whatever arguments he desires to make. The defendant has filed what he denominates a motion for appropriate relief, which we shall treat as a brief.

We hold that defendant's counsel has complied with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). She stated in her brief that she could not in good faith argue any assignments of error. "This is tantamount to a conclusion that the appeal is wholly frivolous." *State v. Kinch*, 314 N.C. 99, 102, 331 S.E.2d 665, 666 (1985). She also advised the defendant that he may file a brief raising any points he desires to raise. This is what is required by *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498.

[2] We agree with the conclusion of the defendant's attorney that it is frivolous to argue that there was not sufficient evidence to support a conviction of first-degree murder. There was evidence that the defendant entered the home of his mother-in-law carrying a 12-gauge shotgun and shot his wife to death in front of two witnesses without any threat from his wife to him. This evidence supports a conviction of first-degree murder. *State v. Hamby*, 276 N.C. 674, 174 S.E.2d 385 (1970), *death sentence vacated*, 408 U.S. 937, 33 L. Ed. 2d 754 (1972).

The defendant argues in his *pro se* brief that he had ineffective assistance of counsel. He bases this on what he says was his counsel's failure to properly perfect his appeal and "improper preparation." As to the perfection of the appeal, the defendant's counsel gave notice of

appeal and petitioned for a writ of certiorari, which was allowed. No more than this is required in perfecting an appeal. As to what the defendant calls "improper preparation," he does not say what was not proper about his attorney's preparation.

In accordance with our duty under *Anders*, we have examined the record and the transcript of the trial. From this examination, we find the appeal to be wholly frivolous.

NO ERROR.

RICKEY WAYNE MELLON v. CATHIE W. PROSSER, INDIVIDUALLY, AND AS A DEPUTY OF THE CLEVELAND COUNTY SHERIFF'S DEPARTMENT; DAN CRAWFORD, SHERIFF OF CLEVELAND COUNTY; AND CLEVELAND COUNTY SHERIFF'S DEPARTMENT

No. 361A97

(Filed 6 February 1998)

Appeal of right by defendants pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 126 N.C. App. 620, 486 S.E.2d 439 (1997), reversing an order entered on 13 May 1996 by Ferrell, J., in Superior Court, Cleveland County. Heard in the Supreme Court on 16 December 1997.

No brief for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by G. Michael Barnhill and W. Clark Goodman, for defendant-appellants.

PER CURIAM.

That part of the opinion of the majority in the Court of Appeals remanding this action to the Superior Court for joinder of the sheriff's surety as a party is reversed for the reasons set forth in the dissenting opinion of Judge Wynn. In all other respects, the opinion of the majority in the Court of Appeals is affirmed for the reasons stated therein.

AFFIRMED IN PART; REVERSED IN PART.

MITCHELL COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. MICHELLE CARPENTER, RESPONDENT

No. 450A97

(Filed 6 February 1998)

Appeal by respondent pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 128 N.C. App. —, 489 S.E.2d 437 (1997), dismissing respondent's appeal from the order terminating her parental rights entered on 11 June 1996 and affirming an order denying respondent's Rule 60(b) motion for relief entered on 28 November 1996, by Lyerly, J., in District Court, Mitchell County. Heard in the Supreme Court 16 December 1997.

Hal G. Harrison for petitioner-appellee.

Brian A. Buchanan for respondent-appellant.

PER CURIAM.

AFFIRMED.

EDWARD LEE BARHAM v. KELLI MOORE BARHAM

No. 440A97

(Filed 6 February 1998)

Appeal of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 127 N.C. App. 20, 487 S.E.2d 774 (1997), which affirmed in part and reversed in part an order entered 11 July 1995 and amended 28 September 1995 by Lawton, J., in District Court, Wake County. Heard in the Supreme Court 18 December 1997.

Jack P. Gulley for plaintiff-appellant.

Oliver & Oliver, P.L.L.C., by John M. Oliver, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

VSA, INC., D/B/A VSA CAROLINAS v. MURIEL K. OFFERMAN, SECRETARY OF REVENUE, IN HER OFFICIAL CAPACITY

No. 319PA97

(Filed 6 February 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 126 N.C. App. 421, 485 S.E.2d 348 (1997), reversing an order allowing defendant's motion for summary judgment and denying plaintiff's motion for summary judgment entered by Cashwell, J., on 3 April 1996 in Superior Court, Wake County. Heard in the Supreme Court 17 December 1997.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Jasper L. Cummings, Jr., for plaintiff-appellee.

Michael F. Easley, Attorney General, by Kay Linn Miller Hobart, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

AGNOFF FAMILY TRUST v. LANDFALL ASSOC.

No. 596P97

Case below: 127 N.C.App. 743

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

APPALACHIAN OUTDOOR ADVERTISING CO. v. TOWN OF BOONE BD. OF ADJUST.

No. 615P97

Case below: 128 N.C.App. 137

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

ASFAR v. CHARLOTTE AUTO AUCTION, INC.

No. 527P97

Case below: 127 N.C.App. 502

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

BAREFOOT v. CHAPEL HILL REALTY

No. 560P97

Case below: 127 N.C.App. 553

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

BISSETTE v. DOE

No. 290P96-2

Case below: 127 N.C.App. 555

Petition by defendant (Nash Co. Bd. of Education) for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

BOONE v. VINSON

No. 555P97

Case below: 127 N.C.App. 604

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

BRIGGS v. RANKIN

No. 536PA97

Case below: 127 N.C.App. 477

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 5 February 1998.

BRITT v. N.C. SHERIFFS' EDUC. AND TRAINING STANDARDS COMM.

No. 600PA97

Case below: 128 N.C.App. 81

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 February 1998.

BROWN v. PARKER

No. 5P98

Case below: 127 N.C.App. 560

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

BRUTON v. N.C. FARM BUREAU MUT. INS. CO.

No. 530P97

Case below: 127 N.C.App. 496

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

CAROLINA SPIRITS, INC. v. CITY OF RALEIGH

No. 602P97

Case below: 127 N.C.App. 745

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998. 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 5 February 1998.

CHICAGO TITLE INSURANCE CO. v. WETHERINGTON

No. 528P97

Case below: 127 N.C.App. 457

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

DARDEN v. HARRELL

No. 500P97

Case below: 127 N.C.App. 553

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

EARLY v. KOEHLER

No. 537P97

Case below: 127 N.C.App. 555

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 5 February 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

EMPLOYMENT SECURITY COMM. v. PEACE

No. 599A97

Case below: 122 N.C.App. 313

Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) retained 5 February 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 February 1998.

EVERHART & ASSOC. v. DEPT. OF E.H.N.R.

No. 610P97

Case below: 127 N.C.App. 693

Petition by petitioners (Everhart & Associates, Inc. and Hettie Tolson Johnson) for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

GIBBS v. LACKAWANNA LEATHER CO.

No. 531P97

Case below: 127 N.C.App. 555

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

GLOVER v. FARMER

No. 535P97

Case below: 127 N.C.App. 488

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

GRAY v. WRANGLER

No. 3P98

Case below: 128 N.C.App. 185

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

HARLOW v. VOYAGER COMMUNICATIONS V

No. 612PA97

Case below: 127 N.C.App. 623

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 5 February 1998.

HARTFORD FIRE INS. CO. v. PIERCE

No. 420A97

Case below: 127 N.C.App. 123

Joint motion to dismiss appeal allowed 5 February 1998.

HOWELL v. CLYDE

No. 569P97

Case below: 127 N.C.App. 717

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

HUANG v. WANG

No. 573P97

Case below: 127 N.C.App. 750

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

IN RE VAN KOOTEN

No. 400A97

Case below: 126 N.C.App. 764

Motion by respondent (Tony Van Kooten) to dismiss appeal allowed 5 February 1998.

J.R.N., INC. v. RANKIN-PATTERSON OIL CO.

No. 598P97

Case below: 127 N.C.App. 560

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

MARLOW v. N.C. EMPLOYMENT SECURITY COMM.

No. 604P97

Case below: 127 N.C.App. 734

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

MARSHALL v. SIZEMORE

No. 570A97

Case below: 127 N.C.App. 751

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 February 1998.

McAULIFFE v. PRECISION DENTAL LAB

No. 6P98

Case below: 128 N.C.App. 185

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

MUSE v. BRITT

No. 373P97

Case below: 347 N.C. 268
123 N.C.App. 357

Motion by petitioner for reconsideration of petition for discretionary review dismissed 5 February 1998.

N.C. FARM BUREAU MUT. INS. CO. v. BRILEY

No. 533P97

Case below: 127 N.C.App. 442

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

OVERCASH v. KOON

No. 608P97

Case below: 127 N.C.App. 754

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

PRYOR v. MERTEN

No. 538P97

Case below: 127 N.C.App. 483

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

SPEARS v. CENTURA BANK

No. 541PA97

Case below: 127 N.C.App. 397

Wake County Superior Court

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 5 February 1998. Petition by plaintiff for writ of certiorari to review the order of Superior Court, Wake County, allowed 5 February 1998.

STATE v. BRANSON

No. 523P97

Case below: 127 N.C.App. 556

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998. Motion by Attorney General to dismiss appeal allowed 5 February 1998.

STATE v. BROWN

No. 548P97

Case below: 127 N.C.App. 561

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. BROWN

No. 618P97

Case below: 127 N.C.App. 755

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. CONNELL

No. 551P97

Case below: 127 N.C.App. 685

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. DANIELS

No. 553P97

Case below: 127 N.C.App. 752

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. ELLIS

No. 588P97

Case below: 127 N.C.App. 562

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 5 February 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. FAIR

No. 534P97

Case below: 127 N.C.App. 562

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

STATE v. FERGUSON

No. 616P97

Case below: 128 N.C.App. 188

Petition by Attorney General for writ of supersedeas and temporary stay denied 31 December 1997. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 31 December 1997.

STATE v. FLOWERS

No. 553A94

Case below: 347 N.C. 405

Motion by defendant (Flowers) to withdraw order of remand allowed 7 January 1998.

STATE v. FOX

No. 521P97

Case below: 127 N.C.App. 562

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998. Motion by Attorney General to dismiss appeal allowed 5 February 1998.

STATE v. GREENE

No. 456A87-4

Case below: Caldwell County Superior Court
328 N.C. 771
324 N.C. 1

Motion by Attorney General to dismiss record on appeal allowed 5 February 1998.

STATE v. HARDRICK

No. 607P97

Case below: 127 N.C.App. 755

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998. Motion by Attorney General to dismiss appeal allowed 5 February 1998.

STATE v. HOWARD

No. 37P98

Case below: 128 N.C.App. 532

Motion by Attorney General for temporary stay denied 5 February 1998.

STATE v. HUDSON

No. 512P97

Case below: 123 N.C.App. 336

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. JACKSON

No. 562P97

Case below: 127 N.C.App. 562

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. LEMONS

No. 377A95

Case below: Wayne County Superior Court

Motion by defendant for appropriate relief denied 5 February 1998.

STATE v. LONG

No. 566P97

Case below: 127 N.C.App. 756

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 8 December 1997. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 December 1997.

STATE v. MATHIS

No. 10PA98

Case below: 126 N.C.App. 688

Petition by Attorney General for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 5 February 1998. Motion by Attorney General to amend petition for certiorari pursuant to G.S. 7A-32 allowed 5 February 1998. Motion by defendant to dismiss denied 5 February 1998.

STATE v. McDONALD

No. 606P97

Case below: 128 N.C.App. 188

Motion by Attorney General for temporary stay denied 30 December 1997. Petition by Attorney General for writ of supersedeas denied 5 February 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. McKINNEY

No. 584P97

Case below: 127 N.C.App. 756

Petition by defendant discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. NIXON

No. 546P97

Case below: 127 N.C.App. 563

Petition by defendant discretionary review pursuant to G.S. 7A-31 denied 5 February 1998. Motion by Attorney General to dismiss appeal allowed 5 February 1998.

STATE v. PRICE

No. 585A87-7

Case below: 337 N.C. 756

Motion by defendant for appropriate relief denied 5 February 1998.

STATE v. ROGERS

No. 583P97

Case below: 121 N.C.App. 273

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

STATE v. RUFF

No. 550PA97

Case below: 127 N.C.App. 575

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 6 January 1998.

STATE v. SEARLES

No. 597P97

Case below: 127 N.C.App. 558

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

STATE v. SEXTON

No. 543P97

Case below: 127 N.C.App. 558

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

STATE v. STARKIE

No. 605P97

Case below: 127 N.C.App. 757

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE v. VALIQUETTE

No. 587P97

Case below: 127 N.C.App. 752

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

STATE v. WATSON

No. 554P97

Case below: 127 N.C.App. 398

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 February 1998.

STATE v. WILSON

No. 579P97

Case below: 127 N.C.App. 757

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998. Motion by Attorney General to dismiss petition for discretionary review denied 5 February 1998.

STATE v. WRIGHT

No. 542P97

Case below: 127 N.C.App. 592

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

STATE FARM LIFE INS. CO. v. ALLISON

No. 13P98

Case below: 128 N.C.App. 74

STRICKLAND v. CAROLINA CLASSICS CATFISH, INC.

No. 576P97

Case below: 127 N.C.App. 615

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

THOMAS v. VAN LEER

No. 590P97

Case below: 128 N.C.App. 187

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

TOWN CENTER ASSOC. v. Y&C CORP.

No. 508P97

Case below: 127 N.C.App. 381

Joint motion to withdraw petition for discretionary review allowed 5 February 1998.

TOWNES v. MILLS

No. 505P97

Case below: 127 N.C.App. 555

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

VIRMANI v. PRESBYTERIAN HEALTH SERVICES CORP.

No. 62P97-2

Case below: 127 N.C.App. 629

Motion by defendant for temporary stay allowed 7 December 1997.

WOODY v. WOODY

No. 581P97

Case below: 127 N.C.App. 626

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 February 1998.

PETITION TO REHEAR

KURTZMAN v. APPLIED ANALYTICAL INDUSTRIES, INC.

No. 103PA97

Case below: 347 N.C. 329

Petition by plaintiff to rehear pursuant to Rule 31 denied 5 February 1998.

STATE OF NORTH CAROLINA v. STANLEY SANDERS

No. 88A85-3

(Filed 6 March 1998)

1. Criminal Law § 548 (NCI4th Rev.)— capital sentencing—juror misconduct—mistrial

The trial court did not err by declaring a mistrial in a capital resentencing proceeding for manifest necessity based upon the cumulative effect of acts of juror misconduct where the record shows that, contrary to the trial court's instructions that the jury was to consider the law as instructed by the court and the evidence heard in court and nothing else, the jurors were discussing extraneous matters, including parole eligibility, a juror's outside investigation on the meaning of life imprisonment, evidence at defendant's previous trial, and whether one juror believed in the death penalty; inappropriate conduct was directed toward one juror when several other jurors told her that she was not capable of continuing deliberations, that she should request the judge to replace her, and that they hoped that she or "anybody in [her] family will be [defendant's] next victim"; and one juror misrepresented to other jurors that she had spoken with police officers and a judge concerning the definition of life imprisonment.

2. Constitutional Law § 225 (NCI4th)— capital sentencing—mistrial—juror misconduct—new sentencing proceeding—not double jeopardy

Where defendant's capital sentencing proceeding ended with a mistrial declared for manifest necessity, defendant's right to be free from double jeopardy will not be violated by a further sentencing proceeding.

3. Criminal Law § 521 (NCI4th Rev.)— capital sentencing—mistrial—juror misconduct—sufficiency of court's findings

The trial court's findings of fact, along with an examination of the record, provided ample support for the trial court's finding of manifest necessity warranting a mistrial in defendant's capital sentencing proceeding based on juror misconduct and sufficiently complied with N.C.G.S. § 15A-1064, although the trial court did not set out each instance of juror misconduct.

4. Criminal Law § 516 (NCI4th Rev.)— capital sentencing— juror misconduct—mistrial—exploration of alternative remedies

The trial court properly explored alternative remedies before declaring a mistrial based on juror misconduct in defendant's capital sentencing proceeding where the court, after receiving information that the jury was discussing extraneous matters, gave the jury curative instructions and an opportunity to resume proper deliberations and continue the sentencing proceeding to conclusion; after the jury deliberated for an additional twenty minutes, it became apparent to the trial court that the jury had disregarded its instructions and was once again discussing extraneous matters and failing to focus on the issues at hand; and the trial court then determined that a mistrial was the appropriate remedy.

Justice FRYE dissenting.

Justice WEBB joins in this dissenting opinion.

On defendant's petition for writ of certiorari to review an order entered on 16 October 1995 by Lamm, J., in Superior Court, Transylvania County, declaring a mistrial, and an order entered on 8 March 1996 by Warren, J., in Superior Court, Transylvania County, denying defendant's plea in bar and motion for imposition of a life sentence. Heard in the Supreme Court 16 October 1997.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

James R. Glover for defendant-appellant.

ORR, Justice.

Defendant was convicted of first-degree murder, first-degree rape, felonious breaking and entering, and felonious larceny on 1 July 1982. Based on the jury's recommendation, defendant was sentenced to death for the first-degree murder conviction and appealed to this Court. In a *per curiam* opinion, this Court vacated the judgments and remanded for a new trial because of "the entirely inaccurate and inadequate transcription of the trial proceedings." *State v. Sanders*, 312 N.C. 318, 319, 321 S.E.2d 836, 837 (1984) (per curiam) (*Sanders I*). Following the new trial and capital sentencing proceeding, defendant was again sentenced to death.

On 7 April 1987, this Court entered an order remanding to the trial court "for the sole purpose of hearing defendant's motion to suppress the evidence taken from his residence." *State v. Sanders*, 319 N.C. 399, 400, 354 S.E.2d 724, 725 (1987). After further briefing and argument by the parties, this Court found no error in the hearing on defendant's motion to suppress or in the guilt phase of defendant's trial. However, because of *McKoy* error, the case was remanded for a new capital sentencing proceeding. *State v. Sanders,* 327 N.C. 319, 395 S.E.2d 412 (1990) (*Sanders II*), *cert. denied,* 498 U.S. 1051, 112 L. Ed. 2d 782 (1991).

On 9 October 1991, based upon defendant's motion for a change of venue, the trial court entered an order transferring venue from Transylvania County to McDowell County. Defendant's third capital sentencing proceeding was held at the 11 September 1995 Criminal Session of Superior Court, McDowell County. On the second day of deliberations, the State moved for a mistrial, and Judge Charles C. Lamm, Jr., orally granted the motion. Judge Lamm subsequently entered a written order on 6 October 1995, declaring a mistrial based on juror misconduct. This order was filed on 16 October 1995. On 16 February 1996, defense counsel filed a "Plea in Bar and Motion for Entry of Life Sentence or Motion for Continuance of Trial Date." Judge Raymond A. Warren denied defendant's "plea in bar for the entry of an order cancelling the penalty phase trial and imposing a life sentence" and allowed defendant's motion for a continuance. Defendant then filed a petition for writ of certiorari with this Court and requested that we review the orders entered by Judge Lamm and Judge Warren. This Court allowed defendant's petition on 10 October 1996.

A detailed review of the evidence introduced during the guilt phase of defendant's trial is set forth in the prior opinion of this Court, finding no error in that phase of the trial. *Sanders II*, 327 N.C. 319, 395 S.E.2d 412. Further discussion of the evidence introduced during that trial is unnecessary here.

[1] In the present case, defendant contends that the trial court erred by granting the State's motion for a mistrial over defendant's objection, thereby violating his constitutional right to be free from double jeopardy. Defendant argues that (1) nothing occurred during jury deliberations which constitutes "manifest necessity" for granting a mistrial, (2) the trial court failed to adequately identify the alleged juror misconduct in its findings of fact, and (3) the trial court erred

by failing to explore alternative remedies which could have permitted the sentencing proceeding to continue to final conclusion. We disagree with defendant's contentions and affirm the orders of the trial court.

In the present case, the jury began sentencing deliberations on 4 October 1995 at 10:45 a.m. That same day at 4:00 p.m., the jury sent the trial court a written question which stated, "How do we as a jury, when one or more of us have questions regarding facts of the case (feel we have not been given enough information)[,] deal with finding the facts or coming to an undecisive [sic] conclusion[?]" After conferring with counsel, Judge Lamm brought the jury out and questioned the foreman as follows:

> THE COURT: Sir, without telling me—if the jury has answered one or more issues already, without telling me what the answer to that issue is; if you could tell me, is this question relating to a specific issue or issues?
>
> FOREMAN: It's on the Issue Three.
>
> THE COURT: On Issue Three?
>
> FOREMAN: Yes, sir.
>
> THE COURT: Okay, sir. Do you wish to be instructed again on Issue Three and Issue Four?
>
> FOREMAN: Yes, sir.

Before instructing on Issues Three and Four, the trial court first reminded the jury that "the state must prove three things beyond a reasonable doubt" before the jury can recommend a sentence of death. The trial court also defined "reasonable doubt" for the jury and gave the pattern jury instructions as to the three things the State was required to prove beyond a reasonable doubt. It then gave the pattern jury instructions pertaining to Issue Three, which provides, "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?" and Issue Four, which provides, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?" After receiving these instructions, the jury resumed deliberations at 4:20 p.m.

At 5:05 p.m., Judge Lamm excused the jurors for the day and stated that they would begin deliberations again the next morning at 9:30. Prior to sealing the jury's Issues and Recommendation as to Punishment form and notepad, Judge Lamm noted that there was a folded piece of paper on top. Several jurors indicated to Judge Lamm that the paper contained another question for him but that they were not through framing the question. Accordingly, Judge Lamm agreed to address the question in the morning once the jurors were ready.

The next morning, prior to returning to deliberate, Judge Lamm asked the foreman to tell him how long the jury had been deliberating on the issue that it was currently deciding. The foreman told Judge Lamm that the jury had been deliberating on the issue since sometime after the lunchtime meal, that three votes had been taken, and that the split for the last vote was "a little bit different." The foreman then indicated that the jury would continue deliberations, and the jury in fact resumed deliberations at 9:49 a.m.

At approximately 10:15 a.m., Judge Lamm was handed another piece of paper by the jury. This note stated, "We have a vote of 11-1. Hung jury on the final issue." Judge Lamm then called the jury into the courtroom and asked the foreman to tell him whether the jury was referring to Issue Four when it referenced the "final issue." The foreman informed Judge Lamm that the jurors had begun deliberations on Issue Four that morning. Judge Lamm requested that the jury deliberate further on that issue to see if it could reach a unanimous decision. Jury deliberations resumed at 10:25 a.m.

At 10:55 a.m., Judge Lamm was handed another note by the jury, which included the following statements:

> We can not come to a unanimously [sic] decision on Issue Four.
>
> We had a[n] error at one point and went ahead and signed it but we reread recommendation as to punishment.
>
> We need to know if life means life in prison.
>
> We [have] one juror who . . . investigat[ed] on her own and talked to a judge and police officers.

After a brief recess, Judge Lamm met with counsel for both parties, in defendant's presence. Both counsel were informed of the contents of the note set out above. Judge Lamm also informed counsel that the note which was received at approximately 10:15 a.m. stated, "We have a vote of eleven to one," and that under that it read, "Hung jury

on the final issue." Finally, he also stated that the folded-up piece of paper which had been sealed the previous night made some reference to the eleven to one vote on Issue Three.

Defense counsel then requested that the trial court rule that the jury was unable to reach a unanimous verdict and enter a sentence of life imprisonment as required by statute. N.C.G.S. § 15A-2000(b) (1997). The trial court denied this request. Defense counsel also requested that the trial court bring the jurors out and conduct a limited inquiry on "whether or not they believe that further deliberation, without any further instruction, would lead or might lead to a unanimous verdict" and if the answer to that was "no," that the trial court declare that the jury was unable to reach a unanimous verdict. The trial court also denied this request. It should be noted that defense counsel did not object to the trial court's rulings on these requests and has not brought them forward on appeal.

Defense counsel's final request was that the trial court reinstruct the jury on the meaning of life imprisonment. Subsequently, the trial court asked what the State's position was with respect to this request. The prosecutor stated that he believed the jury should be instructed on the definition of life imprisonment, but also noted:

> [W]e simply cannot ignore the last part of that note which facially shows juror misconduct. I don't see how this court can do anything other than, at this point, make an inquiry into that. I don't really know what the procedure is but it has to be done. . . . I think we would have to identify the potentially offending juror and give that person a chance here on the record to admit or deny it. I think the court has to make an inquiry and make a determination; has there been juror misconduct before anything else happens.

The foreman was then brought into the courtroom and questioned concerning the jury's note stating that a juror had spoken with a judge and police officers. The foreman stated that juror number six told the jury that she had been informed by a judge and police officers that life imprisonment meant that the defendant had to serve twenty years in prison. Judge Lamm thanked the foreman for his help and asked him not to repeat the conversation to the rest of the jurors. Defense counsel pointed out that defendant "is facing forty years before he is even eligible for parole so what the juror was told is not true." Defense counsel then requested that the jurors be informed that what they may have heard from an outside source is "neither the

law nor the evidence they heard in this courtroom, and they are bound by the law as given by the judge." Additionally, defense counsel requested that the jury be instructed that "life means life."

After some discussion between the trial court and defense counsel, defense counsel stated, "we do not want the court to declare a mistrial at this point." Defense counsel argued that "defendant has a right to have this jury continue to deliberate." The prosecutor agreed with defense counsel and suggested that the trial court make a further inquiry into the statements made by juror number six.

The trial court then brought juror number six, Renita Lytle, into the courtroom. In response to questioning by the trial court, Lytle stated that she had lied to the jury about talking with anyone concerning the situation. She admitted that she spoke with her nephew, who is a police officer, but said she never asked him about the case. She further stated the following:

> And then I told a lie about the judge because—I mean they was giving—they was making me think that I was dumb and that I didn't have a right to my opinion. . . . I mean yesterday they were like, "You need to get out of here!" I mean, "You don't need to be in here! You need to go tell the judge that I don't belong in here and get one of them alternates to come in and take your place." I mean it was really pressuring me into doing things that I really didn't believe in, and I was feeling hurt and I was feeling sad because they didn't like me for the reason, for my suggestion, and I just didn't—and I couldn't take the pressure and so I figured if I just tell them that, you know, tell them this, then they will just back off and leave me alone and then I'd be out of the case because I could not take the pressure.

Lytle further stated that her understanding of life imprisonment was that "you go to jail and you remain for life." However, she indicated that the other jurors had told her that if defendant received life imprisonment, he would "get out in a couple months." She also stated that the other jurors said that they hoped that she or "anybody in [her] family will be his next victim."

At this point, defense counsel requested the trial court to instruct that life means exactly what the court had previously instructed and to give the deadlocked jury instructions pursuant to N.C.G.S. § 15A-1235. The prosecutor expressed concern that the rest of the jury had been informed by a juror that "she did something

wrong that all of them had been told not to do" and stated he did not believe the jury should continue deliberations.

Once the jury returned to the courtroom, the trial court informed the jurors that he was aware there had been some discussion of the meaning of a life sentence. Judge Lamm also noted that some of the discussions may have been based on "inaccurate information" or "inaccurate occurrences." Judge Lamm then instructed the jurors to eliminate the question of parole eligibility from their minds, that life imprisonment means "imprisonment in the state's prison for life," and further instructed them to reason the matter over without surrendering their conscientious convictions.

At 12:25 p.m., jury deliberations resumed. Twenty minutes later, the trial court received a note from juror number three, which the trial court characterized as "one juror making accusations against another juror." The note to the trial court stated as follows:

> 1. Is a statement from Juror #6 that because we were not at the last trials for murder and did not know all the facts that she could not vote for the death sentence and didn't know how the rest of us could—Is that reason acceptable to the court?
>
> 2. Juror 6 made several statements that basically said she did not believe in the death penalty; however, when pressed on the issue said she did believe in it.
>
> I'm sorry if I'm making trouble for the court, I simply felt I needed to ask these questions. If you don't wish to answer, that is, of course, fine with me.
>
> Thank you,
> Juror #3

At this point, defense counsel made the following statement:

> Your honor, at this time the defense makes a motion that the court call the jury out into the courtroom and the court inquire of the foreman of the jury if the jury is still deadlocked. If the foreman answers in the affirmative, we believe it is time to take this matter from the jury. They have been deliberating for a period of more than seven hours; they have degenerated into something that is much less than jury deliberations and I think that this is what the statute contemplates when they give the Superior Court Judge the power to take the matter away from the jury. It's time, it's past time.

The prosecutor then renewed his motion for a mistrial. Subsequently, the trial court declared a mistrial based on juror misconduct.

N.C.G.S. § 15A-1062 provides, in pertinent part:

> Upon motion of the State, the judge may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct resulting in substantial and irreparable prejudice to the State's case and the misconduct was by a juror or the defendant, his lawyer, or someone acting at the behest of the defendant or his lawyer.

N.C.G.S. § 15A-1062 (1997). "Whether to grant a motion for mistrial is within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 35 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 482 (1996). "[H]owever, a trial court in a capital case has no authority to discharge the jury without the defendant's consent and hold the defendant for a second trial, absent a showing of 'manifest necessity.' " *State v. Lachat*, 317 N.C. 73, 82-83, 343 S.E.2d 872, 877 (1986).

A manifest necessity exists only when some event occurs at trial creating a situation where the defendant's right to have the trial continue to termination in a judgment is outweighed by "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689, 93 L. Ed. 974, 978 (1949). This Court has recognized two kinds of necessity to justify a mistrial without defendant's consent—"physical necessity" and the "necessity of doing justice." *State v. Birckhead*, 256 N.C. 494, 505, 124 S.E.2d 838, 847 (1962). The necessity of doing justice has been defined as "aris[ing] from the duty of the court to 'guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution.' " *Id.* (quoting *State v. Wiseman*, 68 N.C. 203, 206 (1873)). It is limited to "the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law." *Id.*

In discussing the determination of a "manifest necessity," this Court has quoted the United States Supreme Court and stated:

> "We think, that in all cases of this nature, the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the

act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."

State v. Shuler, 293 N.C. 34, 43, 235 S.E.2d 226, 232 (1977) (quoting *United States v. Perez*, 22 U.S. 579, 580, 6 L. Ed. 165, 165 (1824)) (alteration in original).

In the present case, the trial court made the following findings of fact and conclusions of law with respect to its decision to grant a mistrial:

Due to the previous occurrences that occurred on the record, the court making no finding or taking everything that has occurred as being true except making no finding as to the truth or falsity of the responses to the court's inquiry of the foreperson, Mr. Woody, with regard to what Juror Number 6, Mrs. Lytle, said that she did, or what she said;

And without taking as true or false, making no finding of fact with regard to the truth or falsity of Mrs. Lytle's explanation of what occurred in that regard; in regard to the telephone call to her nephew or whether she talked to any other police officers or to any judges;

But taking everything else as being true and finding that further things that Mrs. Lytle said as to the treatment that she received in the jury room for at least a portion of the day yesterday and the emotional state that it put her in when she went home yesterday after being dismissed for the day;

And considering these statements of Juror Number 3, . . . and noting that the characterization of the statement are [sic] allegations as to what one juror is saying or doing and the motive behind what one juror is saying or doing and the position that the juror is taking;

From all of those things, the court concludes as a matter of law; [t]hat at least one and more than likely a number of the jurors are not following the instructions of the court as to their conduct and duties as jurors during deliberations; are not following the law as instructed by the court.

The court concludes that this constitutes juror misconduct and for that reason, the court declares a mistrial in this case.

Juror misconduct encompasses a wide range of improper activities. Thus, it is appropriate for the trial court to be given broad discretion in determining whether juror misconduct has occurred. In *State v. Shedd*, 274 N.C. 95, 161 S.E.2d 477 (1968), this Court elaborated on the justification for the trial court's broad discretion and stated:

> The trial judge is clothed with power of discretion as to whether he should order a mistrial or set aside a verdict by reason of alleged misconduct of a juror or jurors "because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though, doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere."

Id. at 104, 161 S.E.2d at 483 (quoting *Moore v. Edmiston*, 70 N.C. 471, 481 (1874)).

Here, a thorough review of the record supports the trial court's decision to grant a mistrial based on juror misconduct. On three separate occasions on 5 October 1995, Judge Lamm sent the jurors out to deliberate and instructed them to resume deliberations. Twice after being sent out to deliberate, the jurors sent back a statement which revealed that they were not deliberating as Judge Lamm had instructed, but were discussing outside matters such as parole eligibility, a juror's outside investigation, evidence at the previous trial, and whether one juror believed in the death penalty. None of these matters had any bearing on their consideration of the aggravating and mitigating circumstances, which Judge Lamm had instructed and reinstructed the jurors to consider in connection with Issues Three and Four.

In fact, immediately after Judge Lamm reiterated his instructions that the jury was to consider the law as instructed by the court and the evidence heard in court "and nothing else," the jurors sent back a note which revealed they were considering irrelevant matters, contrary to the instructions Judge Lamm had just given. This note, which was written by juror number three, showed that at least one juror was discussing the fact that he or she had not heard the evidence in defendant's previous trial. The note also referenced a discussion of whether one juror believed in the death penalty. Thus, there is ample evidence that the jurors were disregarding the trial court's instructions concerning their duties and the law.

Additionally, Judge Lamm noted in his order the treatment which juror Lytle received in the jury room and "the emotional state that it put her in when she went home." While we recognize that jury deliberations require a certain degree of debate and the expression of personal beliefs, the trial court's findings of fact indicate that it believed that the conduct directed at juror Lytle exceeded the allowable limits. It is one thing to permit heated debate inside the jury room, but another to allow personal attacks and threats directed at a juror. Here, juror Lytle indicated that several jurors expressed their belief that she was not capable of continuing deliberations and that she should request the judge to replace her with an alternate. Further, according to juror Lytle, several jurors stated that they hoped she or "anybody in [her] family will be [defendant's] next victim." This conduct is further evidence that the jurors were ignoring Judge Lamm's instructions and continuing to discuss extraneous matters. Even defense counsel recognized this as juror misconduct by stating, "Well, there has been juror misconduct, Your Honor! There have been eleven people back there telling a juror she doesn't belong in that jury and she needed to get out." Once this conduct was brought to the attention of the trial court, there was sufficient evidence to support the trial court's discretionary decision to declare a mistrial.

Although the trial court failed to make any findings of fact with respect to the truth of the allegations concerning juror Lytle's conduct, the record reveals that juror number six told the other jurors that she had spoken with police officers and a judge concerning the definition of life imprisonment. Juror number six admitted on the record that she knew that discussing the case with outside parties was forbidden and that she deliberately told the other jurors that she committed this misconduct. Although she stated, on the record, that she had not actually conducted an outside investigation, the trial

court could not inform the other jurors that she had lied to them without diminishing her credibility with them. A misrepresentation of this nature by one juror to the other jurors also raises a question of juror misconduct.

Furthermore, the danger of potential prejudice to defendant existed in two different respects. First, assuming that the vote on Issue Four was eleven to one in favor of the death penalty, had the hold-out juror capitulated under the pressure, defendant would have received a death sentence. Second, if the eleven jurors voting for the death penalty had, in fact, been told that life meant twenty years in prison, it could have influenced their votes on the death penalty.

As this Court has previously stated, "[t]he determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991). A thorough review of the record reveals that, in the present case, the trial court properly exercised its discretion in ordering a mistrial. Although each instance of misconduct may not be, by itself, enough to warrant a mistrial, the cumulative effect of the misconduct rises to the level of "manifest necessity" for the declaration of a mistrial.

[2] Because we have concluded that the trial court in the present case properly declared a mistrial for a manifest necessity, defendant's right to be free of double jeopardy will not be violated by a further sentencing proceeding. "It has long been a fundamental principle of the common law of North Carolina that no person can be twice put in jeopardy of life or limb for the same offense." *Lachat*, 317 N.C. at 82, 343 S.E.2d at 876. However, this principle is not violated where a defendant's trial ends with a mistrial declared for a manifest necessity or to serve the ends of public justice. *Id.* When a mistrial has been declared properly, "in legal contemplation there has been no trial." *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905). This principle applies equally to sentencing proceedings. Accordingly, this assignment of error is overruled.

[3] Next, we will address defendant's contention that the trial court violated his constitutional rights by failing to make "findings of fact sufficient to identify the alleged misconduct of one or more jurors" which was the basis for the mistrial. Defendant argues that Judge Lamm's order "[m]akes it clear that the mistrial was based on something that occurred in the jury deliberation room, not on any impropriety occurring outside the deliberations themselves." He further

argues that the absence of explicit findings of fact makes it impossible for this Court to review this matter and to determine whether there was a factual basis for the trial court's conclusions that a juror or jurors had failed to abide by instructions.

N.C.G.S. § 15A-1064 provides that "[b]efore granting a mistrial, the judge must make finding [sic] of facts with respect to the grounds for the mistrial and insert the findings in the record of the case." N.C.G.S. § 15A-1064 (1983). The official commentary to the statute adds:

> This provision will be important when the rule against prior jeopardy prohibits retrial unless the mistrial is upon certain recognized grounds or unless the defendant requests or acquiesces in the mistrial. If the defendant requests or acquiesces in the mistrial, that finding alone should suffice.

In the present case, the findings of fact and conclusions of law, as set out above, sufficiently comply with N.C.G.S. § 15A-1064. While the trial court did not set out each instance of juror misconduct, the order provided a sufficient factual basis for appellate review. As this Court noted in *State v. Felton*, 330 N.C. 619, 412 S.E.2d 344 (1992):

> Even if the trial court's prefatory description of the motivating factors leading to its order of mistrial did not amount to a "finding of fact" as mandated by N.C.G.S. § 15A-1064, any such error is clearly harmless as the record here reveals ample factual support for the mistrial order.

Id. at 630, 412 S.E.2d at 351.

In fact, in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), the trial court failed to make any contemporaneous findings in support of its mistrial declaration. However, this Court noted that the basis for the mistrial was "certainly apparent in the record." *Id.* at 570, 356 S.E.2d at 324. Similarly, here, the findings of fact, along with an examination of the record, provide ample support for the trial court's finding of "manifest necessity" warranting a mistrial.

[4] Finally, we address defendant's contention that the trial court erred in granting the mistrial without first exploring alternative remedies which could have allowed the sentencing proceeding to continue. Defendant argues that "[m]any options to mistrial were available and should have been given consideration before aborting the trial by granting the State's motion."

This Court has recognized that the grant of a "[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987). In the present case, the trial court properly explored other options prior to declaring a mistrial. For example, regarding the incident with juror number six, the trial court did not immediately declare a mistrial. Instead, the trial court addressed the questions which had arisen regarding life imprisonment. The trial court instructed the jury that life imprisonment means "imprisonment in the state's prison for life." It further admonished the jurors to eliminate from their minds the question of parole eligibility and to put aside any "inaccurate information."

Thus, the trial court gave the jury an opportunity to resume proper deliberations and continue the sentencing proceeding to conclusion. However, after the jury deliberated for only twenty additional minutes, it became apparent to the trial court that the jury had disregarded its instructions and was once again discussing extraneous matters and failing to focus on the issues at hand. At that point, the trial court, in its discretion, determined that a mistrial was the appropriate remedy. After previously exploring a less drastic remedy, by giving the jury additional curative instructions, the trial court determined that a mistrial was "manifestly necessary." We agree with the trial court's decision and do not believe that the trial court erred in resorting to this drastic remedy. Accordingly, this assignment of error is overruled.

AFFIRMED.

Justice FRYE dissenting.

I am troubled by the difficulties the State has encountered in seeking to secure the death penalty for this defendant for this terrible crime. The General Assembly has provided that when a jury cannot, within a reasonable time, unanimously agree to a sentencing recommendation, the judge shall impose a sentence of life imprisonment. N.C.G.S. § 15A-2000(b) (1997). It seems abundantly clear that, at the time the court declared a mistrial, the jury could not unanimously agree to a sentencing recommendation. The appropriate action was for the judge to either impose a sentence of life imprisonment or encourage the jurors to continue deliberating to see if they could unanimously agree to a sentencing recommendation. "[A] trial court in a capital case has no authority to discharge the jury without the

defendant's consent and hold the defendant for a second trial, absent a showing of 'manifest necessity' for a mistrial." *State v Lachat,* 317 N.C. 73, 82-83, 343 S.E.2d 872, 877 (1986). In this capital sentencing proceeding, defendant objected to a mistrial. No manifest necessity justified discharging this third capital sentencing jury and convening yet another jury to recommend life or death. Because the jury was unable to reach a unanimous agreement as to the sentencing recommendation, our statute requires the imposition of a sentence of life imprisonment. N.C.G.S. § 15A-2000(b).

Justice WEBB joins in this dissenting opinion.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. GLENN I. HODGE, JR.

No. 559PA96

(Filed 6 March 1998)

1. Public Officers and Employees § 43 (NCI4th)— Chief of DOT Internal Audit Section—not policymaking exempt

The position of Chief of the Internal Audit Section of the Department of Transportation does not come within the definition of policymaking set forth in former N.C.G.S. § 126-5(b) and therefore may not be designated as exempt from the provisions of the State Personnel Act pursuant to former N.C.G.S. § 126-5(d)(1) where the evidence in the record showed that the Chief of the Internal Audit Section had final decision-making authority within that section but did not have final decision-making authority to impose a settled course of action to be followed within a department, agency, or division.

2. Public Officers and Employees § 43 (NCI4th)— policymaking position—political affiliation improperly considered

Constitutional standards that consider when political affiliation is an appropriate factor in determining which positions are policymaking should not have been considered in determining whether a position was properly designated as policymaking exempt where it was determined that the position did not meet the definition of policymaking under N.C.G.S. § 126-5(b).

Chief Justice MITCHELL dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 124 N.C. App. 515, 478 S.E.2d 30 (1996), reversing and remanding an order entered by Stephens (Donald W.), J., on 6 September 1995 in Superior Court, Wake County, which affirmed a decision and order of the State Personnel Commission. Heard in the Supreme Court 10 September 1997.

Michael F. Easley, Attorney General, by Grayson G. Kelley, Special Deputy Attorney General; Robert O. Crawford, III, Assistant Attorney General; and Sarah Ann Lannom, Associate Attorney General, for respondent-appellee Department of Transportation.

John C. Hunter for petitioner-appellant Hodge.

FRYE, Justice.

Both this and a companion case, *Powell v. N.C. Dep't of Transp.*, 347 N.C. 614, —— S.E.2d —— (1998), raise the issue of whether the Governor properly designated certain State employee positions as policymaking exempt under N.C.G.S. § 126-5.

In this case, we must determine whether the Court of Appeals erred in reversing an order of the superior court sitting in review of a final decision of a state agency. We conclude that the Court of Appeals did err.

[1] The specific issue in this case is whether the position of Chief of the Internal Audit Section of the Department of Transportation (DOT) comes within the statutory definition of policymaking and may therefore be designated as exempt from provisions of the State Personnel Act (SPA).[1] The SPA permits the Governor to designate as exempt certain policymaking positions within departments of state government, including the DOT. N.C.G.S. § 126-5(d)(1) (1995). A policymaking position is defined as "a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." N.C.G.S. § 126-5(b).

Glenn I. Hodge, Jr., was employed by the DOT as an internal auditor beginning 1 January 1992. On 23 May 1992, Hodge was promoted to the position of Chief of the Internal Audit Section. In March 1993,

1. We recognize at the outset that the relevant provisions of the SPA have recently been amended. However, we construe the statute as it existed for purposes of this case.

under the direction of the Governor's office, a panel of personnel officials compiled a list of positions within the DOT which could be designated as policymaking exempt pursuant to N.C.G.S. § 126-5(d)(1).[2] Hodge's position was included on this list. On 12 February 1993,[3] and again on 3 May 1993, Hodge was notified by letter that his position was to be designated as policymaking exempt and that he would thereafter serve at the pleasure of the Secretary of the DOT. Hodge filed petitions for contested case hearings in the Office of Administrative Hearings on 15 March 1993 and 14 May 1993, challenging the designation of his position as policymaking exempt. The cases were consolidated for hearing.

A contested case hearing was held before Senior Administrative Law Judge (ALJ) Fred G. Morrison, Jr., in November 1993. The evidence presented showed that the position of Chief of the Internal Audit Section of the DOT had considerable independence to direct and supervise audits inside the DOT. The person in this position had supervisory authority within the section over other auditors' work and assignments. The Chief of the Internal Audit Section consulted with the heads of units being audited and with higher-ranking DOT officials and made recommendations for changes based on the results of audits. The decisions made by the person in this position potentially had an impact on policies within the DOT. Importantly, however, the evidence also showed that the Chief of the Internal Audit Section had no inherent or delegated authority to implement recommendations or order action based on audit findings.

ALJ Morrison issued a recommended decision reversing the DOT's designation of Hodge's position as exempt. The ALJ made, *inter alia*, the following contested finding of fact:

> 3. As Chief of the Internal Audit Section, the Petitioner [Hodge] exercised broad flexibility and independence. In addition to supervising other auditors, he could decide who, what, when, how, and why to audit within the Department. While he could not order implementation of any recommendations, he was free to contact the State Bureau of Investigation concerning his findings.

The ALJ also found that designation of the position as policymaking exempt was the substantial equivalent of being dismissed and that

2. The panel was also charged with identifying confidential positions which would be exempt pursuant to N.C.G.S. § 126-5(c)(2).

3. There was an initial determination, on or before 12 February 1993 and prior to the review by the panel of personnel officials, that certain positions were exempt.

DOT officials had made no finding that a political confidant of the Governor was needed for the effective performance of this office (finding of fact number 5). Finally, the ALJ found that Hodge's responsibilities included auditing federally funded transportation programs and that applicable federal rules and audit standards require that auditors be free from organizational or external impairments in order to insure objectivity and independence (finding of fact number 6).

The ALJ concluded that the purpose of N.C.G.S. § 126-5(d)(1) is to "allow the Governor to make partisan personnel decisions in order to have loyal supporters who will carry out administration policies." Citing *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574 (1980), the ALJ stated that when employees challenge these political decisions, the "ultimate inquiry" is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved. The ALJ concluded that "this standard must be followed when positions are declared policymaking exempt from the State Personnel Act" and that it had not been followed in this case.

By a decision and order entered 22 November 1994, the State Personnel Commission (Commission) adopted the ALJ's findings of fact and conclusions of law as its own and ordered that designation of the position as policymaking exempt under N.C.G.S. § 126-5(d) be reversed. The DOT objected to the above findings of fact and conclusions of law, and to the final decision and order of the Commission, and petitioned for judicial review. On 6 September 1995, Judge Donald W. Stephens affirmed the Commission's decision and order.

The Court of Appeals reversed the superior court order, deciding that the Commission erred by applying an incorrect legal standard and that the superior court, in turn, erred by concluding that the Commission's decision was not affected by an error of law. The Court of Appeals held that the Commission's findings, as supported by substantial record evidence, could "only support the legal conclusion that Hodge's position was properly designated as policymaking exempt" and that the superior court erred by affirming the contrary conclusion reached by the Commission. *N.C. Dep't of Transp. v. Hodge*, 124 N.C. App. 515, 520, 478 S.E.2d 30, 32 (1996). The case was remanded with the mandate that the position of Chief of the Internal Audit Section be designated as policymaking exempt.

On 7 March 1997, this Court allowed Hodge's petition for discretionary review.

Whether the position of Chief of the Internal Audit Section of the DOT was properly designated as exempt under N.C.G.S. § 126-5(d)(1) first requires a determination of whether the position met the statutory definition of policymaking under N.C.G.S. § 126-5(b). After an examination of the entire record, we conclude that it did not. Therefore, it was unnecessary in this case for the ALJ to reach the question of the constitutional definition of policymaking under the *Branti v. Finkel* decision.

Substantial evidence presented by both parties showed that the position of Chief of the Internal Audit Section carried considerable independence and responsibility. However, this is not sufficient to make it "a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." N.C.G.S. § 126-5(b). As defined in N.C.G.S. § 143B-11, a division is the principal subunit of a department, and a section is the principal subunit of a division. The Court of Appeals correctly recognized that, "[c]ontrary to the DOT's assertions, the record does not show that, as Chief Internal Auditor, Hodge headed a division within the DOT." *Hodge*, 124 N.C. App. at 519, 478 S.E.2d at 32. Even after a departmental reorganization in February 1993, the Internal Audit Section did not function as a division of the DOT. While we emphasize that the statutory definition of policymaking does not require that the person holding the position actually head a department, agency, or division, he or she must nonetheless have the authority to impose a final decision as to a settled course of action to be followed at the department, agency, or division level.

As noted above, Hodge, as Chief Internal Auditor, could recommend action on audit findings, but the decision to implement changes based on those recommendations or findings rested with the head of the audited unit and the Secretary of the DOT. Hodge had no authority to "impose" a final decision as to a settled course of action within the DOT or any division of the DOT, and his authority at the section level did not rise to the level of authority required by N.C.G.S. § 126-5(b) to be considered policymaking. The substantial evidence in the record amply supports a finding that the Chief of the Internal Audit Section had final decision-making authority within that section but did not have final decision-making authority to impose a settled course of action to be followed within a department, agency, or divi-

sion. We hold that the Court of Appeals erred to the extent that it held that the Commission's findings, as supported by substantial record evidence, compelled a conclusion that the position was properly designated as policymaking exempt.

[2] In summary, the Commission adopted the ALJ's findings of fact and conclusions of law, which were based unnecessarily upon constitutional standards that consider when political affiliation is an appropriate factor in determining which positions are policymaking. This was not the proper legal question and need not have been reached, if at all, until a determination was made as to whether the position met the definition of policymaking under N.C.G.S. § 126-5(b). Nonetheless, the Commission's final decision, that the position of Chief Internal Auditor was not policymaking, was correct based on an application of the statutory definition alone. Accordingly, we reverse the Court of Appeals as to this issue.

Because the *Branti* standard was prematurely applied by the Commission and the statutory definition of policymaking decides the case, we do not address the issue of whether the superior court erred in denying the DOT's motion to remand to the ALJ to present additional evidence in accordance with that federal standard.

For the foregoing reasons, we reverse the decision of the Court of Appeals.

REVERSED.

Chief Justice MITCHELL dissenting.

I conclude that the Court of Appeals was correct in reversing the Superior Court. The State Personnel Commission erred by applying an incorrect legal standard. Therefore, the Superior Court, in turn, erred by concluding that the Commission's decision was not affected by an error of law.

It is clear from the record on appeal that the Commission never considered the only issue raised by the parties. Instead, the Commission rendered its decision entirely upon grounds not raised by either party and not properly before the Commission.

In his petition for a contested case hearing, petitioner Glenn I. Hodge, Jr., stated that "[t]he facts supporting my appeal are: The Respondent [Department of Transportation] has designated the Petitioner's position as a 'policymaking position' under NCGS 126-5.

Petitioner's position is not a 'policymaking position' *as defined in* NCGS 126-5(b)." (Emphasis added.) Everything in the record on appeal emphasizes that neither petitioner Hodge nor respondent Department of Transportation (DOT) considered this case to in any way involve questions of party affiliation or political discrimination. In fact, the prehearing order entered into by the parties and signed by the Administrative Law Judge (ALJ) recites that the parties "stipulated and agreed that the issue to be resolved" during the contested case hearing was as follows: "Was Petitioner's position as Chief of the Internal Audit Section in the Department of Transportation properly designated by Respondent as a policymaking exempt position *in accordance with all the provisions of* North Carolina Gen. Stat. 126-5[?]" (Emphasis added.) However, during counsel's opening statements at the contested case hearing, the ALJ specifically asked whether DOT must establish the need for a "political confidant" of the Governor in the position of Chief of the Internal Audit Section of DOT, which Hodge had held. Counsel for DOT replied that the parties had agreed that "the definition that the General Assembly has now set out for policy-maker doesn't really speak to politics. It speaks to authority level." Counsel for petitioner Hodge agreed that the ALJ was "not being called upon today to rule on a political discrimination case." Additionally, the ALJ declined to allow DOT to offer any evidence during the contested case hearing concerning the political affiliation and partisan activities and statements of petitioner Hodge during the time he held the position in question or evidence concerning the partisan political nature of Hodge's hiring for the position.

Despite the above referred to stipulation and statements of counsel for both parties, the ALJ entered a recommended decision that failed to address the stipulated issue and dwelled almost exclusively on considerations relating to partisan politics. The findings and conclusions in that recommended decision are as follows:

> Based on a preponderance of the substantial evidence admitted into the record of this case, the Administrative Law Judge makes the following:
>
> FINDINGS OF FACT
>
> 1. Governor James G. Martin, a Republican, served as Governor of North Carolina from January of 1985 to January of 1993. During those years the position of Chief-Internal Audit Section

of the Department of Transportation was not exempted from the provisions of the State Personnel Act.

2. Petitioner Glenn I. Hodge Jr., a Republican, began his employment with the State of North Carolina on January 1, 1990, at Pay Grade 71, in the Department of Human Resources. He transferred to the Respondent on January 1, 1992, as an internal auditor at Pay Grade 71. On May 23, 1992, Petitioner was promoted to the position of Chief-Internal Audit Section at Pay Grade 78.

3. As Chief of the Internal Audit Section, the Petitioner exercised broad flexibility and independence. In addition to supervising other auditors, he could decide who, what, when, how, and why to audit within the Department. While he could not order implementation of any recommendations, he was free to contact the State Bureau of Investigation concerning his findings.

4. Governor James B. Hunt, Jr., a Democrat, was elected in 1992 and began serving in January of 1993. He had previously served as Governor from January of 1977 until January of 1985, during which time the subject position was designated as exempt from the provisions of the State Personnel Act.

5. During the early part of 1993, Respondent's officials recommended that the Petitioner's position be designated as exempt because of the nature and duties of the job. They thought it met the statutory definition of policymaking. No finding was made that a political confidant of the Governor was needed for the effective performance of this office. Upon being notified of the Governor's designation of his position as exempt, the Petitioner requested an investigation by the Office of State Personnel after which he filed petitions for contested case hearings pursuant to G.S. §126-5(h). The designation of Petitioner's position as policymaking exempt was the substantial equivalent of his being dismissed by Respondent.

6. Under various agreements and arrangements with the United States Department of Transportation, Petitioner's responsibilities include the auditing of federally funded transportation programs and activities. Applicable federal rules and audit standards require that auditors of federally funded activities be free from organizational, external or other impairments to assure individual objectivity and operational independence in

presenting opinions, conclusions, judgments and recommendations. The standards provide that auditors should be "sufficiently removed from political pressures to insure that they conduct their audits objectively and can report their findings, opinions and conclusions objectively without fear of political repercussion. Wherever feasible, they should be under a personnel system in which compensation, training, job tenure and advancement are based on merit."

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. G.S. 126-5(d)(1) allows the Governor to designate certain positions as exempt policymaking. The purpose is to allow the Governor to make partisan personnel decisions in order to have loyal supporters who will carry out administration policies. G.S. 126-5(c) and (h) allow employees in these positions to challenge such designations. The North Carolina Supreme Court reiterated in Abels v. Renfro Corp., 335 N.C. 209, 218[, 436 S.E.2d 822, 827] (1993), that "it would [']look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases.[']" [(Quoting] Dept. of Correction v. Gibson, 308 N.C. 131[, 136, 301 S.E.2d 78, 82 (1983))].

2. The Supreme Court of the United States ruled in Branti v. Finkel, 445 U.S. 507, [518, 63 L. Ed. 2d 574, 584 (1980),] that when employees challenge these political decisions, ". . . the ultimate inquiry is not whether the label [']policymaker['] or [']confidential['] fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." It is my conclusion that this standard must be followed when positions are declared policymaking exempt from the State Personnel Act, which was not done in this case. Respondent has not shown why a political confidant is a necessary requirement in this position. Branti states "[i]t is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position." [Id.]

3. Reversal of the designation of this position is in order pursuant to G.S. 126-5(d)(6) which states: "Subsequent to the des-

ignation of a policymaking position as exempt . . . the status of the position may be reversed . . . by the Governor . . . in a letter to the State Personnel Director, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate."

Based on the foregoing Findings of Fact and Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDED DECISION

The designation of the position as exempt be reversed.

As can readily be seen, only finding 3 was in any way related to the issue to be resolved at the contested case hearing, and none of the conclusions were in any way based upon that finding. Most of the other findings and all of the conclusions were based upon considerations of whether being a "political confidant" of the Governor or being affiliated with a particular political party was "an appropriate requirement for the effective performance" of the position at issue. The recommended decision quite simply did not mention or address the single issue properly presented by the parties and to be decided—whether the position of Chief of the Internal Audit Section in DOT had properly been designated by DOT as a policymaking exempt position *in accordance with all the provisions of* N.C.G.S. § 126-5. Therefore, the recommended decision was not only affected by, but was the result of, an error of law.

The Commission's decision and order merely adopted the findings of fact and conclusions of law of the ALJ as its own and ordered that the designation of the position in question as policymaking exempt under N.C.G.S. § 126-5 be reversed. The result was to repeat the error of law affecting the recommended decision of the ALJ. Therefore, the order of the Superior Court based upon its findings and conclusions to the effect that the decision of the Commission "was not affected by any error of law" was erroneous and was properly reversed by the Court of Appeals.

Having determined that the Commission had committed error of law and that the order of the Superior Court must be reversed for concluding to the contrary, the Court of Appeals could have remanded this case to the Superior Court for further remand to the Commission with instructions that the Commission address and resolve the question of whether the position at issue had been properly designated as policymaking exempt in accord with N.C.G.S.

§ 126-5. Instead, the Court of Appeals concluded that "the undisputed record evidence" and the single finding by the Commission relating to the matter at issue before it supported a conclusion that the position of Chief of the Internal Audit Section of DOT was properly designated policymaking exempt. Accordingly, the Court of Appeals remanded with the mandate that the position of Chief of the Internal Audit Section be designated policymaking exempt. The Court of Appeals did not err in this regard.

The proper scope of judicial review to be applied in an appeal from a decision of a state administrative agency depends on the issues presented on appeal.

> Our courts have held that if it is alleged that an agency's decision was based on an error of law then a *de novo* review is required. *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981). " 'When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review.' " *Id.* at 580-81, 281 S.E.2d at 29, *quoting Savings & Loan League v. Credit Union Comm.*, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981). A review of whether an agency decision is supported by sufficient evidence requires the court to apply the "whole record" test. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). The "whole record" test is also applied when the court considers whether an agency decision is arbitrary and capricious. *High Rock Lake Assoc. v. Environmental Management Comm.*, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

Brooks v. Rebarco, Inc., 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). However, in the present case, the decision of the Court of Appeals must be affirmed no matter which standard is applied.

The sole issue raised by petitioner Hodge in his petition for a contested case hearing was whether his position was a " 'policymaking position' as defined in NCGS 126-5(b)." At all times pertinent to this appeal, N.C.G.S. § 126-5(b) defined "policymaking position" as "a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." The only finding by the Commission relating to the question of whether the position held by Hodge was "delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division" was finding 3, which stated:

> As Chief of the Internal Audit Section, the Petitioner exercised broad flexibility and independence. In addition to supervising other auditors, he could decide who, what, when, how, and why to audit *within the Department.* While he could not order implementation of any recommendations, he was free to contact the State Bureau of Investigation concerning his findings.

(Emphasis added.) Certainly, the uncontroverted evidence compelled this finding by the Commission, but the uncontroverted evidence also required additional findings.

According to the job description for the position of Chief of the Internal Audit Section, the person holding that position independently directs and supervises all activities and personnel in the Internal Audit Section. The Internal Audit Section is responsible for all internal audits of DOT, which include financial and compliance audits, economy and efficiency audits, management analysis audits, and special investigative audits. Those audits encompass all activities and phases of operations within the Division of Highways, the Division of Motor Vehicles, the State Ports Authority, and the Governor's Safety Program. Auditors are assigned by the Chief of the Internal Audit Section to conduct particular audits, and the Chief of the Internal Audit Section also controls the scope, objectives, findings, and recommendations of any audit conducted in any of the divisions of DOT. Further, the Chief of the Internal Audit Section prepares manuals, guide programs, and audit procedures and gives related instructions for all auditors to utilize in performing audits throughout the entire DOT. The testimony of petitioner Hodge was that his decisions in all the foregoing regards were not reviewable or reviewed by anyone in DOT or elsewhere. All of this evidence was uncontroverted before the Commission and is unchallenged on this appeal.

I conclude that the unfettered and unreviewable power to establish auditing procedures to be applied throughout an entire department of government and to implement those procedures throughout the entire department, combined with the unfettered and unreviewable power to decide who and what throughout the department will be audited, when those audits will be conducted, the manner in which audits will be conducted throughout an entire department, and whether findings of any audit conducted within the entire department shall be referred to the State Bureau of Investigation, is the power "to impose the final decision as to a settled course of action to be fol-

lowed within a department, agency, or division" within the meaning of N.C.G.S. § 126-5(b). The uncontroverted and incontrovertible evidence of record before the Commission and before this Court establishes that the position of Chief of the Internal Audit Section carries with it these powers and more. Accordingly, I believe that the Court of Appeals was correct in holding that the Commission's findings and the record evidence compelled the legal conclusion that the position of Chief of the Internal Audit Section is a "policymaking position" within the meaning of N.C.G.S. § 126-5(b) and had properly been designated as such. Accordingly, I would affirm the decision of the Court of Appeals.

For the foregoing reasons, I must respectfully dissent.

BETSY JOHNSON POWELL, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. 552PA96

(*Filed 6 March 1998*)

1. **Public Officers and Employees § 43 (NCI4th)— Director of Highway Beautification Program—policymaking exempt**

   The position of Director of the Highway Beautification Program (HBP) in the Department of Transportation was properly designated by the Governor as policymaking exempt under the State Personnel Act pursuant to N.C.G.S. § 126-5 where there was substantial evidence in the record which supported the State Personnel Commission's conclusion that the Director of the HBP had the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division.

2. **Public Officers and Employees § 43 (NCI4th)— Director of Highway Beautification Program—designation as policymaking exempt—not impermissible patronage dismissal**

   Assuming without deciding that the Director of the Highway Beautification Program (HBP) properly raised the issue as to whether the reclassification of her position as policymaking exempt constituted an impermissible patronage dismissal that violates the First Amendment to the U.S. Constitution under

Branti v. Finkel, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), the State Personnel Commission's conclusion that the Department of Transportation showed why a political confidant was necessary for the effective performance of this position was supported by evidence and findings that the Director of the HBP was the eyes and ears of the Governor, the Administration, and the Department of Transportation with respect to beautification and related issues. The Governor was entitled to decide, even on a partisan and political basis, who will be his or her spokesperson in carrying out the goals of the HBP.

Justice ORR dissenting.

Justice LAKE 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, 124 N.C. App. 542, 478 S.E.2d 28 (1996), affirming an order entered by Stephens (Donald W.), J., on 6 September 1995 in Superior Court, Wake County. Heard in the Supreme Court 10 September 1997.

Broughton, Wilkins, Webb & Sugg, P.A., by R. Palmer Sugg, for petitioner-appellee.

Michael F. Easley, Attorney General, by Grayson G. Kelley, Special Deputy Attorney General, Robert O. Crawford, III, Assistant Attorney General, and Sarah Ann Lannom, Associate Attorney General, for respondent-appellant.

FRYE, Justice.

Both this case and a companion case, *N.C. Dep't of Transp. v. Hodge*, 347 N.C. 602, —— S.E.2d —— (1998), raise the issue of whether the Governor properly designated certain State employee positions as policymaking exempt under N.C.G.S. § 126-5.

[1] The issue in this case is whether the position of Director of the Highway Beautification Program (HBP) in the Department of Transportation (DOT) may be designated by the Governor as policymaking exempt pursuant to N.C.G.S. § 126-5. We must determine whether the Court of Appeals was correct in affirming an order of the superior court sitting in review of a final decision of an administrative agency. We conclude that the Court of Appeals erred in affirming the superior court's order, which reversed the final decision of the State Personnel Commission (Commission).

The State Personnel Act (SPA) governs personnel administration for most employees of state agencies. N.C.G.S. §§ 126-1 to -5 (1995). The SPA provides certain protections for state employees subject to its provisions. However, some state employees are not protected by the SPA. Elected officials, public school superintendents, principals, teachers, and other public school employees, for example, are not subject to most of the provisions of the SPA. N.C.G.S. § 126-5(c2)(1).

In addition, N.C.G.S. § 126-5(d)(1), as it existed at all times relevant to this appeal, permits the Governor to designate up to 1.2% of the total number of full-time positions in the DOT as policymaking exempt. He may also request that additional policymaking positions be designated as exempt. N.C.G.S. § 126-5(d)(2). However, hearing officers, "by whatever title," may not be designated as policymaking exempt. N.C.G.S. § 126-5(d)(7). The statute defines a policymaking position as "a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." N.C.G.S. § 126-5(b). No further guidance is given by the statute as to what is or is not a policymaking position, although a procedure is set forth for notification of the affected parties.

An employee whose position is designated policymaking exempt under the SPA is not left without options. The employee has priority consideration for other positions, as vacancies arise, for which he or she is qualified. N.C.G.S. § 126-5(e)(1); *see also N.C. Dep't of Correction v. Hill*, 313 N.C. 481, 485, 329 S.E.2d 377, 379 (1985) (interpreting "priority" in N.C.G.S. § 126-5(e) to mean the right to an automatic offer of a position which becomes available). Further, the statute provides that whether a position was properly designated policymaking exempt shall be investigated by the Office of State Personnel (OSP), and the dispute shall be resolved as provided in article 3 of chapter 150B of the North Carolina General Statutes. N.C.G.S. § 126-5(h). An employee who contends that his or her position was wrongly designated as policymaking exempt is entitled to a contested case hearing under the Administrative Procedure Act. N.C.G.S. § 150B-22 (1995).

Contested case hearings are conducted by the Office of Administrative Hearings (OAH) and are heard by an Administrative Law Judge (ALJ). The ALJ makes a recommendation to the Commission, N.C.G.S. § 150B-34 (1995), and the Commission then

makes a final decision based upon the record from the OAH, N.C.G.S. § 150B-36 (1995). If the employee or state agency is aggrieved by the Commission's final decision, either party may petition the superior court for judicial review, N.C.G.S. § 150B-43 (1995), as petitioner Powell did in this case. Review is then conducted in accordance with N.C.G.S. § 150B-51(b).

On 25 May 1993, Powell filed a petition for a contested case hearing in the OAH. She also requested that the OSP investigate the propriety of designating her position as policymaking exempt. In an investigation report dated 22 June 1993, the State Personnel Director notified the Secretary of the DOT that the position of Director of the HBP was properly designated as policymaking exempt.

A contested case hearing was held on 2 and 28 February 1994 before Senior Administrative Law Judge Fred G. Morrison, Jr. The ALJ made findings of fact and conclusions of law and entered a recommended decision in which he recommended that the designation of Powell's position as exempt be affirmed. On 20 September 1994, the Commission rendered its final decision, adopting most of the ALJ's findings of fact as follows:

FINDINGS OF FACT

1. Governor James G. Martin, a Republican, served as Governor of North Carolina from January of 1985 to January of 1993. During those years, the position of Director of the Highway Beautification Programs in the Department of Transportation was not exempted from the provisions of the State Personnel Act.

2. Petitioner Betsy Johnson Powell, a Republican, began her employment with the State of North Carolina in February of 1989, at the Employment Security Commission. In August of 1989, she transferred to Respondent [(DOT)] to serve as Director of its Highway Beautification Programs. Her pay grade was 72. This is a professional position requiring minimum supervision for routine work. Review of initiatives or materials developed by the position is necessary. Progress is monitored through the Performance Management System. The individual in this position interfaces with DOT staff at all levels of the organization, local government officials, and the general public.

3. Ms. Powell's job responsibilities were broken down as follows:

   A. (20%) Managing, organizing and directing the Beautification Programs staff responsibilities including the Adopt-A-Highway Program and support staff responsibilities.

   B. (20%) Implementation of the North Carolina Department of Transportation Recycling Plan. This includes compliance with all federal and state laws now in place or planned for later implementation.

   C. (20%) Training of department personnel in effective means of source reduction, recycling, and reuse of recycled products.

   D. [10%] Keep abreast of federal and state legislation regarding mandate usage of recycled or solid waste materials. Will attend in-state and out-of-state recycling seminars/conventions and litter abatement in order to both develop and implement innovative solutions to recycling issues.

   E. (10%) Maintain records of compliance and success of recycling efforts and prepare reports for federal, state, and litter prevention efforts and department use.

   F. (10%) Liaison to local government beautification councils and community beautification organizations.

   G. (5%) Advise management [of] changes and opportunities in the fields of recycling and litter abatement.

   H. (5%) Liaison to Governor's Highway Beautification Council.

4. The Governor's Highway Beautification Council consists of members appointed by the Governor. During the Martin administration, the wife of former Lieutenant Governor James Gardner, a Republican, served as chairman of this Council.

5. Petitioner, during 1992, took a three months' leave of absence from her position to serve as the Eastern Regional Field Coordinator in the gubernatorial campaign of Lt. Governor Gardner, the Republican general election opponent of Democrat James B. Hunt Jr.

6. Governor James B. Hunt, Jr., a Democrat, was elected in 1992 and began serving in January of 1993. He had previously served as Governor from January of 1977 until January of 1985, during which time the subject position was not designated as exempt from the provisions of the State Personnel Act.

. . . .

8. Current Transportation officials want this position filled by a political confidant of the Governor primarily because of the public exposure involved. This employee will serve as a surrogate of the Governor and Secretary of Transportation before the various councils and other organizations across North Carolina. The primary purpose will be to promote the Governor's programs as much as possible. A prior Martin video has been replaced by two involving Governor Hunt.

The Commission also made the following additional findings:

ADDITIONAL FINDINGS OF FACT

7. In March of 1993, a team of personnel specialists from the Department of Transportation (hereinafter DOT) Personnel Division, headed by the DOT Personnel Director, reviewed all positions in the DOT to determine those positions that met the definition of policymaking exempt under G.S. 126-5(b). The team of personnel specialists reviewed job descriptions, Office of the State Personnel (hereinafter OSP) job specifications, and organizational charts to make this assessment. All positions in DOT that met the definition of policymaking under G.S. 126-5(b) were recommended to the Secretary's Office for placement on the exempt list. The Senior Deputy Secretary reviewed the positions with the appropriate managers and accepted the recommendations. The list was forwarded to the OSP and returned approved. The Governor designated the positions as policymaking exempt in April 1993. Letters were prepared in accordance with the form letters provided by the OSP and sent to the affected employees with an effective date that afforded the ten-day notice required under G.S. 126-5(g).

8. Effective April 5, 1993, the position of Director of the Highway Beautification Program was designated as policymaking exempt by the Governor in accordance with G.S. 126-5.

9. G.S. 126-5(g) requires that the holders of positions to be designated as exempt be notified in writing ten days prior to the effective date of the designation as to the position holder.

10. The Petitioner was notified of the designation of the position of Director of the Highway Beautification Program as policymaking exempt by letter dated May 3, 1993, with an effective date of May 17, 1993.

11. Effective May 17, 1993, the position of Director of the Highway Beautification Program became designated as policymaking exempt as to the Petitioner.

12. The only statutory rights provided to employees exempted from the provisions of the State Personnel Act [are] the right to an investigation by OSP and the right to resolve a dispute as to the propriety of the exempt designation through a contested case hearing provided for under G.S. 126-5(h).

13. In an investigation report dated June 22, 1993, Ronald G. Penny, State Personnel Director, notified DOT Secretary R. Samuel Hunt of the determination of the OSP that the position of Director of Highway Beautification Program was properly designated as policymaking exempt.

14. As Director of the Highway Beautification Program, the Petitioner headed that subdivision of the DOT and reported first to the Assistant Secretary for Management, then to a Special Assistant to the Secretary of the DOT. After February 1993, the Highway Beautification Program became a Division, headed by the Petitioner, who reported to the Deputy Secretary of Transportation. The duties performed by and the responsibility delegated to the Director of the Highway Beautification Program remained the same through the Petitioner's tenure in that position.

15. As the Director of Highway Beautification Program the Petitioner was delegated with the authority to represent the Department of Transportation, the Secretary of Transportation, the Governor and the Administration across the state and nation in regard to highway beautification and other related issues with respect to the Administration policy. The position holder traveled to meet with various citizen[s'] groups and made speeches about the Governor's position on beautification and other issues and

organized and conducted ceremonies with regard to the Adopt-[A]-Highway program and other public relations type activities. She also solicited persons to work as volunteers and coordinated volunteers on behalf of the Department who were willing to work in the Administration.

16. To these volunteers and other citizens across the state, the Director of the Beautification Program was the eyes and ears of the Governor, the Administration and the department with respect to beautification and other related issues.

The Commission then adopted the ALJ's conclusions of law as follows:

CONCLUSIONS OF LAW

1. G.S. 126-5(d)(1) allows the Governor to designate certain positions as exempt policymaking [sic]. The purpose is to allow the Governor to make partisan personnel decisions in order to have loyal supporters who will carry out administration policies. G.S. 126-5(c) and (h) allow employees in these positions to challenge such designations. The North Carolina Supreme Court reiterated in Abels v. Renfro Corp., 335 N.C. 209, 218[, 436 S.E.2d 822, 827](1993), that "it would look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." [N.C.] Dept. of Correction v. Gibson, 308 N.C. 131[, 301 S.E.2d 78 (1983)].

2. The Supreme Court of the United States ruled in Branti v. Finkel, 445 U.S. 507, [63 L. Ed. 2d 574 (1980),] that when employees challenge these political decisions, ". . . the ultimate inquiry is not whether the label [']policymaker['] or [']confidential['] fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." It is my conclusion that this standard must be followed when positions are declared policymaking exempt from the State Personnel Act, which has been done in this case. Respondent has shown why a political confidant is a necessary requirement in this position, thus the designation must stand.

The Commission made the following additional conclusions of law:

ADDITIONAL CONCLUSIONS OF LAW

3. G.S. 126-5(d) provides that the Governor may designate certain positions as policymaking exempt from the protections of the State Personnel Act.

4. G.S. 126-5(b) defines a "policymaking position" as one delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division.

5. As the Director of the Highway Beautification Program, the Petitioner was delegated with the authority to impose a final decision as to a settled course of action to be followed with respect to beautification on a statewide basis and to represent the Administration with citizen volunteer groups and other citizens.

6. The Petitioner's position as Director of the Highway Beautification Program was properly designated as policymaking exempt under G.S. 126-5.

The Commission then ordered that the decision of the DOT designating the position of Director of the HBP as policymaking exempt be affirmed.

Powell filed a petition for judicial review in Superior Court, Wake County. On 6 September 1995, Judge Donald W. Stephens reversed the Commission's decision. The DOT appealed to the Court of Appeals, and the Court of Appeals affirmed the superior court's order. On 6 March 1997, this Court allowed the DOT's petition for discretionary review.

Judicial review of a final agency decision is conducted in superior court pursuant to the Administrative Procedure Act. N.C.G.S. § 150B-43. The standard of review is as follows:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1995).

The proper standard of review by the superior court depends upon the particular issues presented by the appeal. *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *see also Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580, 281 S.E.2d 24, 28 (1981). When the issue on appeal is whether the agency's decision was supported by substantial evidence or whether the agency's decision was arbitrary and capricious, the reviewing court must apply the "whole record" test. *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392; *see also Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996). A "whole record" review "does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views," but rather requires the court to determine the substantiality of the evidence by taking all the evidence, both supporting and conflicting, into account. *Associated Mechanical Contractors*, 342 N.C. at 832, 467 S.E.2d at 401.

In this case, we are concerned with whether the Commission's conclusion that petitioner's position was vested with the authority to impose a final decision as to a settled course of action to be followed within a department, agency, or division, and that it was therefore policymaking exempt, was unsupported by substantial evidence in view of the entire record.

In this Court, the DOT argues that the Court of Appeals erred by affirming the superior court's decision reversing the Commission's finding that Powell's position was policymaking exempt. The Court of Appeals first said that a key issue was whether, at the time Powell's position was designated as policymaking exempt, the HBP was a division of the DOT. While we agree with the Court of Appeals that HBP was not a division of the DOT, we believe that the Court of Appeals focused on the wrong issue. The issue is not whether the HBP was a division of the DOT, but rather whether the position of Director of the

HBP carried with it the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division.

The Court of Appeals correctly identified the second issue as whether there was substantial record evidence to support the Commission's conclusion that the Director of the HBP had the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division. The Court of Appeals concluded that there was no substantial evidence to support the conclusion that this position carried decision-making authority of such scope as would enable Powell to make or impact policies on a department-wide, agency-wide, or division-wide level at the DOT. In determining whether the Court of Appeals is correct on this issue, we must review the evidence that was before the Commission, whose final agency decision is being reviewed. The Commission is the fact-finding agency, whose decision must be upheld if supported by the whole record.

In two days of hearings, evidence was presented in the form of affidavits, job descriptions, and personal testimony tending to show that the position of Director of the HBP carried with it responsibility for the HBP and the Beautification Program staff, including the Adopt-A-Highway Program. The Director of the HBP served as the liaison to the Governor's Highway Beautification Council. Decisions made by the Director of the HBP could structure a major goal of the DOT and could establish a policy platform to guide programmatic efforts within the entire DOT. The Director of the HBP was held accountable for independent progress under broadly construed goals and received minimal supervision. After a departmental reorganization in February 1993, the Director of the HBP reported directly to the Deputy Secretary of Highways. The duties performed by and the responsibilities delegated to the Director of the HBP remained the same throughout Powell's tenure in that position. The position of Director of the HBP was the only such position in state government.

The evidence presented was capable of two reasonably conflicting views: (1) that the position carried with it the requisite authority, and (2) that it did not. The Commission made detailed findings of fact and conclusions of law as fully set forth in this opinion. In the Commission's judgment, the evidence showed that the position carried with it the authority to impose a final decision as to a settled course of action to be followed within a department, agency, or divi-

sion. We believe the Commission has taken a reasonable view of the evidence. The whole record test does not permit the reviewing court to substitute its judgment for the Commission's judgment as between two reasonably conflicting views. After reviewing both the supporting and conflicting evidence in the record, we conclude that substantial evidence in the whole record supports the Commission's conclusion that the DOT properly designated Powell's position as policymaking exempt pursuant to the statute.

[2] The United States Supreme Court has held that certain patronage dismissals violate the First Amendment to the United States Constitution. *See Branti v. Finkel*, 445 U.S. 507, 63 L. E. 2d 574 (1980); *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547 (1976). The Fourth Circuit has held that the *Branti-Elrod* analysis should be applied not only to patronage dismissals, but also to those patronage practices "that can be determined to be the substantial equivalent of dismissal." *Delong v. United States*, 621 F.2d 618, 623-24 (4th Cir. 1980); *see also Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990). Powell argues that the reclassification of the position of Director of the HBP as policymaking exempt constitutes, in and of itself, the substantial equivalent of an impermissible patronage dismissal. She also argues that the fact that she was notified of the termination of her employment eighteen days after she was notified of the reclassification of the position means that this course of action was designed to bring about the termination of her employment. Assuming without deciding that Powell has properly raised the *Branti-Elrod* issue, the evidence clearly supports the ALJ's conclusion, adopted by the Commission, that the DOT has shown why a political confidant is necessary for the effective performance of this position. As found by the Commission, the Director of the HBP was the eyes and ears of the Governor, the Administration, and the DOT with respect to beautification and related issues. Clearly an elected official is entitled to decide, even on a partisan and political basis, who will be his or her spokesperson in carrying out the goals of the Highway Beautification Program.

We conclude that there was substantial evidence to support the designation of the position of Director of the Highway Beautification Program as policymaking exempt under N.C.G.S. § 126-5. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justice ORR dissenting.

Superior Court Judge Donald W. Stephens, in reviewing the "whole record" in this case, concluded that

> there is no competent evidence to support a conclusion that this position was one vested with authority to impose the final decision on any department-wide course of action or many [sic] agency-wide course of action or on any division-wide course of action. The Petitioner's position did not meet any legal definition of policymaking under G.S. § 126-5(b) and, as such, the reclassification to exempt status for this position was contrary to law.

Similarly, a unanimous Court of Appeals panel, in an opinion written by Judge John B. Lewis, Jr., concluded that "[t]here is no substantial evidence to support the conclusion that she [Ms. Powell] had decision-making authority of such scope as would enable her to make or impact policies on a department-wide, agency-wide, or decision-wide level at the DOT." Accordingly, the Court of Appeals affirmed the trial court's ruling.

Having carefully reviewed the transcripts in this case, as well as the Administrative Law Judge's (ALJ) and Personnel Commission's findings of fact, I agree with the conclusion of the trial court and Court of Appeals. There is no substantial evidence to support the conclusion that Ms. Powell's position as Director of the Highway Beautification Program falls within the definition of "policymaking." There is simply no evidence to permit its redesignation to "exempt" after years of being a nonexempt position vested with the protections given to state employees under the State Personnel Act. N.C.G.S. ch. 126 (1995).

In addition, the majority points to no specific evidence that would allow a conclusion that Ms. Powell could "impose the final decision as to a settled course of action to be followed within a department, agency, or division." N.C.G.S. § 126-5(b). Instead, the majority focuses on the Personnel Commission's findings of fact. The Personnel Commission adopted the ALJ's findings numbered one through six and eight, but specifically declined to adopt number seven. The Personnel Commission also made additional findings on its own. A close examination shows that absolutely none of these findings specifically address the critical factor in this case—the petitioner's ability to impose a final decision. While the ALJ's findings

include a general description of the position's duties, the Personnel Commission's findings focus on the fact that "[t]o . . . volunteers and other citizens across the state, the Director of the Beautification Program was the eyes and ears of the Governor, the Administration and the department with respect to beautification and other related issues." Being "the eyes and ears of the Governor," or of anyone else in state government, does not equate with the statutory test for policymaking so as to warrant exempting this position.

The majority states that "the evidence was capable of two reasonably conflicting views." I agree with the trial court's and the Court of Appeals' conclusion that there is a total lack of substantial evidence to support the State's position in this case. Therefore, I respectfully dissent.

Justice Lake joins in this dissenting opinion.

N.C. STEEL, INC.; N.C. STEEL ERECTORS, INC.; N.C. STEEL MANAGEMENT, INC.; N.C. STEEL FABRICATORS, INC.; AIRCRAFT SERVICES OF RALEIGH, INC.; MONTAGUE BUILDING COMPANY; SMITH & SMITH, SURVEYORS, P.A., AND NORTH CAROLINA MARBLE & GRANITE v. NATIONAL COUNCIL ON COMPENSATION INSURANCE; NATIONAL WORKERS' COMPENSATION REINSURANCE POOL; NORTH CAROLINA RATE BUREAU; AETNA CASUALTY & SURETY COMPANY; CIGNA INSURANCE COMPANY AND INS. CO. OF NORTH AMERICA; EMPLOYERS INS. OF WAUSAU A MUTUAL COMPANY; FIDELITY & CASUALTY CO. OF N.Y.; HARTFORD UNDERWRITERS INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; MICHIGAN MUTUAL INSURANCE COMPANY; NATIONAL SURETY CORPORATION; ST. PAUL FIRE & MARINE INSURANCE COMPANY; THE TRAVELERS INSURANCE COMPANY; AND UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 317PA96

(Filed 6 March 1998)

1. Insurance § 8 (NCI4th)— filed rate doctrine—adoption for North Carolina

The filed rate doctrine, which provides that a plaintiff may not claim damages on the ground that a rate approved by a regulator as reasonable is nonetheless excessive because it is the product of unlawful conduct, is adopted for application in North Carolina.

2. Insurance § 8 (NCI4th); Workers' Compensation § 318 (NCI4th)— excessive workers' compensation rates—action against carriers—restraint of trade—unfair practice—unfair competition—claims barred by filed rate doctrine

The filed rate doctrine barred claims by plaintiff employers against defendant workers' compensation carriers and rate organizations for restraint of trade under N.C.G.S. § 75-1, unfair and deceptive practices under N.C.G.S. § 75-1.1, and unfair competition in violation of N.C.G.S. § 58-63-15 based on allegations that defendants withheld evidence from the Commissioner of Insurance about servicing carrier fees for residual market (assigned risk pool) workers' compensation insurance in a 1992 rate case and caused the Commissioner to approve excessive rates for workers' compensation insurance.

3. Insurance § 8 (NCI4th)— workers' compensation rates—collateral attack—equitable estoppel cases inapplicable

Cases which hold that when an insurer makes a representation as to coverage in a filing, it cannot give a lesser coverage in its policies do not apply to an action in which plaintiff employers alleged that defendant insurance carriers and rate organizations withheld information from the Commissioner of Insurance in a rate case and caused the Commissioner to approve excessive rates.

4. Insurance § 8 (NCI4th); Workers' Compensation § 318 (NCI4th)— workers' compensation rates—illegal activities—injunctive relief—filed rate doctrine

The filed rate doctrine barred plaintiffs' claims for injunctive relief based on alleged illegal activities in the setting of workers' compensation insurance rates.

5. Workers' Compensation § 318 (NCI4th)— excessive servicing carrier fees—forcing into residual market—claim for damages—filed rate doctrine

The filed rate doctrine barred plaintiff employers' claims for damages based on allegations that a conspiracy by defendant workers' compensation carriers and rating organizations to fix excessive servicing carrier fees forced some employers into the residual market (assigned risk pool) where the premiums are higher and the employers do not receive dividends on their poli-

cies since plaintiffs could not prove damages without recalculating rates previously fixed by the Commissioner of Insurance.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 123 N.C. App. 163, 472 S.E.2d 578 (1996), affirming in part and reversing in part an order entered 16 February 1995 by Clark, J., in Superior Court, Wake County, granting the defendants' motion for summary judgment. Heard in the Supreme Court 18 March 1997.

This is an action by eight corporations which allege that the eleven defendant insurance companies and three other entities have engaged in a restraint of trade in violation of N.C.G.S. § 75-1; have engaged in unfair and deceptive practices in violation of N.C.G.S. § 75-1.1; have engaged in unfair competition in violation of N.C.G.S. § 58-63-15; have engaged in constructive fraud; have breached a fiduciary duty; have breached a covenant of good faith and fair dealing; and have conspired to commit fraud, breach of fiduciary duty, and breach of implied covenants of good faith and fair dealing. The only claims brought forth with this appeal are the claims based on chapters 58 and 75 of the North Carolina General Statutes.

The defendants moved to dismiss the action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) and (c). At the hearing on this motion, the court considered matters outside the pleadings, which converted it to a hearing for summary judgment. *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). The superior court granted the motion for summary judgment, and the Court of Appeals affirmed in part and reversed in part. We allowed petitions for discretionary review by plaintiffs and defendants.

Lore & McClearen, by R. James Lore, for plaintiff-appellants and -appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., and Steptoe & Johnson, by Mark F. Horning, for The Aetna Cas. & Surety Co.; Womble, Carlyle, Sandridge & Rice, by Pressly M. Millen, for National Council on Compensation Insurance and National Workers' Compensation Reinsurance Pool; Young, Moore, Henderson & Alvis, by R. Michael Strickland, for N.C. Rate Bureau; Poyner & Spruill, by John R. Jolly, Jr., for CIGNA Ins. Co. and Ins. Co. of North America; Ragsdale, Liggett & Foley, by George R. Ragsdale, for Employers Ins. of Wausau; Cranfill, Sumner &

Hartzog, by Dan M. Hartzog, for Fidelity & Cas. Co. of New York; Moore & Van Allen, by Joseph W. Eason and Denise Smith Cline, for Hartford Underwriters Ins. Co.; Manning, Fulton & Skinner, by John B. McMillan, for Liberty Mutual Ins. Co.; Moore & Van Allen, by Joseph W. Eason and Denise Smith Cline, for Michigan Mutual Ins. Co.; Maupin, Taylor, Ellis & Adams, by M. Keith Kapp, for National Surety Corp.; Petree Stockton, L.L.P., by John L. Sarratt, for St. Paul Fire & Marine Ins. Co.; Parker, Poe, Adams & Bernstein, by John F. Graybeal, for Travelers Ins. Co.; and Tharrington, Smith & Hargrove, by Douglas E. Kingsbery, for United States Fidelity & Guaranty Co., defendant-appellants and -appellees.

The Alliance of American Insurers, by Ann W. Spragens, Senior Vice President and General Counsel, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by B. Davis Horne, Jr., on behalf of American Insurance Association and National Association of Independent Insurers, amici curiae.

WEBB, Justice.

The gravamen of the plaintiffs' claim is that the defendants withheld certain evidence from the Insurance Commissioner in a rate case decided in 1992, causing the Commissioner to approve excessive rates for workers' compensation insurance. The materials submitted at the hearing on the motion for summary judgment showed that workers' compensation insurance, with minor exceptions, is mandatory. N.C.G.S. § 97-9 (1991). Employers may be self-insured, they may purchase insurance in the voluntary market, or they may purchase insurance in the residual market. Employers who are not or cannot be self-insured and who cannot purchase insurance in the voluntary market must purchase in the residual market, often called the assigned risk pool. N.C.G.S. § 58-36-1(5) (1994). There is a 14% surcharge for coverage in the residual market, and dividends are not paid on residual market coverages as is done in the voluntary market.

Workers' compensation rates are regulated by law. The process of rate-making is begun by the filing of proposed rates with the Insurance Commissioner by the North Carolina Rate Bureau (NCRB). N.C.G.S. § 58-36-15 (1994). The proposed rates become legal rates unless the Insurance Commissioner intervenes and holds hearings for

the purpose of approving final rates. N.C.G.S. § 58-36-20 (1994). The NCRB is an organization created by statute, N.C.G.S. § 58-36-1, and is a defendant in this case. Much of NCRB's function in rate increase applications is done by a national rating organization, the National Council on Compensation Insurance (NCCI), which is also a defendant in this case.

The plaintiffs contend that the way the residual market is conducted by the defendants unlawfully causes excessive rates. The Commissioner of Insurance has promulgated a "North Carolina Workers' Compensation Insurance Plan" (Plan), which delegates the regulation of the residual market to NCRB. The plan requires that each company writing workers' compensation insurance accept customers assigned to it who have not been able otherwise to procure such coverage.

NCCI has created a National Workers' Compensation Pool (Pool) consisting of all insurance companies who write workers' compensation insurance in North Carolina. The Pool is a defendant in this case. Premiums paid for assigned risk insurance are deposited in the Pool. When an insured is accepted for assigned risk insurance, a member of the Pool is designated to service its policy. This company, which is called a servicing carrier, issues a policy and services it. It does not keep the premium, however. The premiums are deposited in the Pool, and claims are paid from the Pool. In this way, all carriers of assigned risk insurance share equally in the assigned risk losses.

The companies which issue assigned risk policies are paid servicing carrier fees by the Pool. These fees are agreed upon by the Pool and the carriers, and varied from 27.4% to 30% of assigned risk premiums during the period from 1989 through 1993. It is the servicing carrier fees about which the plaintiffs complain.

The plaintiffs assert two theories of damages resulting from the alleged illegal activity. First, they contend rates are forced up by the use of the servicing carrier fees, which are undisclosed noncompetitive expenses, and loss factors that would have been demonstrably lower in a competitive residual market, thereby adversely affecting purchasers of workers' compensation insurance in both the voluntary and residual markets. Second, they say that the actions of the defendants forced some policyholders into the residual market, where the premiums are higher and the plaintiffs do not receive dividends on their policies.

[1] The defendants rely on the filed rate doctrine, which grew from the United States Supreme Court's opinion in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 67 L. Ed. 183 (1922). The filed rate doctrine provides that a plaintiff may not claim damages on the ground that a rate approved by a regulator as reasonable is nonetheless excessive because it is the product of unlawful conduct. *See also Square D Co. v. Niagra Frontier Tariff Bur*eau, 476 U.S. 409, 90 L. Ed. 2d 413 (1986).

We agree with the Court of Appeals for the reasons stated in its opinion that we should adopt the filed rate doctrine. The General Assembly has given the Insurance Commissioner the duty of setting rates. The Commissioner, aided by his staff, has the expertise to determine proper rates. We do not believe that, by the enactment of N.C.G.S. ch. 75, the General Assembly intended that duly set rates be challenged in another forum. When the Commissioner approved the rates, they became the proper rates.

As Judge Wynn, writing for the Court of Appeals, points out, chapter 58 of the General Statutes contains a comprehensive regulatory scheme for insurance companies, which includes provisions for punishing violators of the chapter. N.C.G.S. § 58-2-70(g) (1994). It also contains a provision for the appeal of decisions of the Commissioner. N.C.G.S. § 58-2-75(a) (1994). We do not believe that, with this comprehensive regulatory scheme, the General Assembly intended that the rates could be collaterally attacked.

[2] The plaintiffs contend that the servicing carrier fees were not considered by the Commissioner. They say that the failure of the defendants to disclose to the Commissioner the plan by which these fees are paid is a violation of N.C.G.S. § 58-63-15(5) and an unfair practice. We believe this is a good example of why questions involving rates should be settled by the Insurance Commissioner and not by a jury. Whether the payment of the servicing carrier fees is a relevant factor which must be considered by the Commissioner in setting rates pursuant to N.C.G.S. § 58-36-10 is a technical question which requires considerable expertise to answer. It is best decided by the Commissioner, who has this expertise. It should not be decided by a court or jury, which does not have this expertise.

The plaintiffs rely on several cases which they say establish the rule that actions for violations of chapter 58 may be brought under N.C.G.S. §§ 75-1 and 75-1.1. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986); *Dull v. Mutual of Omaha*

Ins. Co., 85 N.C. App. 310, 354 S.E.2d 752, *disc. rev. denied*, 320 N.C. 512, 358 S.E.2d 518 (1987); *Phillips v. Integon Corp.*, 70 N.C. App. 440, 319 S.E.2d 673 (1984); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980). These cases involve wrongs which are not involved with rate-making. The filed rate doctrine provides that rates may not be collaterally attacked after they have been set by a regulator. These cases are not precedent for this case.

The plaintiffs next argue that applying the filed rate doctrine in this case is inconsistent with *State ex rel. Hunt v. N.C. Reinsurance Facility*, 302 N.C. 274, 275 S.E.2d 399 (1981). We held in that case that recoupment surcharges which insurers were allowed to assess their policyholders were not rates which had to be filed with the Insurance Department. The defendants argue that, in the same way, the servicing carrier fees involved in this case are not subject to regulation by the Commissioner, and the filed rate doctrine should not bar them from pursuing a remedy based on a price fixing conspiracy in regard to the servicing carrier fees.

The plaintiffs are complaining about the rates set by the Commissioner. This distinguishes the case from *Hunt*. It is the approval of the rates by the Commissioner that gives them the protection of the filed rate doctrine.

The plaintiffs next contend that the General Assembly, by an amendment to N.C.G.S. § 58-63-15, showed that it intended that actions such as this one may be maintained. N.C.G.S. § 58-63-15 lists thirteen things that are unfair methods of competition or unfair or deceptive practices. In 1986, the General Assembly amended the section to provide that a violation of one of the thirteen unfair practices does not create a private cause of action. The other twelve unfair practices were not mentioned in the revision of the section, and the plaintiffs argue that this means private causes of action may be brought on violations of any of them. None of the wrongs enumerated in N.C.G.S. § 58-63-15 involved the wrongs alleged in this case. We do not believe the General Assembly had wrongs of this type in mind when it amended the section.

The plaintiffs next argue that *Keogh* is distinguishable from this case because in *Keogh* the United States Supreme Court recognized that the plaintiffs had a remedy under the Interstate Commerce Act. They did not need a second remedy under the Sherman Antitrust Act. We do not believe an adequate other remedy is necessary for the

application of the filed rate doctrine. We note, however, that after the determination of a rate, a ratepayer may petition the Commissioner to investigate for fraud. N.C.G.S. § 58-2-70(c). If the Commissioner determines there was fraud in the application, he may petition the Superior Court, Wake County, for an order for restitution to any injured party. N.C.G.S. § 58-2-70(e). This is a remedy for injured ratepayers.

The plaintiffs next contend that certain language in *ICC v. Transcon Lines*, 513 U.S. 138, 130 L. Ed. 2d 562 (1995), provides that when there is a comprehensive regulatory scheme with which a party must comply, there may be a departure from the filed rate in order to comply with the whole scheme. The plaintiffs say we have a comprehensive regulatory scheme in this case, which includes chapter 75 of the General Statutes. *Transcon* deals with the authority of the Interstate Commerce Commission to obtain injunctive relief to enforce regulations adopted by the Commission. It does not deal with the issues involved in this case.

The plaintiffs next rely on N.C.G.S. § 58-63-35(d), which provides:

> No order of the Commissioner under this Article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State.

N.C.G.S. § 58-63-35(d) (1994). The plaintiffs say that this section makes other available remedies a part of the comprehensive insurance regulation of the State. They rely on *Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225 (1995), for the proposition that a remedy under one statute does not preclude a remedy under another statute. In *Stanley*, we held that a plaintiff could bring an action for treble damage pursuant to N.C.G.S. ch. 75-1, art. 1, for a violation of the Ejectment of Residential Tenants Act although there was a remedy under the Act. There was a provision in the Tenants Act which provided, "[t]he remedies created by this section are supplementary to all existing common-law and statutory rights and remedies." N.C.G.S. § 42-25.9(c) (1994).

Stanley is distinguishable from this case. There was no setting of a rate in *Stanley*. We believe that N.C.G.S. § 58-63-35 provides that a person is not relieved of other liability by this section if he is otherwise liable. In this case, the defendants are not otherwise liable because of the filed rate doctrine.

The plaintiffs, relying on *United States v. Radio Corp. of America*, 358 U.S. 334, 3 L. Ed. 2d 354 (1959), argue that the regulatory power of the Commissioner of Insurance is not complete, and this allows an action under chapter 75. The regulatory power of the Commissioner is complete so far as setting rates is concerned. That is all that is involved in this case.

The plaintiffs next contend that we should adopt the state action doctrine as articulated in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 119 L. Ed. 2d 410 (1992). Under the state action doctrine antitrust actions are immune from prosecution if (1) the state's intent is to replace competition with state regulation, and (2) the state in fact actively supervises the challenged conduct. The plaintiffs contend that the second prong of the state action doctrine is not met in this case because there is no state supervision of the servicing carrier fees. The plaintiffs argue that the state action doctrine subsumes the filed rate doctrine and includes more than rate issues. They say that we used the state action doctrine in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 656, 386 S.E.2d 200, 213 (1989).

In *Madison Cablevision*, we said that it was not necessary to the decision in that case, but we discussed the state action doctrine to demonstrate it was consistent with the result we reached. We do not believe we should adopt the state action doctrine in this case. We might adopt the state action doctrine in a proper case, but in a case dealing with insurance rates, we believe the reasoning of *Keogh* is sound.

[3] The plaintiffs next contend that the doctrine of equitable estoppel in insurance regulation as adopted in other states should be adopted in this state. They cite three cases to support this proposition. *Continental Cas. Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937 (E.D. Pa. 1995); *Anderson v. Minnesota Ins. Guar. Ass'n*, 520 N.W.2d 155 (Minn. Ct. App. 1994), *rev'd on other grounds*, 534 N.W.2d 706 (Minn. 1995); *Morton Int'l, Inc. v. General Accident Ins. Co. of America*, 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, 512 U.S. 1245, 129 L. Ed. 2d 878 (1994). These three cases hold that when an insurer makes a representation as to coverage in a filing, it cannot give a lesser coverage in its policies. These cases have no application to this case. They do not involve the setting of insurance rates.

[4] Finally, the plaintiffs say the Court of Appeals was in error in saying they had abandoned their claim for injunctive relief. They contend that the filed rate doctrine does not bar a claim for in-

junctive relief. They rely on a sentence in *Square D*, 476 U.S. at 422, 90 L. Ed. 2d at 425, which reads, "The alleged collective activities of the defendants . . . were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief." They also rely on a sentence in *Keogh*, 260 U.S. at 161, 67 L. Ed. at 187, which reads, "[U]nder the Anti-trust Act a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal, and if so, the government may have redress by criminal proceedings . . . [or] by injunction." We are not bound by the United States Supreme Court's ruling as to equitable relief. Nevertheless, we believe the two sentences relied upon by the plaintiffs say it is the government, and not individuals, that is entitled to equitable relief.

We affirm the Court of Appeals in its holding that the plaintiffs do not have a claim based on illegal activities in the setting of workers' compensation insurance rates.

[5] The plaintiffs also contend that they may recover on what they say is a "non-rate" theory, which they describe as follows: The plaintiffs say the defendants conspired to pay excessive servicing carrier fees, which prevented the premiums from covering losses in the residual market. Because of this shortfall, the defendants had to use part of the premiums from the voluntary market to cover this loss. As a result, the defendants placed more marginal risks in the residual market with its higher premiums. The plaintiffs say that it is not necessary to question the rates set by the Insurance Commissioner in order to prove their damages. The damage, say the plaintiffs, comes from the shifting of policyholders into the residual market. The damages they seek do not depend on a challenge to the rates. We disagree.

We believe that the plaintiffs cannot prove their claim without the rates set by the Commissioner being questioned. The plaintiffs' damages must come from being shifted from the voluntary market to the residual market. If the plaintiffs offer evidence that a certain number of policyholders who were in the residual market should have been in the voluntary market, the defendants could show that the influx of these policyholders would have caused the Commissioner to set different rates for the two markets. This is a questioning of rates set by the Commissioner, which the filed rate doctrine is designed to prevent.

The plaintiffs rely on the affidavit of Dr. John W. Wilson, an expert in insurance rates, who stated that "none of the damages

deriving from this forced expansion of the residual market as a result of excessive servicing carrier fees depend on or result in changes in the regulated manual rates." Dr. Wilson's statement, however, is not supported by the record. We can find no other way to calculate the damages plaintiffs allege than to require a jury to speculate regarding what rate the Commissioner would have approved had the allegedly excessive fee been considered, and had more employers been able to purchase insurance in the voluntary market.

This case is analogous to *Uniforce Temporary Personnel, Inc. v. National Council on Compensation Insurers, Inc.*, 892 F. Supp. 1503 (S.D. Fla. 1995), *aff'd*, 87 F.3d 1296 (11th Cir. 1996), which involved a claim that the ratepayers were improperly insured in the residual market and thus forced to pay higher rates than they would have if they had obtained insurance in the voluntary market. In *Uniforce*, employers claimed that the defendant-insurance carriers conspired to fix excessively high servicing carrier fees, which resulted in the employers' being forced to purchase insurance in the residual market instead of the voluntary market. *Id.* at 1507. The court in that case determined that the "plaintiffs' claims for damages [fell] squarely within the filed rate doctrine." *Id.* at 1512. As in *Uniforce*, the jury in this case would have had

> to measure the difference between the properly approved workers' compensation insurance rates paid by plaintiffs and those mythical rates which would have been applicable but for the defendants' concerted activity. This undertaking is not within the province of the courts but should reside with the respective state regulators with authority over rate-setting.

Id. The plaintiffs' second theory of recovery thus cannot survive a motion for summary judgment and is barred by the filed rate doctrine.

The Court of Appeals held that it is not necessary to question the rates set by the Commissioner under the plaintiffs' second claim. It said it was not necessary to calculate approved rates in order to determine damages, and relief could be given to the plaintiffs by determining the number of insurers who were forced to purchase in the residual market. This is where we differ with the Court of Appeals. We do not believe the plaintiffs could prove damages without recalculating rates previously approved by the Insurance Commissioner.

We reverse the Court of Appeals on the plaintiffs' second claim for relief.

AFFIRMED IN PART AND REVERSED IN PART.

THOMASINE B. McALLISTER AND EDWARD McALLISTER v. KHIE SEM HA, M.D.

No. 298PA97

(Filed 6 March 1998)

1. **Abortion; Prenatal or Birth-Related Injuries and Offenses § 24 (NCI4th)— medical malpractice—wrongful pregnancy—12(b)(6) dismissal—erroneous**

The trial court erred by granting defendant's motion to dismiss a medical malpractice claim under N.C.G.S. § 1A-1, Rule 12(b)(6) where the claim arose from defendant's failure to inform plaintiffs of the results of a test for sickle-cell genetic traits before plaintiff-wife became pregnant with their second child. Although defendant contended that plaintiffs' claim is for wrongful birth because they are seeking damages in connection with the birth of their child and that the claim is thus not actionable under *Azzolino v. Dingfelder*, 315 N.C. 103, plaintiffs alleged that they were not able to make an informed choice regarding whether to conceive again as a result of defendant's negligence and did not allege that their son's very existence was a compensable injury, as did the plaintiffs in *Azzolino*. Whether defendant's alleged negligence actually caused plaintiffs any injury is to be resolved by the trier of fact.

2. **Negligence § 6 (NCI4th)— sickle-cell genetic testing—failure to convey results—subsequent pregnancy—negligent infliction of emotional distress—claim sufficiently stated**

The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim for negligent infliction of emotional distress arising from defendant's failure to inform them of the results of genetic tests for sickle-cell disease where plaintiffs alleged that plaintiff-wife became pregnant and gave birth to a child with sickle-cell disease as a result of defendant's negligence and that defendant's negligence caused them extreme mental and

emotional distress, specifically referring to plaintiff-wife's fears regarding her son's health and her resultant sleeplessness. Plaintiff's allegations, while sparse, are sufficient to state a claim; whether defendant's alleged negligence caused either of the plaintiffs to suffer severe emotional distress is a question for the trier of fact.

3. Abortion; Prenatal or Birth-Related Injuries and Offenses § 24 (NCI4th)— wrongful pregnancy—sickle-cell disease—damages

The Court of Appeals incorrectly concluded that plaintiffs in a medical malpractice claim could seek a version of child-rearing expenses where plaintiffs attempted to distinguish their claim from *Jackson v. Bumgardner*, 318 N.C. 172, by arguing that they seek damages only for the extraordinary care involved in the treatment of their son's sickle-cell disease as opposed to all expenses associated with rearing a child. Such extraordinary costs are simply a part of child-rearing expenses for parents rearing an impaired child; furthermore, the complaint in this case is similar to the complaint in *Jackson*.

4. Appeal and Error § 372 (NCI4th)— service of proposed record—extension of time granted by Court of Appeals—no abuse of discretion

The Court of Appeals did not abuse its discretion by granting plaintiffs' motion for an extension of time to serve the proposed record on appeal and deeming the proposed record timely served where plaintiffs served the record 78 days after giving notice of appeal and, on the same date, filed the motion seeking an extension of time.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 126 N.C. App. 326, 485 S.E.2d 84 (1997), reversing an order allowing defendant's motion to dismiss entered 22 March 1996 by Britt (Joe Freeman), J., in Superior Court, Robeson County, and remanding for further proceedings. Heard in the Supreme Court 9 February 1998.

Britt & Britt, P.L.L.C., by William S. Britt, for plaintiff-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by Gregory M. Kash and Leigh Ann Garner, for defendant-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay and Charles George, on behalf of N.C. Association of Defense Attorneys, amicus curiae.

WHICHARD, Justice.

Plaintiffs brought this action for medical malpractice and negligent infliction of emotional distress arising from defendant's alleged failure to inform plaintiffs of the results of certain blood tests he performed. The trial court granted defendant's motion to dismiss the complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The Court of Appeals reversed, and this Court granted defendant's petition for discretionary review.

The facts set forth herein are taken from the allegations of the complaint, which, in deciding a motion to dismiss, must be taken as true. *See Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981).

The complaint alleges that defendant is a duly licensed physician practicing family medicine. Plaintiffs, husband and wife, had a baby boy on 8 May 1991. In June 1991, plaintiffs received a letter from the State Health Department advising them that they needed to be tested for sickle-cell disease because of genetic traits carried by plaintiff-wife which their son could have inherited.

Plaintiffs went to the medical offices of defendant, where blood was drawn and sent to the State Laboratory of Public Health. Defendant told plaintiffs that if there was anything to be concerned about, he would call them, and that if they did not hear from him, there was no cause for concern. Plaintiffs never heard from defendant on the test results, even though plaintiff-wife visited defendant for minor ailments approximately four times between June 1991 and September 1993.

In September 1993, plaintiff-wife became pregnant with plaintiffs' second child. Plaintiffs' second son was born on 27 May 1994. In June 1994, plaintiffs learned that their second son had Hemoglobin O Arab, a sickle-cell disease. Plaintiffs further learned that the results of the 1991 blood tests showed that plaintiff-husband carried the O Arab factor sickle cell. Plaintiffs allege that the traits carried by plaintiff-wife combined with the factor carried by plaintiff-husband put the couple at a one-in-four risk of bearing a child with sickle-cell disease.

Plaintiffs have had to carry their child to Duke Medical Center for testing and procedures, and he has been placed on daily medication until he reaches five years of age. Plaintiff-wife has been unable to sleep through the night because of her fear that her child would stop breathing or would have other problems. This lack of sleep has prevented plaintiff-wife from attaining peak performance in her job as a school teacher. Both plaintiffs have missed work because of the requirements of caring for their child.

The complaint further alleges defendant was negligent in one or more of the following respects: (1) failure to communicate the results of the blood tests to plaintiffs; (2) failure to have adequate procedural safeguards to ensure that test results were properly communicated to patients; (3) breach of "the appropriate standards of practice for physicians practicing in Red Springs, or similar communities in 1991, with the same or similar training [and] experience as Defendant"; (4) failure "to use his best medical judgment"; and (5) failure "to use reasonable care and diligence in the application of his knowledge and skill to the plaintiffs' care and treatment."

Plaintiffs further allege that because of defendant's negligence, they never received any genetic counseling to prepare them for being the parents of a child with sickle-cell disease and were deprived of the opportunity to make an informed decision regarding whether to have another child. The complaint also alleges that defendant's actions "amounted to extreme and outrageous conduct that amounts to a wanton and reckless disregard of the rights and safety of the Plaintiffs." Finally, plaintiffs allege that defendant's negligence caused them "extreme mental and emotional distress, and financial loss."

This case is before the Court on a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). "A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial." *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241. Further, "when the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." *Stanback v. Stanback*, 297 N.C. 181,

202, 254 S.E.2d 611, 625 (1979). "A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

Plaintiffs here allege two claims in their complaint, one for medical malpractice and the other for negligent infliction of emotional distress. We address each in turn in light of the above standard of review.

[1] The scope of a physician's duty to his patient, the basis of any medical malpractice claim, was succinctly described by Justice Higgins in *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955), as follows:

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable.

Id. at 521-22, 88 S.E.2d at 765 (citations omitted). The requirement has been refined such that the physician is now required to provide care "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." N.C.G.S. § 90-21.12 (1997). *See Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986).

Defendant does not argue that plaintiffs have failed to allege sufficient facts to support a medical malpractice claim. Rather, he contends that plaintiffs have stated a claim for a particular type of medical malpractice which is not recognized in North Carolina, a claim generally referred to as "wrongful birth." In *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 93 L. Ed. 2d 75 (1986), this Court considered a case in which the

plaintiffs alleged that the defendants were negligent in their prenatal care of the plaintiff-mother by failing to properly advise her regarding the availability of amniocentesis and genetic counseling. *Id.* at 105, 337 S.E.2d at 530. The plaintiffs further alleged that had they been properly advised, they would have had amniocentesis performed and would have discovered that their child would suffer from Down's syndrome. The plaintiffs alleged that had they been aware of this outcome, they would have chosen to terminate the pregnancy via abortion. *Id.*

The Court observed that "[t]he jurisdictions which have reached the merits of claims for wrongful birth currently appear to be almost unanimous in their recognition of them when but for the defendants' negligence, the parents would have terminated the defective fetus by abortion." *Id.* at 110, 337 S.E.2d at 533. The Court noted, however, that in order to allow recovery for such claims, courts must hold "that the existence of a human life can constitute an injury cognizable at law." *Id.* at 111, 337 S.E.2d at 534. The Court concluded: "We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury." *Id.*

Defendant argues that the Court's refusal in *Azzolino* to recognize a claim for wrongful birth precludes the claim in this case. Defendant argues that because plaintiffs are seeking damages in connection with the birth of an impaired child, their claim is one for wrongful birth and thus is not actionable. We disagree.

The case of *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743, is instructive in the analysis of defendant's contentions. In *Jackson* the Court addressed a situation in which the plaintiffs brought a medical malpractice claim against the defendant-doctor based on his failure to replace the plaintiff-mother's intrauterine device (IUD) following surgery. *Id.* at 174, 347 S.E.2d at 744-45. The plaintiffs alleged that before surgery, they informed the defendant that they could not afford to have another child and that they were relying on the IUD to prevent pregnancy. *Id.* at 174, 347 S.E.2d at 745. The plaintiffs further alleged that the defendant assured them he would replace the IUD if it became necessary to remove it during surgery. Following surgery, the plaintiffs believed they continued to be protected from pregnancy by the IUD. After plaintiff-mother became pregnant, however, they discovered that the defendant had not in fact retained or replaced her IUD. *Id.*

The defendant in *Jackson*, like defendant here, argued that *Azzolino* precluded the plaintiffs' claim. *Id.* at 179-80, 347 S.E.2d at 748. As in the case at bar, the trial court dismissed the plaintiffs' claim pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). *Id.* at 174, 347 S.E.2d at 745. This Court there concluded, as we do here, that *Azzolino* did not require dismissal of the plaintiffs' claim. *Id.* at 180-82, 347 S.E.2d at 748-49. The Court observed that the facts alleged by the plaintiffs in *Jackson* were similar to those constituting a claim recognized in other jurisdictions and generally referred to as "wrongful conception" or "wrongful pregnancy." *Id.* at 178-79, 347 S.E.2d at 747. The Court stated:

> Our survey shows that the vast majority of courts which have considered wrongful conception cases have viewed the case as being indistinguishable from an ordinary medical malpractice action where the plaintiff alleges a breach of duty on the part of a physician and resulting injury for failure to perform that duty. . . . We find both the reasoning and the results of these authorities quite persuasive.

Id. at 179, 347 S.E.2d at 747-48. The Court distinguished *Azzolino* by observing that "the injury alleged in *Azzolino* was the continued existence of the deformed fetus," *id.* at 180, 347 S.E.2d at 748, whereas in *Jackson* it was "the fact of the pregnancy *as a medical condition* that [gave] rise to compensable damages and complete[d] the elements for a claim of negligence," *id.* at 181, 347 S.E.2d at 748. The Court concluded by stating: "[W]e find that plaintiff's complaint contains sufficient allegations to withstand defendant's motion to dismiss pursuant to Rule 12(b)(6) on plaintiff wife's claim for medical malpractice. We also hold that her claim is one that is recognizable in this State." *Id.* at 182, 347 S.E.2d at 749.

In the case at bar, plaintiffs alleged in their complaint that defendant was negligent in his failure to report the results of the blood tests he performed, that plaintiffs were unable to make an informed choice regarding whether to conceive another child as a result, and that plaintiff-wife did in fact become pregnant and give birth to another child. Plaintiffs further specifically alleged that defendant breached the appropriate standards of medical practice in the care he provided plaintiffs. The complaint *does not* allege that plaintiffs' son's very existence—the injury the Court declined to recognize in *Azzolino*—is an injury for which they should be compensated. Thus, the claim is not one precluded by *Azzolino*. Defendant

makes no argument, and we perceive no reason to hold, that plaintiffs' allegations are insufficient to give him "notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial," or that there appears on the face of plaintiffs' complaint an "insurmountable bar to recovery on the claim alleged." *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241. Therefore, we hold that plaintiffs have stated a claim for medical malpractice sufficient to survive a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). We express no opinion as to whether defendant's alleged negligence actually caused any injury to plaintiffs. That is an issue to be resolved by the trier of fact. *See Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (" '[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.' ") (quoting William L. Prosser, *Torts* § 45 (4th ed. 1971)).

[2] We turn next to plaintiffs' claim for negligent infliction of emotional distress. This Court examined the nature of such a claim at length in *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990). The Court explained:

> [T]o state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress. Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. In this context, the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.
>
> . . . Further, a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence.
>
> . . . .

> . . . Questions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury.

Id. at 304-05, 395 S.E.2d at 97-98 (citations omitted). The Court concluded:

> The plaintiffs here allege that they were the parents of the fetus which allegedly died as a result of the defendants' negligence and were in close proximity to and observed many of the events surrounding the death of the fetus and its stillbirth. We conclude that these plaintiffs may proceed with their action for severe emotional distress.

Id. at 306, 395 S.E.2d at 98.

Plaintiffs here alleged that plaintiff-wife became pregnant and gave birth to a child with sickle-cell disease as a result of defendant's negligence. Plaintiffs alleged that defendant's negligence caused them "extreme mental and emotional distress," specifically referring to plaintiff-wife's fears regarding her son's health and her resultant sleeplessness. Like the allegations in *Johnson*, plaintiffs' allegations here, while sparse, are sufficient to state a claim for negligent infliction of emotional distress. The allegations "are sufficient to give . . . defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial." *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241. Whether defendant's alleged negligence in fact caused either of the plaintiffs to suffer severe emotional distress is a question for the trier of fact. *See Johnson*, 327 N.C. at 305, 395 S.E.2d at 98; *Williams*, 296 N.C. at 403, 250 S.E.2d at 258. We therefore affirm the Court of Appeals decision insofar as it reversed the trial court's order dismissing plaintiffs' action for failure to state a claim upon which relief can be granted.

[3] Defendant next argues that the Court of Appeals erred in its conclusion regarding the damages plaintiffs may seek in their medical malpractice claim. Defendant argues that the decisions of this Court in *Azzolino* and *Jackson* prohibit plaintiffs from seeking child-rearing damages. We agree.

As described above, *Jackson* involved a situation in which the plaintiffs alleged that their physician negligently failed to replace the plaintiff-mother's IUD following surgery, resulting in the birth of a healthy baby. *Jackson*, 318 N.C. at 174, 347 S.E.2d at 744-45. Besides

seeking damages for the expenses of pregnancy and birth, the plaintiffs in *Jackson* also sought to recover for "the general cost and maintenance of said minor child from the date of his birth until such time as he shall become of legal age or emancipated." *Id.* at 177, 347 S.E.2d at 746. With regard to this claim for damages, the Court stated:

> [W]e hold that plaintiff wife may recover damages for the expenses associated with her pregnancy, but that plaintiffs may not recover for the costs of rearing their child. . . .
>
> . . . [T]he decision in *Azzolino v. Dingfelder* would prohibit recovery of damages for the costs of rearing the child. In that case this Court held that "life, even life with severe defects, cannot be an injury in the legal sense." *Azzolino*, 315 N.C. at 109, 337 S.E.2d at 532. Thus, to permit recovery of child-rearing expenses would be *contra* to both the holding and rationale of *Azzolino*.

Id. at 182, 347 S.E.2d at 749. This holding controls our analysis of this issue.

Plaintiffs attempt to distinguish their damages claim from the claim in *Jackson* by arguing that they seek damages only for the extraordinary care involved in the treatment of their son's sickle-cell disease, as opposed to all of the expenses associated with rearing a child. We do not find this distinction availing. Rather, such extraordinary costs are simply a part of child-rearing expenses for parents rearing an impaired child. Though *Jackson* involved a healthy child, the Court did not distinguish between healthy and unhealthy children in its holding on this issue. In fact, the Court relied explicitly on *Azzolino*, a case involving a child with Down's syndrome.

Further, the complaint in this case is similar to the complaint of the plaintiffs in *Jackson* in many respects. Both involved allegations of preconception medical malpractice which allegedly resulted in each plaintiff-mother becoming pregnant and giving birth to a child. Further, both involved alleged nonfeasance by the defendant-doctor. In *Jackson* the alleged nonfeasance was the failure to replace the plaintiff's IUD, while in this case it was the failure to inform plaintiffs of their blood-test results.

It bears noting that none of these three cases—*Jackson*, *Azzolino*, or the case at bar—involved a situation in which plaintiffs alleged that the defendant-doctor negligently injured a fetus and thus caused an otherwise normal child to be born in an impaired condition. The child in *Jackson* was born without impairment. The disor-

der in *Azzolino*, Down's syndrome, and the disorder in this case, sickle-cell disease, are both genetic, and thus are not the result of any injury negligently inflicted by either defendant-doctor.

Because we find *Jackson* controlling, we disavow the Court of Appeals opinion insofar as it held that plaintiffs could seek, in their medical malpractice claim, a version of child-rearing expenses, the costs of the extraordinary care for their child.

[4] The final issue involves the timeliness of plaintiffs' service on defendant of the proposed record on appeal. Plaintiffs gave notice of appeal from the trial court's order on 18 March 1996. Plaintiffs served the proposed record on appeal on defendant on 5 June 1996, seventy-eight days after giving notice of appeal. On the same date, 5 June 1996, plaintiffs filed a motion with the Court of Appeals seeking an extension of time under Rule 27(c) of the North Carolina Rules of Appellate Procedure. Plaintiffs sought an extension of time because they had not served the proposed record on appeal on defendant within the thirty-five days mandated by Rule 11(a) and (b) of the North Carolina Rules of Appellate Procedure. On 10 June 1996, the Court of Appeals granted plaintiffs' motion for an extension of time and deemed the proposed record timely served. Defendant now argues that the Court of Appeals erred by granting plaintiffs' motion.

Rule 27(c) of the North Carolina Rules of Appellate Procedure provides, in pertinent part:

> Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time.

N.C. R. App. P. 27(c). When a lower court is given discretion to allow an extension of time, the court's decision on the matter will be found to be erroneous only upon a showing of an abuse of discretion. *See Tinkham v. Hall*, 47 N.C. App. 651, 654, 267 S.E.2d 588, 591 (1980). Defendant does not argue that the Court of Appeals abused its discretion in granting plaintiffs' Rule 27(c) motion, but rather asserts that "based on the plaintiffs' failure to comply with the time limitations set out by the applicable Appellate Rules, the plaintiffs' appeal should have never been reviewed by the Court of Appeals." We perceive no reason to hold that the Court of Appeals abused its discretion in granting plaintiffs' motion; defendant's argument on this issue is without merit.

Because we affirm the Court of Appeals opinion insofar as it reversed the trial court's order dismissing plaintiffs' complaint, we remand the case to the Court of Appeals for further remand to the Superior Court, Robeson County, to allow plaintiffs to proceed on their claims for medical malpractice and negligent infliction of emotional distress.

AFFIRMED.

DEPARTMENT OF TRANSPORTATION v. CHARLES EDWARD HUMPHRIES AND WIFE, LORETTA HUMPHRIES; W. J. ALLRAN, III, TRUSTEE; NATIONSBANK OF NORTH CAROLINA (FORMERLY NCNB OF NORTH CAROLINA)

No. 232PA97

(Filed 6 March 1998)

Easements § 16 (NCI4th)— unrecorded 1952 highway right-of-way—purchaser for value protected

The trial court erred by granting DOT a right-of-way across defendant's land where the predecessor to DOT acquired a right-of-way in 1952 pursuant to an agreement with defendants' predecessors in title; the right-of-way agreement was never recorded with the Register of Deeds, but was kept on file in the Department of Transportation; none of the deeds in defendants' chain of title refer to the right-of-way agreement; and it was stipulated that defendants were bona fide purchasers for value. DOT right-of-way agreements were required to be recorded in order to prevail over a bona fide purchaser for value prior to the 1959 amendment to N.C.G.S. § 47-27, which speaks solely to the process by which DOT is required to record and does not change in any way the validity of right-of-way agreements executed prior to 1 July 1959 as to purchasers for valuable consideration. Granting validity to an unrecorded right-of-way, not excepted by the statute, against a bona fide purchaser for value would create precisely the confusion and inequities in land ownership that the Conner Act was intended to protect against.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered on 7 February 1997 by Patti, J., in Superior Court, Gaston County, granting

plaintiff a right-of-way over defendant Humphries' property. Heard in the Supreme Court 19 November 1997.

Michael F. Easley, Attorney General, by J. Bruce McKinney, Assistant Attorney General, for plaintiff-appellee.

Long, Parker & Warren, P.A., by Robert B. Long, Jr., and Kimberly A. Lyda, for defendant-appellants Charles and Loretta Humphries.

ORR, Justice.

This case arises out of a condemnation action instituted by plaintiff, North Carolina Department of Transportation (DOT), against defendants Charles and Loretta Humphries on 8 May 1995 as part of DOT's project to widen North Carolina Highway 150. DOT is claiming an existing right-of-way, seventy-five feet from the centerline of the highway, pursuant to an unrecorded right-of-way agreement.

Although defendants own three tracts of land along Highway 150, the only portion of defendants' property at issue in the present case is tract 2. Defendants purchased tract 2 on 22 July 1969 and were bona fide purchasers for value. According to the description of the property contained in the chain of title, the tract 2 property line in question is located approximately thirty feet from the centerline of N.C. Highway 150 and runs with the western edge of the right-of-way for U.S. Highway 150. Defendants contend that under N.C.G.S. § 47-27, DOT was required to record the right-of-way agreement in order to prevail over a bona fide purchaser for value. We agree.

In 1951-1952, the State Highway and Public Works Commission, now the DOT, acquired a right-of-way in Gaston County for the construction of N.C. Highway 150. The right-of-way agreement, which DOT relies on, was obtained by DOT on 20 March 1952 from one of defendants' predecessors in title, James and Mary Black. The right-of-way agreement between DOT and the Blacks was never recorded in the Gaston County Register of Deeds Office, but was kept on file in the office of the right-of-way branch of the Department of Transportation in Raleigh, North Carolina. None of the deeds in defendants' chain of title to tract 2 refer to the right-of-way agreement between the Blacks and DOT, and nothing in the record references the right-of-way agreement.

In the present case, the trial court made a finding of fact that DOT "did not maintain any of the area on defendants' property beyond 30

feet from the centerline of N.C. 150." In fact, the trial court noted that defendants have placed improvements within the claimed right-of-way without any objection by DOT. The nearest sign which references the claimed right-of-way is located more than one-eighth of a mile, but less than one-fourth of a mile, from the tract 2 property. This sign states, "NOTICE—RIGHT-OF-WAY OF THIS HIGHWAY INDICATED BY MARKERS. ALL ENCROACHMENTS PROHIBITED. S.H. & P.W.C." However, the sign does not include the width of any claimed right-of-way. Finally, the seventy-five-foot right-of-way claimed by DOT is within approximately one foot of defendants' home.

In the present case, DOT instituted a condemnation action against defendants on 8 May 1995 claiming an existing seventy-five-foot-of-centerline right-of-way over their property. Defendants then filed an answer to the complaint denying the validity of the right-of-way claimed by DOT. On 7 February 1997, the trial court entered an order granting DOT "a right of way across defendants' subject tract 75 feet in width from the centerline of N.C. 150." In its order, the trial court concluded that "by virtue of N.C.G.S. § 47-27, DOT was not required to record the March 20, 1952 Right-of-Way Agreement."

The issue presented to us by this appeal is whether the trial court erred in concluding that DOT had a valid seventy-five-foot-of-centerline right-of-way, as set forth in the right-of-way agreement executed by defendants' predecessors in interest but never recorded. DOT contends that the Court of Appeals' holding in *Department of Transp. v. Auten*, 106 N.C. App. 489, 417 S.E.2d 299 (1992), and this Court's holding in *Kaperonis v. N.C. State Highway Comm'n*, 260 N.C. 587, 133 S.E.2d 464 (1963), control the outcome in the present case.

In *Auten*, the defendant challenged the trial court's ruling that prior to 1 July 1959, the DOT was not required to record right-of-way agreements. The defendant claimed that the Highway Commission did not have title to the land because the prior right-of-way had not been recorded. *Auten*, 106 N.C. App. at 490, 417 S.E.2d at 300. In a brief opinion, the Court of Appeals concluded, "We read *Kaperonis* to hold that G.S. 47-27 does not require the DOT to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959." *Id.* at 491, 417 S.E.2d at 301.

However, this statement by the Court of Appeals misconstrues our holding in *Kaperonis*. In *Kaperonis*, we held that the State Highway Commission had a one-hundred-foot right-of-way arising

out of an easement held by the State since 1929. *Kaperonis*, 260 N.C. at 600, 133 S.E.2d at 474. The right-of-way instrument itself was never recorded; however, the landowners had record notice of the right-of-way by virtue of a survey of the property which had been incorporated into a deed in the chain of title. This Court held

> that when the plaintiffs' predecessors in title conveyed the premises involved herein, described by metes and bounds, and for a more particular description incorporated in said deeds by reference [to] the blueprint of the survey of T.J. Orr, as set out herein, and added that "(s)o much of said property as lies within the bounds of the right of way of Wilkenson Boulevard is subject thereto"; that the right of way of 50 feet as shown on said plat was notice to the grantees in said deeds that the State Highway Commission claimed said 50-foot right of way across the land conveyed.

Id. at 598, 133 S.E.2d at 472. Thus, although we held that the defendant had a valid right-of-way, we did not rely on N.C.G.S. § 47-27. Instead, we focused on the fact that the plaintiffs had notice of the claimed right-of-way.

Further, in *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 139 S.E.2d 227 (1964), this Court limited the holding in *Kaperonis* to its particular circumstances. In discussing *Kaperonis*, this Court stated:

> The facts in this case are substantially different from those in the case of *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E.2d 464. In that case, the deed conveying the property from the predecessors in title to Kaperonis referred to a certain plat which showed an existing 50-foot right of way across the property conveyed, and the plat was made a part of the description. Moreover, the plat was introduced in evidence and identified as the plat referred to and incorporated in the deed. Furthermore, the predecessors in title to Kaperonis had signed a release of claim for damages in consideration of $850.00 paid to them by the Highway Commission, which release was signed upon completion of the project involved in 1929. In our opinion, the evidence in the *Kaperonis* case was sufficient to have established a right of way by prescription, had the Commission not theretofore purchased the right of way from his predecessors in title.

Browning, 263 N.C. at 134-35, 139 S.E.2d at 230. Thus, although the *Kaperonis* Court referenced the 1959 amendment to N.C.G.S. § 47-27, the *Browning* Court clarified that it was not the basis for the holding in *Kaperonis*.

In fact, further proof that this Court has not yet addressed the issue of whether N.C.G.S. § 47-27 applied to DOT prior to the 1 July 1959 amendment can be found in *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967), which was decided four years after *Kaperonis*. In *Nuckles*, we dismissed the State Highway Commission's appeal, including the issue of whether an unrecorded right-of-way agreement executed in 1946 was valid against a bona fide purchaser for value. *Id.* at 15, 155 S.E.2d at 784. In dismissing the appeal, Justice Sharp stated for the Court:

> The dismissal of plaintiff's appeal also makes it unnecessary to decide (1) whether G.S. 47-27 applied to the State Highway Commission prior to its 1 July 1959 amendment, or (2)—if it did—what the effect of Exhibit 9 would have been had it been recorded. G.S. 47-27 makes deeds and conveyances of easements and rights-of-way invalid as to creditors and purchasers for value prior to recordation. The amendment involved makes this section expressly applicable to the Highway Commission. The first question was debated in the briefs. Plaintiff contends that before 1 July 1959 it was not required to register any deed or agreement for a right-of-way or easement. Defendants contend that, by the amendment, the legislature merely made explicit that which was already implicit in the statute and was attempting to force the Highway Commission to comply with the registration laws. . . . Plaintiff cites *Browning v. Highway Commission*, [263 N.C. 130, 139 S.E.2d 227]; *Kaperonis v. Highway Commission*, [260 N.C. 587, 133 S.E.2d 464]; *Yancey v. Highway Commission*, 222 N.C. 106, 22 S.E.2d 256 [(1942)]. Defendants cite, *inter alia*, *Williams v. Board of Education*, 266 N.C. 761, 147 S.E.2d 381 [(1966)]; *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 [(1925)]; *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 [(1903)]. Suffice it to say, no decision determinative of the question has been called to our attention.

Nuckles, 271 N.C. at 15-16, 155 S.E.2d at 784-85. Accordingly, we overrule the Court of Appeals' decision in *Auten* to the extent that it holds that N.C.G.S. § 47-27 does not require DOT to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959 in order to be valid against bona fide purchasers for

value. Whether N.C.G.S. § 47-27 applied to the State Highway Commission prior to the 1 July 1959 amendment is an issue of first impression for this Court.

The statutory scheme for recordation of real estate transactions in North Carolina, which is now generally known as the Conner Act, was originally enacted in 1885. 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 17-1, at 699 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 4th ed. 1994). Unlike the laws of most states, North Carolina's recordation statutes are characterized as "pure race" statutes. The effect of a "pure race" statute is to protect any purchaser for value who records first, whether or not he has notice of a prior unrecorded conveyance and whether he is a prior or subsequent purchaser. *Id.* § 17-2, at 700. As stated in *Webster's*, "[i]f a conveyance is not recorded, it is considered void as against prior or subsequent purchasers of the same property for value who record first." *Id.* § 17-2, at 703.

The purpose of these laws is to provide certainty in real estate transactions, for the benefit of purchasers and lenders. As this Court has previously stated:

> The examiner of a real estate title by his search of the records seeks to determine if the grantors in the chain of title were seized of a marketable title, free of all taxes, liens or encumbrances, at the time such grantor made or intends to make the conveyance. In making such examination he is entitled to rely with safety upon an examination of the records and act upon the assurances against all persons claiming under the grantor that what did not appear did not exist.

Hughes v. N.C. State Highway Comm'n, 275 N.C. 121, 130-31, 165 S.E.2d 321, 327 (1969).

The statute in question here, codified now as N.C.G.S. § 47-27, was enacted in 1917 and provided, in pertinent part:

> [A]ll persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall . . . record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated.

Gregory's Revisal Biennial 1917 of N.C. § 986A, at 984, para. 1. The statute then set out the specific process for proper recordation of the

instruments held by persons, firms, or corporations. The statute also specifically enumerated the classes of instruments and conveyances which were not required to be registered:

> (1) It shall not apply to any deed or instrument executed prior to January first, one thousand nine hundred and ten.
>
> (2) It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this act.
>
> (3) It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.
>
> (4) It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alley-ways.

Id. para. 2. While this statute set out the procedures for recording "any deed or agreement for rights of way and easements of any character whatsoever," as well as the penalty for noncompliance, it did not address the effect that nonrecordation would have against bona fide purchasers for value.

In 1943, the General Assembly amended the statute. The most significant aspect of the amendment required *all* easements, deeds, and right-of-way agreements to be recorded in order to have effect against bona fide purchasers for valuable consideration. The final paragraph of N.C.G.S. § 47-27, added in 1943, provided as follows:

> No deed, agreement for right of way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

N.C.G.S. § 47-27, para. 4 (1943). It therefore appears that the General Assembly intended N.C.G.S. § 47-27 to operate under the same theory as the Conner Act—as a "pure race" statute. As noted above, a "pure race" statute protects any purchaser for value who records first, regardless of notice. Thus, the effect of the 1943 amendment was to require that any "deed, agreement for right of way, or easement of any character" be registered before it could be valid against a bona fide purchaser for value.

It is also important to note that the 1943 amendment did not change the exceptions previously listed in the original statute. With regard to statutory construction, this Court has stated that "the exclusion of a particular circumstance from a statute's general operation is evidence of legislative intent not to exempt other particular circumstances not expressly excluded." *Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 344-45, 389 S.E.2d 35, 39 (1990), *disapproved of on other grounds by Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768 (1994). Pursuant to the principles of statutory construction, had the General Assembly intended to make unrecorded DOT right-of-way agreements valid against bona fide purchasers for value, it would have expressly exempted such agreements.

In 1959, the General Assembly again modified N.C.G.S. § 47-27 by adding the following additional paragraph:

> From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements.

N.C.G.S. § 47-27, para. 5 (Supp. 1965). This amendment speaks solely to the process by which DOT is required to record. Apparently, the General Assembly realized that under the 1943 statute, it was not clear how DOT was to record the instruments. The 1943 statute provided the process by which "persons, firms, or corporations" were required to record, but did not refer to DOT. The above amendment specifically provides that after 1 July 1959, DOT is required to record "any deeds of easement, or any other agreements granting or conveying an interest in land . . . *in the same manner and to the same extent* that individuals, firms or corporations are required to record such easements." *Id.* (emphasis added). This language in the 1959 amendment obviously refers back to the first paragraph of N.C.G.S. § 47-27, which provides the procedure for registration that is required of "persons, firms, or corporations."

However, this amendment does not change in any way the validity of DOT right-of-way agreements executed prior to 1 July 1959 as to purchasers for valuable consideration. In the present case, the parties have stipulated that defendants were bona fide purchasers for

value. Thus, in order for a right-of-way agreement to be valid against them, the 1943 amendment requires that it be recorded. Accordingly, the unrecorded right-of-way agreement in the present case does not entitle DOT to the claimed right-of-way.

In concluding that DOT right-of-way agreements were required to be recorded in order to prevail over a bona fide purchaser for value prior to the 1959 amendment, we are upholding the stated purpose of our recordation statutes and the established principles of statutory construction. Interpreting N.C.G.S. § 47-27 to grant validity to an unrecorded right-of-way, not excepted by the statute, against a bona fide purchaser for value would create precisely the confusion and inequities in land ownership that the Conner Act was intended to protect against. As a "pure race" state, North Carolina focuses on recordation, above and beyond anything else. If the General Assembly had intended for DOT to be exempt from filing, it could have included it in the exclusions listed in the statute.

In enacting the 1959 amendment, it appears that the General Assembly merely sought to clarify the process by which DOT was required to record. In the present case, we hold that N.C.G.S. § 47-27 applied to DOT prior to the 1959 amendment. Accordingly, we reverse the order of the Superior Court granting DOT "a right of way across defendants' subject tract 75 feet in width from the centerline of N.C. 150." This case is remanded to Superior Court, Gaston County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

LENNON DAVID CAIN AND LINDA S. CAIN, HUSBAND AND WIFE v. GENCOR, INC., AN OHIO CORPORATION, D/B/A GENERAL TIRE AND RUBBER CORPORATION, INC., AN OHIO CORPORATION

No. 318PA97

(Filed 6 March 1998)

Trial § 322 (NCI4th)— instructions—contentions of parties—equal emphasis

The trial court's instructions did not give more emphasis to defendant's contentions of contributory negligence than it did to plaintiffs' contentions of negligence and did not mislead the jury to the prejudice of plaintiffs.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 126 N.C. App. 435, 491 S.E.2d 567 (1997), affirming in part and reversing in part a judgment entered on a jury verdict in favor of defendants by Burroughs, J. in Superior Court, Mecklenburg County, on 14 February 1996, and granting plaintiffs a new trial. Heard in the Supreme Court 15 December 1997.

DeVore & Acton, P.A., by Fred W. DeVore III, for plaintiff-appellees.

Dean & Gibson, L.L.P., by Rodney Dean and D. Christopher Osborn, for defendant-appellant.

PER CURIAM

Under Rule 51(a) of the North Carolina Rules of Civil Procedure, the trial judge is no longer required to summarize or recapitulate the evidence, or to explain the application of the law to the evidence. Nor is the judge required to state the contentions of the parties. However, if the judge undertakes to state the contentions of the parties, equal stress must be given to the contentions of each party.

In the instant case, the Court of Appeals, in an unpublished opinion, concluded that the trial court committed reversible error by giving more emphasis to defendant's contentions of contributory negligence than it did to plaintiffs' contentions of negligence. The jury answered in the negative as to whether plaintiff Lennon Cain was injured by the negligence of defendant and, therefore, did not reach the question of contributory negligence. We have reviewed the trial judge's instructions in their entirety, including the instructions and reinstructions on negligence, contributory negligence, and willful and wanton conduct. Viewing the instructions as a whole, we are satisfied that the trial judge's instructions, while not a model of clarity, did not mislead the jury to the prejudice of plaintiffs. *See Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967); *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E.2d 766 (1965); *Mayberry v. Charlotte City Coach Lines, Inc.*, 260 N.C. 126, 131 S.E.2d 671 (1963). Accordingly, we reverse the decision of the Court of Appeals and remand for reinstatement of the judgment of the trial court.

REVERSED AND REMANDED.

ANTONIA AYERS CRISP v. DARRELL CRISP

No. 323A97

(Filed 6 March 1998)

Appeal of right by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 625, 486 S.E.2d 485 (1997), affirming a judgment entered on 20 December 1995 by Bryant, J., in District Court, Graham County. On 2 October 1997 the Supreme Court allowed plaintiff's petition for a writ of certiorari to review additional issues. Heard in the Supreme Court 10 February 1998.

Sutton & Edmonds, by John R. Sutton, for plaintiff.

Coward, Hicks & Siler, P.A., by William H. Coward, for defendant.

PER CURIAM.

As to the issue presented by defendant's appeal based on the dissenting opinion in the Court of Appeals, the decision of the Court of Appeals is affirmed. As to the additional issues presented by this Court's having allowed plaintiff's petition for a writ of certiorari, we conclude that certiorari was improvidently allowed.

AFFIRMED IN PART; CERTIORARI IMPROVIDENTLY ALLOWED IN PART.

[347 N.C. 660 (1998)]

ERNESTINE RICHARDSON; MERLE RICHARDSON v. McCRACKEN ENTERPRISES, D/B/A McCRACKEN OIL COMPANY, A NORTH CAROLINA CORPORATION

No. 341A97

(Filed 6 March 1998)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 506, 485 S.E.2d 844 (1997), affirming an order entered by Stephens (Donald W.), J., on 16 May 1996 in Superior Court, Franklin County, granting summary judgment to defendant. Heard in the Supreme Court 11 February 1998.

Steven E. Hight, Attorney, P.A., by Steven E. Hight and Steven H. McFarlane, for plaintiff-appellants.

Hatch, Little & Bunn, L.L.P., by A. Bartlett White, Harold W. Berry, and Tina L. Frazier, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. JERRY WAYNE INMAN

No. 391A97

(Filed 6 March 1998)

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, 127 N.C. App. 210, 490 S.E.2d 253 (1997), ordering a new trial after a jury trial in which judgment was entered by Hyatt, J., on 14 March 1996 in Superior Court, Swain County, sentencing defendant to a term of sixty days' imprisonment, suspended, with one year unsupervised probation. Heard in the Supreme Court 9 February 1998.

Michael F. Easley, Attorney General, by Reuben F. Young, Assistant Attorney General, for the State.

Mark R. Melrose for defendant-appellant.

PER CURIAM.

AFFIRMED.

GINGER ANN BRADY, R.D.H., PETITIONER v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT

No. 398A97

(Filed 6 March 1998)

Appeal by petitioner pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 126 N.C. App. 829, 488 S.E.2d 855 (1997), affirming a judgment entered by Spencer (James C., Jr.), J., on 25 July 1996, in Superior Court, Wake County. Heard in the Supreme Court 10 February 1998.

Harry H. Harkins, Jr., for petitioner-appellant.

Bailey & Dixon, L.L.P., by Ralph McDonald and Denise Stanford Haskell, for respondent-appellee.

PER CURIAM.

AFFIRMED.

NORTH CAROLINA DEPARTMENT OF ADMINISTRATION v. SHAW FOOD SERVICES, INC.

No. 411PA97

(Filed 6 March 1998)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of an order entered by the Court of Appeals on 11 August 1997, denying plaintiff's petition for writ of supersedeas and dissolving the temporary stay of an order entered on 10 June 1997 by Thompson, J., in Superior Court, Wake County. Heard in the Supreme Court 11 February 1998.

Michael F. Easley, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, and Teresa L. White, Assistant Attorney General, for appellant Department of Administration.

Hunton & Williams, by A. Todd Brown and Albert Diaz, for defendant-appellee Shaw Food Services.

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

DONNIE EARL ROBBINS v. FRANKLIN FREEMAN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, IN HIS OFFICIAL CAPACITY; JUANITA BAKER, CHAIRMAN OF THE NORTH CAROLINA PAROLE COMMISSION, IN HER OFFICIAL CAPACITY; ELBERT BUCK, WILLIAM A. LOWRY, CHARLES L. MANN, SR., AND PEGGY STAMEY, MEMBERS OF THE NORTH CAROLINA PAROLE COMMISSION, IN THEIR OFFICIAL CAPACITIES

No. 416PA97

(Filed 6 March 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 127 N.C. App. 162, 487 S.E.2d 771 (1997), reversing an order entered by Jenkins, J., on 9 January 1996 in Superior Court, Wake County. Heard in the Supreme Court 11 February 1998.

George B. Currin for plaintiff-appellee.

Michael F. Easley, Attorney General, by David F. Hoke and Elizabeth F. Parsons, Assistant Attorneys General, for defendant-appellants.

PER CURIAM.

AFFIRMED.

MARK REGAN v. AMERIMARK BUILDING PRODUCTS, INC., CLEM FOX AND MICHAEL WLOCK

No. 449A97

(Filed 6 March 1998)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 127 N.C. App. 225, 489 S.E.2d 421 (1997), affirming the trial court's order entered by Barnette, J., on 10 September 1996, in Superior Court, Wake County, granting summary judgment in favor of defendants. Heard in the Supreme Court 18 December 1997.

Glenn, Mills and Fisher, P.A., by Robert B. Glenn, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten, for defendant-appellee AmeriMark Building Products; and Womble, Carlyle, Sandridge & Rice, by David A. Irvin, for defendants-appellees Clem Fox and Michael Wlock.

PER CURIAM.

Chief Justice Mitchell and Justices Webb, Parker, and Lake voted to affirm the decision of the Court of Appeals for the reasons stated in the majority opinion by Walker, J. Justices Frye, Whichard, and Orr voted to reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion by Greene, J. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

PATRICIA NOURSE v. FOOD LION, INC.

No. 471A97

(Filed 6 March 1998)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 127 N.C. App. 235, 488 S.E.2d 608 (1997), reversing the superior court's order entered by LaBarre, J., on 1 July 1996, in Superior Court, Wake County, granting summary judgment in favor of the defendant. Heard in the Supreme Court 12 February 1998.

J.B. Rouse III & Associates, by Ginger L. Crosby and Graham F. Gurnee, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Mark Davis, for defendant-appellant.

PER CURIAM.

Justices Frye, Webb, Whichard, and Lake voted to affirm the decision of the Court of Appeals for the reasons stated in the majority opinion by Greene, J. Chief Justice Mitchell, and Justices Parker and Orr voted to reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion by John, J. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

CAROL S. KELLY v. FOOD LION, INC.

No. 469A97

(Filed 6 March 1998)

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, 127 N.C. App. 395, 490 S.E.2d 254 (1997), reversing the superior court's order entered by Spencer, J., on 29 July 1996, in Superior Court, Alamance County, granting summary judgment in favor of defendant. Heard in the Supreme Court 12 February 1998.

David I. Smith for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Robert S. Pierce, for defendant-appellant.

PER CURIAM.

AFFIRMED.

GEOFFREY PAGE v. MARSHALL OIL CO., INC.

No. 455A97

(Filed 6 March 1998)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 127 N.C. App. 396, 490 S.E.2d 256 (1997), affirming in part, reversing in part and remanding a judgment entered by Cashwell, J., on 10 May 1996, in Superior Court, Wake County. Heard in the Supreme Court 9 February 1998.

Glover & Petersen, P.A., by James R. Glover, for plaintiff-appellee.

Davis, Sturges & Tomlinson, by Charles M. Davis and John W. Davis, for defendant-appellant.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion of Walker, J., we reverse the decision of the Court of Appeals and we remand this case to that court for further remand to the Superior Court, Wake County, for reinstatement of its summary judgment for defendant on plaintiff's unlawful eviction claim.

REVERSED AND REMANDED.

[347 N.C. 669 (1998)]

DONALD L. SMITH, HAROLD D. COLEY, JR., D. REID COTTRELL, AND E. MICHAEL LATTA, AND ALL OTHER SIMILARLY SITUATED	)	
v.	)	ORDER
STATE OF NORTH CAROLINA, AND MURIEL OFFERMAN, SECRETARY OF REVENUE	)	

61A98

(Filed 18 February 1998)

On initiative of this Court pursuant to G.S. 7A-31(a) and Rule 15(e)(2) of the Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> Discretionary review prior to a determination by the Court of Appeals is allowed *ex mero motu*. The record on appeal, all exhibits, and other documents in this case shall be certified to this Court by the Court of Appeals.
>
> The case shall be docketed in this Court as of the date of this order's certification. Parties who have already submitted briefs to the Court of Appeals may elect to rebrief their case for the Supreme Court so long as their new briefs are filed in accordance with Appellate Rule 13(a)(1).

By order of the Court in Conference, this the 18th day of February, 1998.

Lake, J.
For the Court

AMMONS v. COUNTY OF WAKE

No. 493P97

Case below: 127 N.C.App. 426

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

CHICORA COUNTRY CLUB v. TOWN OF ERWIN

No. 23P98

Case below: 128 N.C.App. 101

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

DWYER v. MARGONO

No. 26P98

Case below: 127 N.C.App. 122

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

GORDON v. GARNER

No. 22P98

Case below: 127 N.C.App. 649

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

GRANTHAM v. R. G. BARRY CORP.

No. 556P97

Case below: 127 N.C.App. 529

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

HILL v. TOWN OF CAPE CARTERET

No. 392P97

Case below: 126 N.C.App. 829

Plaintiff's pro se petition for discretionary review under G.S. 7A-31 of an unpublished opinion of the Court of Appeals, *Hill v. Town of Cape Carteret*, 126 N.C.App. 829, 488 S.E.2d 853 (1997), is allowed for entry of the following order:

Pursuant to *Edwards v. West*, 347 N.C. 351, 492 S.E. 2d 356 (1997) and *Hale v. Afro-American Arts International, Inc.*, 335 N.C. 231, 436 S.E. 2d 588 (1993), the Court of Appeals is directed to hear and determine plaintiff's appeal.

By order of the Court in Conference, this 5th day of March, 1998.

HINEMAN v. HINEMAN

No. 24P98

Case below: 128 N.C.App. 188

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

INGRAM v. INGRAM

No. 52P98

Case below: 128 N.C.App. 331

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

KENNEDY v. HAWLEY

No. 20PA98

Case below: 128 N.C.App. 312

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 March 1998.

LLOYD v. JONES

No. 539P97

Case below: 127 N.C.App. 556

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

N.C. FARM BUREAU MUT. INS. CO. v. BRILEY

No. 533P97

Case below: 347 N.C. 577
127 N.C.App. 442

Petition by plaintiff to rehear petition for discretionary review pursuant to Rule 31 dismissed 24 February 1998.

NEWS AND OBSERVER PUBLISHING CO. v. COBLE

No. 53PA98

Case below: 128 N.C.App. 307

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 March 1998.

ONSLOW COUNTY v. MOORE

No. 559P97

Case below: 127 N.C.App. 546

The Appellants' (Moore, McKillop and Treants) petition for writ of certiorari to review decision of the North Carolina Court of Appeals, Onslow County v. Moore, McKillop v. Onslow County, and Treants v. Onslow County, 127 N.C.App. 546, 491 S.E.2d 670 (1997) (filed 21 October 1997), is allowed for the limited purpose of entering the following order:

The opinion of the Court of Appeals dismissing the appeals is vacated and the matter is remanded to the Court of Appeals for consideration of the appeals on the merits.

By order of the Court in conference, this 5th day of March, 1998.

PARHAM v. N.C. DEPT. OF HUMAN RES.

No. 50P98

Case below: 128 N.C.App. 332

Petition by defendants (NCDHR and N.C. Dept. of Public Instruction) for writ of certiorari to review the decision of the North Carolina Court of Appeal denied 5 March 1998.

SHACKELFORD v. CITY OF WILMINGTON

No. 561PA97

Case below: 127 N.C.App. 449

Petition by petitioners for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 5 March 1998.

SMITH v. NATIONWIDE MUTUAL FIRE INS. CO.

No. 572P97

Case below: 127 N.C.App. 751

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

STATE v. BALLARD

No. 488A97

Case below: 127 N.C.App. 316

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 March 1998.

STATE v. CAPORASSO

No. 47A98

Case below: 128 N.C.App. 236

Motion by the Attorney General to dismiss the appeal allowed 5 March 1998.

STATE v. HUFFMAN

No. 547P97

Case below: 127 N.C.App. 562

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

STATE v. RUSSELL

No. 520P97

Case below: 127 N.C.App. 563

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

STATE v. WOOTEN

No. 208A94-2

Case below: Pitt County Superior Court

Motion by defendant (Wooten) for temporary stay allowed 23 February 1998.

T. L. HERRING & CO. v. BD. OF ADJUST. OF CITY OF WILSON

No. 35A98

Case below: 128 N.C.App. 532

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 March 1998.

TURNER v. GREENE

No. 567P97

Case below: 127 N.C.App. 753

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 March 1998.

VIRMANI v. PRESBYTERIAN HEALTH SERVICES CORP.

No. 62PA97-2

Case below: 127 N.C.App. 629

Petition by defendant for writ of supersedeas allowed 5 March 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 March 1998.

WILLIAMS v. HOLSCLAW

No. 28PA98

Case below: 128 N.C.App. 205

Petition by unnamed defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 March 1998.

APPENDIXES

ORDER ADOPTING AMENDMENTS
TO THE RULES OF
APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENT TO
THE CODE OF JUDICIAL CONDUCT

AMENDMENTS TO RULES GOVERNING
ADMISSION TO PRACTICE LAW

AMENDMENT TO THE REVISED RULES
OF PROFESSIONAL CONDUCT

AMENDMENTS TO RULES AND
REGULATIONS CONCERNING
LEGAL SPECIALIZATION

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the Rules of Appellate Procedure

Rules 7, 9, 11, and 18 are hereby amended to read as in the following pages. All amendments shall become effective on 1 February 1998.

Adopted by the Court in Conference this the 6th day of November. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

Orr, J
For the Court

RULE 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) **Ordering the Transcript.**

(1) **Civil Cases**. Within ~~10~~ 14 days after filing the notice of appeal the appellant shall ~~contract, in writing, with the court reporter for production of a transcript of such parts of the proceedings not already on file as he deems necessary. The appellant shall file a copy of the contract with the clerk of the trial tribunal.~~ arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. ~~Unless the entire transcript is to be filed, an appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal~~. If an appellee deems a transcript of other parts of the proceedings to be necessary, ~~he shall,~~ the appellee, within ~~10~~ 14 days after the service of the ~~statement~~ written documentation of the appellant, ~~file and serve on the appellant a copy of the contract ordering any additional parts of the transcript. As part of the contract ordering the transcript, the ordering party shall provide such deposit toward payment of the cost of the transcript as the court reporter may require.~~ shall arrange for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tri-

bunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed; and the name and address of the court reporter or other neutral person designated to prepare the transcript.

(2) **Criminal Cases.** ~~In criminal cases where there is an order establishing the indigency of the defendant for the appeal, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings by forwarding a copy of the appeal entries signed by the judge and a statement of the portions of transcript requested; the number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's order establishing indigency for the appeal, if any. In criminal cases where there is no order establishing indigency, the defendant shall contract with the court reporter arrange for production of the transcript, as in civil cases.~~

In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall arrange for the transcription of the proceedings as in civil cases.

Where there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript : a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the number of copies of the transcript required and the name, address and telephone number of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) Production and Delivery of Transcript

~~(1) From the date of the reporter's receipt of a contract for production of a transcript the reporter shall have 60 days to procure and deliver the transcript in civil cases and non-capital criminal cases and shall have 120 days to procure and deliver the transcript in capitally tried cases.~~

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date the clerk of the trial court serves the order upon the person designated to prepare the transcript, that person shall have 60 days to procure and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix G of these Rules.

The trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

RULE 9

THE RECORD ON APPEAL

(a) Function; Composition of Record.

(1) Composition of the Record in Civil Actions and Special Proceedings.

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(C)(2); ~~and~~

k. assignments of error set out in the manner provided in Rule 10; and

l. a statement, where appropriate, that the record of proceeding was made with an electronic recording device.

(3) Composition of the Record in Criminal Actions.

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); ~~and~~

j. assignment of error set out in the manner provided in Rule 10; and

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(c) Presentation of Testimonial Evidence and Other Proceedings.

(5) Electronic Recordings. When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

Rule 11.

Settling the Record on Appeal

(a) By Agreement. Within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

RULE 18.

TAKING APPEAL; RECORD ON APPEAL— COMPOSITION AND SETTLEMENT

(c) Composition of Record on Appeal.

(10) a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

ORDER ADOPTING

AMENDMENT 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, most recently on 25 May 1997 and published at 346 N.C. 806, is hereby amended by the addition of a new subsection (5) to read as follows:

7A. *Political conduct in general.*

(5) The foregoing provisions of Canon 7A do not prohibit candidates for judicial office from conducting a joint campaign, soliciting support for, endorsing or financially contributing to other judicial candidates.

This amendment 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. It shall be effective from the date this order is signed.

Adopted by the Court in Conference this 17th day of February, 1998.

s/Orr, J.
Orr, J.
For the Court

AMENDMENTS TO THE RULES GOVERNING
ADMISSION TO PRACTICE
LAW IN THE STATE OF NORTH CAROLINA

The following amendments to the Rules Governing Admission to Practice Law in the State of North Carolina were approved by the Council of the North Carolina State Bar upon the recommendation of the Board of Law Examiners of the State of North Carolina at the Council's quarterly meeting on April 17, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules Governing Admission to Practice Law in the State of North Carolina be amended as follows (additions underlined, deletions interlined):

Board of Law Examiners
of
The State of North Carolina

RESOLUTION

WHEREAS, the Board of Law Examiners of the State of North Carolina held a meeting in Charleston, South Carolina, on March 22, 1998; and

WHEREAS, at this meeting, the Board considered the amendments to Rules .0202, .0403, .0502, and .1203 of the Rules Governing Admission to the Practice of Law in the State of North Carolina; and,

WHEREAS, on motion duly made and seconded, it was RESOLVED that Rules .0202, .0403, .0502(1)(b)i, (2) and (3), and .1203 be amended to read as follows:

Rule.0202 Definitions

(3) . . . Mailings which are postmarked after a deadline or which if postmarked on or before a deadline and do not include required fees or which include a check in payment of required fees which is not honored due to insufficient funds will not be considered as timely filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or which answers to the questions are not complete will not be considered filed and will be returned.

Rule .0403 Filing Deadlines

(1) Applications shall be filed and received by the secretary at the offices of the Board on or before the ~~second~~ first Tuesday in January immediately preceding the date of the July written bar examination and on or before the ~~second~~ first Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $200 (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the ~~second~~ first Tuesday in March immediately preceding the July written bar examination and or before the first Tuesday in November immediately preceding the February written bar examination.

(3) Applicants who fail to timely file their application will not be allowed to take the Bar Examination designated on the application.

(4) Any applicant who has aptly filed an application to stand the February written bar examination may make application to take the immediately following July bar examination by filing a Supplemental Application with the secretary of the Board at the offices of the Board on or before the first Tuesday in May immediately preceding the July written bar examination.

Rule .0502 Requirements for Comity Applicants

(1)(b)i Certificates of Moral Character from four (4) ~~attorneys~~ individuals who know the applicant;

(2) Pay to the Board with each typewritten application, a fee of ~~$1250.00~~ $1500.00, no part of which may be refunded to the applicant whose application is denied;

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law . . . .

Rule .1203 Conduct of Hearings

(2) The Panel will make a determination as to the applicant's eligibility to stand the written bar examination or to be licensed by comity. The panel may grant the application, deny the application, or refer it to the ~~full~~ Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the ~~full~~ Board by giving written notice to the secretary at the offices of the Board within ten (10) days following receipt of the Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the full Board and shall result in the determination of the Panel becoming final.

NOW, THEREFORE, BE IT RESOLVED by unanimous vote of the Board of Law Examiners of the State of North Carolina that Rules .0202, .0403, .0502, .1203 of the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as set out above; and that the action of this Board be certified to the Council of the North Carolina State Bar and to the North Carolina Supreme Court for approval.

Enacted at a regularly scheduled meeting of the Board of Law Examiners of the State of North Carolina on March 22, 1998.

Given over my hand and seal of the Board of Law Examiners this the 31st day of March, 1998.

s/Fred P. Parker III
Executive Director

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 Governing Admission to Practice Law in the State of North Carolina were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on April 17, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of May, 1998.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules Governing Admission to Practice Law in the State of North Carolina as approved 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 29th day of July, 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 Governing Admission to Practice Law in the State of North Carolina 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 29th day July, 1998.

s/Orr, J.
For the Court

AMENDMENT TO THE REVISED RULES
OF PROFESSIONAL CONDUCT
OF THE NORTH CAROLINA STATE BAR

The following amendment to the Revised Rules of Professional Conduct of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 17, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Revised Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, Rule 7.5(c) regarding the listing of a lawyer licensed in another jurisdiction, be amended as follows (additions are in bold type, deletions are interlined):

Revised Rules of Professional Conduct
27 N.C.A.C. 2 Revised Rule 7.5(c)

Revised rule 7.5 (c) - A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as a lawyer affiliated with the firm **unless the listing properly identifies the jurisdiction in which the lawyer is licensed and states that the lawyer is not licensed in North Carolina**.

Comment [3] - This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license such as immigration law, federal tort claims, military law, and the like. The lawyer's name may ~~not~~ be included in the firm letterhead, ~~and~~ **provided** all communications by such on behalf of the firm ~~must~~ indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina.

NORTH CAROLINA

WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 17, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of May, 1998.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 29th day of July, 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 29th day July, 1998.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 17, 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 legal specialization, as particularly set forth in 27 N.C.A.C. 1D .1725, be amended by adding the following additional specialty designation as approved by the Supreme Court on March 6, 1997, (addition is in bold type):

27 NCAC 1D, Section .1700

Rule .1725

There are hereby recognized the following specialties:

(1) bankruptcy law

(a) consumer bankruptcy law

(b) business bankruptcy law

(2) estate planning and probate law

(3) real property law

(a) real property - residential

(b) real property - business, commercial, and industrial

(4) family law

(5) criminal law

(a) criminal appellate practice

(b) state criminal law

(6) immigration law.

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 17, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of May, 1998.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 29th day of July, 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 29th day July, 1998.

s/Orr, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ABORTION; PARENTAL OR BIRTH-RELATED INJURIES AND OFFENSES
ADOPTION OR PLACEMENT FOR ADOPTION
APPEAL AND ERROR
ARREST AND BAIL

CANCELLATION AND RESCISSION OF INSTRUMENTS
CONSTITUTIONAL LAW
CONTRACTS
COUNTIES
CRIMINAL LAW

EASEMENT
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KIDNAPPING AND FELONIOUS RESTRAINT

LABOR AND EMPLOYMENT

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PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS
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RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
RAPE AND ALLIED SEXUAL OFFENSES

SCHOOLS
SEARCHES AND SEIZURES
STATE

TRIAL

WORKERS' COMPENSATION

ABORTION; PRENATAL OR BIRTH-RELATED INJURIES AND OFFENSES

§ 24 (NCI4th). Wrongful conception of child born impaired

The trial court erred by granting defendant's motion to dismiss a medical malpractice claim where the claim arose from defendant's failure to inform plaintiffs of the results of a test for sickle-cell genetic traits before plaintiff-wife became pregnant with their second child. Plaintiffs alleged that they were not able to make an informed choice regarding whether to conceive again and did not allege that their son's very existence was a compensable injury. **McAllister v. Ha,** 638.

The Court of Appeals incorrectly concluded that plaintiffs in a medical malpractice action could seek a version of child-rearing expenses where plaintiffs sought damages for the extraordinary care involved in the treatment of their son's sickle-cell disease. Such extraordinary costs are simply a part of the child-rearing expenses for parents rearing an impaired child. **Ibid.**

ADOPTION OR PLACEMENT FOR ADOPTION

§ 1 (NCI4th). Protection of parties to adoption, generally

The doctrine of equitable adoption should be recognized in North Carolina. **Lankford v. Wright,** 115.

The doctrine of equitable adoption recognizes the foster child's right to inherit from the person or persons who contracted to adopt the child and who honored that contract in all respects except through formal statutory procedures. **Ibid.**

The elements of equitable adoption are an express or implied agreement to adopt, reliance, performance by the natural parents and the child, partial performance by the foster parents, and intestacy of the foster parents. **Ibid.**

The doctrine of equitable adoption applied so as to give plaintiff a right of inheritance from her foster mother where plaintiff's foster parents agreed to adopt plaintiff, plaintiff's natural mother gave up custody of plaintiff to the foster parents, plaintiff lived in the foster parents' home and acted as their child, the foster parents gave plaintiff their last name and raised her as their child, and the foster mother died intestate several years after the foster father died. **Ibid.**

§ 3 (NCI4th). Funding by state or county

When the General Assembly restricted the use of the State Abortion Fund to eliminate payments for medically necessary abortions, the State was not obligated to fund such abortions using the State's contribution to the Medical Assistance Fund. **Rosie J. v. N.C. Dept. of Human Resources,** 247.

Indigent women who need medically necessary abortions are not members of a suspect class and are not being deprived of a fundamental right by the refusal of the State to fund abortions for them. **Ibid.**

Restrictions placed by the General Assembly on State funding of medically necessary abortions for indigent women is rationally related to the legitimate governmental objective of encouraging childbirth; the restrictions are thus valid and do not violate provisions of the North Carolina Constitution. **Ibid.**

APPEAL AND ERROR

§ 120 (NCI4th). Appealability of particular orders; summary judgment orders; multiple claims or parties; appeal allowed

The Court of Appeals erred by dismissing as interlocutory plaintiff's appeal from an order granting summary judgment for defendant Video where (1) the summary

APPEAL AND ERROR—Continued

judgment order terminated plaintiff's action as to that defendant and deprives plaintiff of a jury trial on that cause of action, and (2) the applicability of G.S. 97-10.2 as alleged in defendant Hendon's answer raises the possibility of inconsistent verdicts as to defendant Video's liability if plaintiff is required to wait until after trial on the merits against the other defendants to have the merits of his appeal as to defendant Video determined. **Tinch v. Video Industrial Services,** 380.

§ 147 (NCI4th). Preserving question for appeal; necessity of request, objection, or motion

Defendant waived appellate review of whether portions of his testimony in a prior trial should have been redacted when the transcript was introduced because he made no objection or request through counsel to omit any portion of the testimony. **State v. Flowers,** 1.

§ 155 (NCI4th). Effect of failure to make motion, objection, or request; criminal actions

Where the trial court sustains defendant's objection but defendant fails to move to strike objectionable testimony, defendant waives his right to assert on appeal error arising from the objectionable testimony. **State v. Jones,** 193.

§ 362 (NCI4th). Omission of necessary part of record; indictment, verdict, and judgment

The record was sufficient to determine the appeal in a capital prosecution for first-degree murder where the verdict sheet was lost in the office of the clerk of superior court but the transcript revealed that the judge and the clerk examined the verdict sheet after it was taken by the bailiff from the jury and that each juror was polled. **State v. Gray,** 143.

§ 372 (NCI4th). Settling record on appeal; extensions of time

The Court of Appeals did not abuse its discretion by granting a motion for extension of time to serve a proposed record on appeal and deeming the proposed record timely served. **McAllister v. Ha,** 638.

§ 471 (NCI4th). Correction of error in criminal actions; discretionary matters generally

An abuse of discretion is established only upon a showing that a court's actions are manifestly unsupported by reason. **State v. T.D.R.,** 489.

ARREST AND BAIL

§ 63 (NCI4th). Arrest by a law enforcement officer without a warrant; particular circumstances showing probable cause; identification of suspect by victims and bystanders

There was no error in a capital prosecution for first-degree murder in the denial of defendant's motion to suppress all of his statements to law enforcement officers and items gathered in a search of his home where he contended that he was arrested without probable cause but officers found the victim's body at the scene when they arrived and a neighbor told them that defendant had killed his wife, so that they had probable cause to arrest. **State v. Gray,** 143.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10 (NCI4th). Grounds for cancellation; mistake of fact; mutual mistake

The jury could find that any implied contract not to sue a pediatrician was avoided by a mutual mistake of fact where the parties forecast evidence from which a jury could find that plaintiffs' attorney's disinterest in defendant as a party-defendant was the result of his reliance on her repeated representations denying her involvement in a child's care during the crucial period following his birth, and that defendant's representations were false but were the result of an honest mistake. **Creech v. Melnik,** 520.

§ 11 (NCI4th). Grounds for cancellation; unilateral mistake

The jury could find that any implied contract not to sue a pediatrician was avoided on the ground that defendant had reason to know that plaintiffs' attorney's belief that defendant was not involved in the care of an infant immediately after his birth was a mistake or that defendant caused that mistake where the evidence forecast by the parties would permit the jury to find that defendant knew she treated the child at the critical time but falsely assured plaintiffs' attorney to the contrary. **Creech v. Melnik,** 520.

CONSTITUTIONAL LAW

§ 225 (NCI4th). Former jeopardy; prosecution after mistrial based on juror misconduct

Where defendant's capital sentencing proceeding ended with a mistrial based on juror misconduct, defendant's right to be free from double jeopardy will not be violated by a further sentencing proceeding. **State v. Sanders,** 587.

§ 230 (NCI4th). Former jeopardy; new trial after appeal or post-conviction attack; capital crimes

The trial court did not violate a defendant's rights under the Double Jeopardy Clause and the constitutional doctrine of collateral estoppel in a capital resentencing proceeding by refusing to instruct the jury that the mitigating circumstances found by the jury at the first proceeding were established as a matter of law. **State v. Adams,** 48.

§ 262 (NCI4th). Right to counsel generally

There was no error in a capital prosecution for first-degree murder in the denial of defendant's motion to suppress all of his statements to law enforcement officers and items gathered in a search of his home where defendant contended that his request for counsel in his home was ignored, but a neighbor and member of the bar was outside defendant's home as he was being taken to police headquarters, defendant requested that the neighbor represent him, an officer notified the neighbor of his request, and the neighbor followed defendant to the police station and remained with defendant during the police interrogation. **State v. Gray,** 143.

§ 277 (NCI4th). Effectiveness of waiver of right to counsel; particular circumstances

The trial court did not err in a capital first-degree murder prosecution by admitting into evidence pretrial statements made by the defendant and contained in the transcript of his testimony at the prior trial of his codefendants where his Sixth Amendment rights were fully protected in the earlier trial. **State v. Flowers,** 1.

CONSTITUTIONAL LAW—Continued

§ 284 (NCI4th). Right to appear pro se; defendant's dismissal of counsel

The trial court did not violate the constitutional rights of the defendant in a capital first-degree murder prosecution by allowing him to proceed pro se. **State v. Flowers,** 1.

§ 287 (NCI4th). Effective assistance of counsel; failure to remove counsel at defendant's request

The trial court did not err in a capital first-degree murder prosecution by refusing to replace defendant's counsel where the trial court properly found that defendant's court-appointed counsel had provided effective representation. **State v. Flowers,** 1.

§ 318 (NCI4th). Effectiveness of assistance of counsel on appeal generally

Defendant's counsel on appeal from a first-degree murder conviction complied with *Anders v. California*, 386 U.S. 738, where she filed a brief stating that she could not in good faith argue any assignments of error, sent the record and transcript of the trial to defendant, and advised defendant further that he could file a brief with the Supreme Court making whatever arguments he desired to make. **State v. Chance,** 566.

§ 325 (NCI4th). Speedy trial; what constitutes violation of right generally

A defendant in a capital first-degree murder prosecution was not denied his rights to a speedy trial under the state or federal constitutions. **State v. Flowers,** 1.

§ 342 (NCI4th). Presence of defendant at proceedings generally

The constitutional and statutory rights of a defendant in a capital first-degree murder prosecution were not violated by the trial court's ex parte issuance of subpoenas duces tecum for defendant's intangibles tax documentation, returns and account information. A defendant does not have the right to be present as the State gathers its evidence. **State v. Gray,** 143.

§ 370 (NCI4th). Death penalty generally

The North Carolina death penalty statute is not unconstitutional. **State v. Stephens,** 352.

CONTRACTS

§ 47 (NCI4th). Construction generally; effect of mistake

The jury could find from evidence forecast by the parties that any implied contract not to sue a pediatrician was avoided by mutual mistake of fact or by a unilateral mistake based on false assurances by defendant. **Creech v. Melnik,** 520.

COUNTIES

§ 126 (NCI4th). Waiver of immunity by purchase of insurance

Plaintiff sufficiently alleged a waiver of governmental immunity by Buncombe County through the purchase of liability insurance, and the trial court improperly dismissed a claim against the Buncombe County DSS for lack of subject matter jurisdiction. **Meyer v. Walls,** 97.

CRIMINAL LAW

§ 78 (NCI4th Rev.). Change of venue; circumstances insufficient to warrant change

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion for a change of venue or for a special venire. **State v. Gray,** 143.

The trial court did not err by denying a change of venue for a defendant in a capital prosecution for first-degree murder, arson, felonious breaking and entering, first-degree rape, and first-degree sexual offense where each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based on the evidence presented at trial. **State v. Hill,** 275.

§ 98 (NCI4th Rev.). Discovery proceedings; overview

The trial court possesses inherent authority to compel discovery in certain instances in the interest of justice when no statute has placed a limitation on the trial court's authority. **State v. Warren,** 309.

Even when statutes limit the trial court's authority to compel pretrial discovery, the court may retain inherent authority to compel discovery of the same documents at a later stage of the proceedings. **Ibid.**

§ 101 (NCI4th Rev.). Discovery proceedings; continuing duty to disclose

The trial court did not err in a capital first-degree murder prosecution of a security guard in the parking lot by denying defendant's renewal of his motion in limine to exclude defendant's statement "Come here, I've got something for you" where the witness was confused about when he first revealed this statement to the State and defendant made no argument that the State failed to comply with the rules of discovery. The choice of sanctions, if any, rests in the discretion of the trial court and defendant failed to make any showing of abuse of discretion. **State v. Tucker,** 235.

§ 115 (NCI4th Rev.). Discovery proceedings; information subject to disclosure by defendant; reports of examinations and tests

The State had no constitutional or statutory right to discover the report of a clinical psychologist who had examined defendant in preparation for his murder trial where defendant did not intend to introduce the report at trial and did not call the psychologist to testify. **State v. Warren,** 309.

Under the limitation in G.S. 15A-906, the trial court properly declined to compel defendant to disclose his nontestifying psychologist's report when the State requested such disclosure prior to trial. **Ibid.**

The trial court had the inherent authority to compel defendant to disclose to the State a nontestifying psychologist's report after defendant admitted guilt of first-degree murder and after the capital sentencing proceeding was underway where defendant's mental health expert testified that he had studied every mental health report in defendant's medical history, and the State sought to discover the report for use during its cross-examination of defendant's expert. **Ibid.**

§ 116 (NCI4th Rev.). Discovery proceedings; information not subject to disclosure by defendant generally

Assuming that an affidavit in which defendant's son lied about defendant's presence at the time of a shooting was not discoverable, defendant waived his right not to produce it when his attorney read it at a bond hearing. **State v. Gray,** 143.

CRIMINAL LAW—Continued

§ 120 (NCI4th Rev.). Regulation of discovery; failure to comply

The trial did not abuse its discretion during a capital prosecution for first-degree murder by denying defendant's request for a mistrial where defendant received a copy of the ballistic report six months before trial and a typographical error was revealed through the testimony of an SBI agent. **State v. Stephens,** 352.

§ 188 (NCI4th Rev.). Pleas of mental incapacity to plead or stand trial; miscellaneous matters

There was sufficient competent evidence in a capital prosecution for first-degree murder to support the trial court's finding that defendant had the capacity to proceed to trial. **State v. Tucker,** 235.

§ 246 (NCI4th Rev.). Continuance; discretion of court, generally; review for abuse of discretion

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, but if the motion is based on a constitutional right, the trial court's ruling thereon presents a question of law that is fully reviewable on appeal. **State v. T.D.R.,** 489.

§ 276 (NCI4th Rev.). Continuance; absence of evidence; medical, psychiatric, or psychological examinations

The district court did not abuse its discretion or commit any constitutional error in denying a juvenile defendant's motion for a further continuance of his hearing on whether jurisdiction of rape and burglary charges should be transferred to superior court for trial of defendant as an adult in order that independent psychological evaluation could be performed and offered as evidence at the hearing where defendant offered no explanation as to why the three months he had to prepare for the hearing was insufficient time for him to secure any necessary evidence. **State v. T.D.R.,** 489.

§ 379 (NCI4th Rev.). Expression of opinion on evidence during trial; comments to counsel when ruling on objections

The trial court's comment to defense counsel not to ask a witness questions when he was being examined by the State was not demeaning to defense counsel and did not constitute an expression of opinion on the evidence. **State v. Jones,** 193.

The trial court's comment to defense counsel, while sustaining defense counsel's objection to a question by the prosecutor, that counsel did not have to make speeches and should just file his objections, although inappropriate, did not demean or belittle counsel before the jury and was not error. **Ibid.**

§ 384 (NCI4th Rev.). Expression of opinion on evidence during trial; admonition of counsel to avoid repetitious questioning

The trial court's comment to defense counsel that a witness had "been asked and answered that once" was a proper effort by the court to prohibit repetitive questioning and did not constitute an expression of opinion. **State v. Jones,** 193.

The trial court did not express an opinion but was properly attempting to prevent repetitive questioning (1) when the court asked why counsel asked a witness to repeat an answer and instructed counsel to ask the next question, and (2) after counsel asked repetitive questions, the court stated that the witness said he didn't observe anything and asked how many times he had to say it. **Ibid.**

CRIMINAL LAW—Continued

§ 386 (NCI4th Rev.). Expression of opinion on evidence during trial; admonition of counsel to avoid repetitious questioning; miscellaneous matters

The trial court's admonition to counsel not to thank a witness for his answer and to ask the next question did not demean defense counsel and did not constitute an expression of opinion on the evidence. **State v. Jones,** 193.

§ 390 (NCI4th Rev.). Expression of opinion on evidence during trial; instructions and admonitions to witnesses, generally

The trial court's direction to a witness to read all of an officer's notes about a statement attributed to the witness "because I'm sure he's going to ask you lots of questions on what's in those papers" did not constitute an expression of opinion that defendant's counsel was going to waste time by his forthcoming questions but was a proper abmonition to the witness to answer the question he had been asked and do what was requested. **State v. Jones,** 193.

§ 402 (NCI4th Rev.). Expression of opinion on evidence during trial; opening remarks

The trial court did not err in a capital first-degree murder prosecution in its pretrial instruction to the jury on court procedures by introducing the court reporter, indicating that she was appointed by the senior resident judge, and stating that it was her duty to take down and transcribe everything said so that it could be reviewed should it be appealed. **State v. Gray,** 143.

§ 416 (NCI4th Rev.). Court's power to grant mistrial

The trial court properly explored alternative remedies before declaring a mistrial based on juror misconduct in defendant's capital sentencing proceeding where the court gave the jury curative instructions and an opportunity to resume proper deliberations and continue the sentencing proceeding to conclusion before declaring a mistrial. **State v. Sanders,** 587.

§ 430 (NCI4th Rev.). Argument of counsel; comment on defendant's failure to offer evidence; failure to call defendant's spouse

The prosecutor's jury argument that defendant failed to call his ex-wife to support his alibi that he was with her at the time of the crimes even though she had been in the courtroom for the entire trial was a proper comment on defendant's failure to produce exculpatory evidence. **State v. Sidden,** 218.

§ 431 (NCI4th Rev.). Argument of counsel; comment on defendant's failure to call other particular witnesses or offer particular evidence

There was no violation of a defendant's constitutional rights in a capital prosecution for first-degree murder where the prosecutor in his closing argument challenged the defense to explain why defendant was found in an attic with one of the murder weapons if he was not guilty. **State v. Stephens,** 352.

The trial court did not abuse its discretion by not intervening ex mero motu in response to a statement by a prosecutor during closing arguments in a capital prosecution for first-degree murder where defendant contended that the prosecutor improperly commented on his failure to testify, but the statement properly suggested potential bias in defendants' sisters' testimony concerning the degree of his intoxication. **State v. Richmond,** 412.

CRIMINAL LAW—Continued

§ 439 (NCI4th Rev.). Argument of counsel; defendant characterized as professional criminal, outlaw, or bad person

The prosecutor's jury argument that when you "try the devil, you've got to go to hell to get your witnesses" and that defendant "qualifies in that respect" was not so egregious that the court should have stricken it ex mero motu. **State v. Sidden,** 218.

§ 448 (NCI4th Rev.). Argument of counsel; comment on jury's duty

A prosecutor's jury argument in a capital first-degree murder prosecution was not so grossly improper as to require intervention ex mero motu where the prosecutor argued that jurors should take seriously the obligation to do something about violent crimes. **State v. Gray,** 143.

There was no error in a capital prosecution for first-degree murder where the prosecutor argued that we must live under the laws we have until a time comes when we no longer need laws. **Ibid.**

§ 451 (NCI4th Rev.). Argument of counsel; interjection of counsel's personal beliefs; *other*

The prosecutor's statement in reference to a convenience store videotape showing defendant purchasing kerosene used in starting an apartment building fire which killed the victim, "This is one of the better cases, ladies and gentlemen, that any jury in Buncombe County will ever see. You can see premeditation and deliberation" was not an improper argument asking the jury to rely on the prosecutor's judgment as an expert and was not so grossly improper as to require intervention by the trial court. **State v. Smith,** 453.

§ 453 (NCI4th Rev.). Argument of counsel; comment on rights of victim, victim's family

The prosecutor's argument in a capital sentencing proceeding about due process rights afforded defendant by the trial and the absence of due process rights for the victims was not so grossly improper as to require intervention by the trial court. **State v. Smith,** 453.

§ 458 (NCI4th Rev.). Argument of counsel; comment on aggravating or mitigating circumstances

There was no gross impropriety requiring intervention ex mero motu in the prosecutor's closing arguments in capital sentencing hearing where defendant argued that the prosecutor trivialized the differences in the culpability of the defendant and codefendants, but, read in context, the argument explained that the focus of the heinous, atrocious, or cruel aggravating circumstance is on the victim and not on how many blows defendant struck. **State v. Flowers,** 1.

There was no gross impropriety requiring intervention ex mero motu in a capital sentencing hearing where defendant contended that the prosecutor improperly urged the jury to consider an armed robbery conviction to support the aggravating circumstance that defendant had been convicted of a prior violent felony; although judgment had been arrested on the armed robbery verdict, the verdict itself remained intact and was proper for consideration by the jury during the weighing of circumstances. **Ibid.**

There was no gross impropriety requiring intervention ex mero motu in a capital sentencing hearing where defendant contended that the prosecutor argued that psychological torture should be considered in support of the especially heinous, atrocious, or cruel circumstance. **Ibid.**

CRIMINAL LAW—Continued

There was no error in a capital sentencing proceeding where the district attorney argued that the victim's status as a witness in civil and criminal cases could be considered as evidence of two aggravating circumstances. **State v. Gray,** 143.

There was no error in a capital sentencing proceeding where the district attorney argued that the jury should give no weight to nonstatutory mitigating circumstances. **Ibid.**

The prosecutor could rebut defendant's argument that the catchall mitigator was supported by his generosity to the community by arguing the inference from the evidence that the money defendant gave his neighbors came from illegal drug and liquor sales and by referring to defendant as the "Godfather of Traphill." **State v. Sidden,** 218.

The prosecutor's jury argument in a capital sentencing proceeding that, if the jury found statutory mitigating circumstances to exist, "then you should consider them in whatever way you might want to use them," while somewhat misleading as to the value the jury must accord to statutory mitigating circumstances, was not so grossly improper as to require the trial court to intervene ex mero motu and was not reversible error. **State v. Warren,** 309.

The prosecutor's references in his final summation in a capital sentencing proceeding to another murder victim did not amount to improperly asking the jury to sentence defendant to death for a crime for which he was not being tried but was a proper argument that defendant deserved the death penalty based on the evidence supporting the course of conduct aggravating circumstance. **State v. Smith,** 453.

The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding during the State's argument where the State focused on the idea that mitigation is that which reduces moral culpability while neglecting defendant's age, character, prior record, mentality, education, habits, and environment. **State v. Richmond,** 412.

The trial court did not err by not intervening ex mero motu in a capital sentencing hearing when the State argued that the jury should not find defendant's voluntary consumption of alcohol and drugs mitigating. **Ibid.**

The trial court did not err by not intervening ex mero motu in a capital sentencing hearing where the State argued that we all grow out of dysfunctional families and have psychological problems and that about 35 per cent of the world has alcoholic fathers. **Ibid.**

The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding where the State argued that it was an insult to the jurors' intelligence for defendant to claim that his recent religious activity should be considered mitigating and sarcastically suggested that defendant's service as a pallbearer at the funeral of one of his victims should be included in the catchall mitigating circumstance. **Ibid.**

§ 460 (NCI4th Rev.). Argument of counsel; capital cases generally

There was no gross impropriety requiring intervention ex mero motu in a capital sentencing hearing where the prosecutor argued that any penalty other than death would be meaningless. **State v. Flowers,** 1.

A prosecutor's jury argument that a first-degree murder defendant's age, status, and size should be considered in determining whether he should receive the death sentence was not so grossly improper as to require intervention ex mero motu. **State v. Gray,** 143.

CRIMINAL LAW—Continued

A district attorney's argument in a capital sentencing proceeding was not so grossly improper as to require intervention ex mero motu where defendant contended that the district attorney injected arbitrary factors by arguing the defendant's character, including that he had his children lie for him, his privileged status in the community, his love of money, his self-control, and the extent of his remorse. **Ibid.**

The prosecutor's biblical references in urging the jury to return a recommendation of death under the law were not grossly improper and did not require the trial court to intervene ex mero motu. **State v. Sidden,** 218.

The trial court did not abuse its discretion in failing to intervene when the State argued in a capital sentencing proceeding that if defendant were sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television. **State v. Smith,** 453.

§ 466 (NCI4th Rev.). Argument of counsel; possibility of parole, generally

The trial court did not err when it refused to allow defendant to inform the jury in a capital sentencing proceeding that he had received a life sentence for first-degree murder in South Carolina under which he is parole-eligible after serving twenty years. **State v. Warren,** 309.

§ 467 (NCI4th Rev.). Argument of counsel; permissible inferences

The trial court did not err in a capital prosecution for first-degree murder by not preventing the State from changing the theory of guilt upon which it sought conviction from the earlier trial of codefendants. **State v. Flowers,** 1.

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by not intervening ex mero motu when the prosecutor argued that the act of choking someone establishes premeditation and deliberation. **State v. Richmond,** 412.

§ 470 (NCI4th Rev.). Argument of counsel; comments supported by evidence

There was no error in closing arguments in a capital murder prosecution where the prosecutor argued defendant's prior acts of violence against the victim, his wife, as substantive evidence even though some evidence of the incidents had been admitted to show the victim's state of mind. **State v. Gray,** 143.

The prosecutor could properly argue that defendant had turned the victims into "skeletal remains." **State v. Sidden,** 218.

The trial court did not abuse its discretion in a capital prosecution for three first-degree murders and a first-degree rape by not intervening ex mero motu where the prosecutor argued that one of the killings was to eliminate a possible witness. **State v. Richmond,** 412.

§ 472 (NCI4th Rev.). Argument of counsel; explanation of applicable law

The trial court did not abuse its discretion by not intervening ex mero motu in the prosecutor's closing argument in a prosecution for murder and rape where defendant contended that the prosecutor misstated the law concerning the serious personal injury element of first-degree rape. **State v. Richmond,** 412.

§ 474 (NCI4th Rev.). Argument of counsel; use of, or reference to physical evidence

The prosecutor could properly use photographs of murder victims during closing argument where the photographs were in evidence. **State v. Sidden,** 218.

CRIMINAL LAW—Continued

§ 475 (NCI4th Rev.). Argument of counsel; miscellaneous

There was no error requiring the trial court to intervene ex mero motu in a prosecution for first-degree murder where the prosecutor characterized defendant's statements to an officer as a confession. Although the statements were not introduced as a confession, they were sufficiently self-incriminating to be so characterized in argument. **State v. York,** 79.

The trial court did not err in a capital prosecution for first-degree murder by allowing the district attorney to argue flight where the district attorney did not argue flight as evidence of premeditation and deliberation. **State v. Gray,** 143.

§ 478 (NCI4th Rev.). Conduct of counsel during trial; questioning of defendant, witnesses

Any improper conduct by the prosecutor in asking defendant's expert witness who testified that defendant had not had problems with violence whether he "didn't hear that [defendant] beat up Richard Jackson or tried to rape him or anything like that" was sufficiently corrected by the trial court's curative instruction. **State v. Smith,** 453.

In a prosecution for murder and attempted murder by setting an apartment building on fire by the use of kerosene, the trial court did not err by permitting the prosecutor to ask defendant's expert witness whether an intelligence test administered to defendant contained the question, "If you buy six dollars worth of gasoline and pay for it with a ten-dollar bill, how much change should you receive?" and, when the witness answered in the affirmative, to ask the witness, "He knew that one, didn't he?" **State v. Smith,** 453.

§ 491 (NCI4th Rev.). Conduct affecting jury; communication with bailiff or clerk

The trial court did not err in a capital first-degree murder prosecution by failing to dismiss jurors after discovering that the courtroom bailiff was a State's witness where the bailiff's only contact with jurors occurred while letting them into and out of the courtroom and directing them to their seats. There is no evidence to suggest that this bailiff at any time acted as custodian or officer in charge of the jury and his contact with the jury was brief, incidental, entirely within the courtroom, and without legal significance. **State v. Flowers,** 1.

§ 498 (NCI4th Rev.). Permitting jury to view scene or evidence out of court generally

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by allowing the jury to view a police vehicle into which defendant had fired while fleeing the murder. **State v. Tucker,** 235.

§ 521 (NCI4th Rev.). Mistrial; requirement that basis of mistrial order be stated

The trial court's findings of fact, along with an examination of the record, provided ample support for the trial court's finding of manifest necessity warranting a mistrial in defendant's capital sentencing proceeding based on juror misconduct although the court did not set out each instance of misconduct. **State v. Sanders,** 587.

CRIMINAL LAW—Continued

§ 548 (NCI4th Rev.). Mistrial; conduct or statements involving jurors; jury deliberations

The trial court did not err by declaring a mistrial in a capital resentencing proceeding for manifest necessity based upon the cumulative effect of acts of juror misconduct where the record shows that, contrary to the trial court's instructions, the jurors were discussing extraneous matters, including parole eligibility, a juror's outside investigation on the meaning of life imprisonment, evidence at defendant's previous trial, and whether one juror believed in the death penalty. **State v. Sanders,** 587.

§ 553 (NCI4th Rev.). Mistrial; conduct or statements involving prosecutor; jury argument

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by denying defendant's motion for a mistrial and curative instructions after allegedly impermissible comments by the State about a codefendant's failure to testify. **State v. York,** 79.

The trial court did not err by not granting a mistrial ex mero motu based on alleged prosecutorial misconduct during closing arguments in the guilt and sentencing phases of a prosecution for capital murder and other crimes where the prosecutor referred to the crime as perhaps the most atrocious that has occurred in Harnett County. **State v. Hill,** 275.

The trial court did not err by not granting a mistrial ex mero motu in a capital prosecution for first-degree murder and other crimes where the prosecutor argued that defendant was guilty even if someone else was with him even though the State had previously declined to rely on an acting-in-concert theory. **Ibid.**

The trial court did not err by not intervening ex mero motu or declaring a mistrial in a capital prosecution for first-degree murder and other crimes where the prosecutor in the sentencing phase routinely referred to the 16-year-old victim by her married name even though introduction of her prior marriage had been disputed, argued that the victim's being shot in the head multiple times at point blank range was especially heinous, atrocious, or cruel, argued that the brutality here exceeded that normally present in a killing, characterized mitigating circumstances as excuses, and argued that defendant bore the burden of proving mitigating circumstances even though the State had already stipulated as to one circumstance. **Ibid.**

The trial court did not err in a capital prosecution for first-degree murder and other crimes by not declaring a mistrial ex mero motu where defendant argued that many of the submitted mitigating circumstances were developed by defense experts who testify for capital defendants at rates ranging from $75 to $125 per hour. **Ibid.**

§ 560 (NCI4th Rev.). Mistrial; miscellaneous

The trial court did not err in a capital resentencing by denying defendant's motion for a mistrial following jurors' questions concerning defense counsel's integrity. **State v. Adams,** 48.

§ 564 (NCI4th Rev.). Mistrial; defendant's prior convictions

The trial court did not err in a capital resentencing by not granting a mistrial where a defense witness stated on cross-examination that she had seen defendant on death row. **State v. Adams,** 48.

The trial court did not err by denying defendant's motion for a mistrial in a capital prosecution for first-degree murder where defendant admitted on cross-examination by the State to having fired the gun used here several times and to hav-

CRIMINAL LAW—Continued

ing pled guilty to second-degree murder in another case; the State asked defendant whether he had fired the gun in that case, defense counsel objected and the court sustained the objection; after a lengthy review out of the presence of the jury, the State agreed not to pursue that inquiry; and the court stated to the jury that the objection was sustained. **State v. Tucker,** 235.

§ 568 (NCI4th Rev.). Mistrial; hearsay testimony

The trial court did not err in a capital prosecution for first-degree murder and other crimes by denying defendant's motion for a mistrial based on the repeated elicitation of hearsay testimony concerning a comment defendant had made about the victim. **State v. Hill,** 275.

§ 586 (NCI4th Rev.). Grounds for dismissal; defendant's constitutional rights flagrantly violated

Once the district court has transferred jurisdiction over a juvenile to the superior court, the superior court has authority to review criminal pleadings filed against the defendant in superior court and to dismiss those pleadings if defendant's rights were flagrantly violated and there is irreparable prejudice to defendant's preparation of his case. **State v. T.D.R.,** 489.

§ 690 (NCI4th Rev.). Peremptory instructions involving particular mitigating circumstances in capital cases generally

There was no plain error in a capital resentencing in the trial court's peremptory instructions on mitigating circumstances where defendant contended that the peremptory instruction given by the judge failed to make clear the uncontroverted nature of the evidence, but the court's instruction conformed with the North Carolina Pattern Jury Instructions and properly allowed the jury to determine the credibility of the evidence. **State v. Adams,** 48.

The trial court did not err in a capital resentencing proceeding by not giving a peremptory instruction that defendant generally maintained a good and loving relationship with his parents and other family members. **Ibid.**

The trial court did not err in a capital resentencing by not peremptorily instructing the jury that defendant had a level of maturity that would reduce his culpability where the evidence concerning his maturity level was not uncontroverted. **Ibid.**

Although defendant was only twenty-two and a half years old when he murdered the victim, his mental and physical maturity, experience, and prior criminal history supported the trial court's denial of defendant's request for a peremptory instruction on the (f)(7) mitigating circumstance of age. **State v. Warren,** 309.

The trial court erred in the denial of defendant's request for a peremptory instruction on the nonstatutory mitigating circumstance that he had graduated from a truck-driving school, but this error was harmless beyond a reasonable doubt. **Ibid.**

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction on the circumstance that defendant had a severe personality disorder. **State v. Richmond,** 412.

The trial court did not err in a capital sentencing hearing by not giving peremptory instructions on the mitigating circumstances concerning defendant's childhood. **Ibid.**

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction on the mitigating circumstances that defendant confessed to

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law enforcement officers and that he cooperated with law enforcement officers upon his arrest. **Ibid.**

The court did not err in a capital sentencing hearing by not giving a peremptory instruction that defendant would adjust well to prison life. **Ibid.**

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction that defendant has expressed remorse. **Ibid.**

The trial court did not err in a capital sentencing hearing by not giving a peremptory instruction that defendant has exhibited good conduct in jail. **Ibid.**

The trial court did not err during a capital sentencing proceeding by not giving a peremptory instruction that defendant has helped other inmates develop their religious faiths. **Ibid.**

§ 692 (NCI4th Rev.). Peremptory instructions involving particular mitigating circumstances in capital cases; defendant influenced by mental or emotional disturbance

The trial court did not err in a capital sentencing hearing by refusing to peremptorily instruct the jury on the mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of the murders. **State v. Richmond,** 412.

§ 693 (NCI4th Rev.). Peremptory instructions involving particular mitigating circumstances in capital cases; significant history of prior criminal activity

The trial court did not err in a capital sentencing hearing by denying defendant's request to peremptorily instruct the jury that defendant had no significant history of criminal activity where defendant argued that his misdemeanor offenses and his history of drug abuse do not constitute a significant history of prior criminal activity. **State v. Stephens,** 352.

There was no plain error in a capital sentencing hearing where defendant contended that the court did not direct a verdict on the statutory mitigating circumstance that defendant had no significant history of prior criminal activity even though the State had agreed to stipulate to the fact. Although the trial court did not completely eliminate all remarks that might allow jurors discretion in finding the circumstance, the trial court in fact directed a verdict on this circumstance. **State v. Hill,** 275.

§ 786 (NCI4th Rev.). Instructions; defense of voluntary intoxication

The trial court did not err in a capital prosecution for the first-degree murders of a mother and two children and the first-degree rape of the mother by refusing to instruct the jury on voluntary intoxication where the evidence at best showed that defendant was intoxicated at some time prior to the murders. **State v. Richmond,** 412.

§ 805 (NCI4th Rev.). Acting in concert instructions appropriate under the evidence generally

The trial court did not erroneously instruct the jury on acting in concert in a prosecution for first-degree murder by torture where defendant contended that there was insufficient evidence to prove that each of the codefendants shared a common plan or scheme to intentionally inflict torture on the victim and that the instruction lessened the State's burden of proof. Premeditation and deliberation is not an element of first-degree murder by torture or felony murder, and intent to kill is not an essential ele-

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ment of first-degree murder either by torture or under the felony murder rule. **State v. York,** 79.

§ 878 (NCI4th Rev.). Additional instructions after retirement of jury, generally; permissible reasons for giving additional instructions

When the jury asked during deliberations why a person whose name had been mentioned in the evidence did not testify, the trial court properly instructed the jury to decide the case based on the evidence presented and was not required to reinstruct the jury to consider arguments of counsel. **State v. Sidden,** 218.

§ 923 (NCI4th Rev.). Polling the jury generally

The trial court did not err in a capital first-degree murder prosecution by asking the jurors to raise their hands after the verdict was returned if that was their verdict; no request for an individual polling of the jurors was made, there is nothing to suggest that the trial court undertook on its own motion to poll the jurors individually, and the procedure followed by the court merely served to insure that the record reflected the fact that the written verdicts were returned in open court and were unanimous. **State v. Flowers,** 1.

§ 925 (NCI4th Rev.). Manner of polling jury

There was no error in a capital sentencing proceeding in the manner in which some of the jurors were polled regarding their recommendation of three death sentences where the clerk failed to ask some of the jurors "Do you still assent thereto?" **State v. Richmond,** 412.

§ 1114 (NCI4th Rev.). Fair Sentencing Act; required findings generally

The trial court erred when sentencing defendant for conspiracy to murder under the Fair Sentencing Act by imposing a sentence in excess of the presumptive without first making findings in aggravation. **State v. Flowers,** 1.

§ 1129 (NCI4th Rev.). Aggravating factors under Fair Sentencing Act; prohibition on use of evidence of element of offense

The trial court did not err when imposing a sentence under the Fair Sentencing Act for conspiracy to commit first-degree murder by finding the statutory aggravator that defendant induced another to commit the offense where the State introduced evidence tending to prove inducement in addition to that tending to prove agreement and the court did not need to rely on evidence necessary to prove the crime when finding the aggravating factor. **State v. Mickey,** 508.

§ 1227 (NCI4th Rev.). Mitigating factors under Fair Sentencing Act; applicability of jury's findings in sentencing phase of capital case

There was no prejudicial error when the trial court sentenced defendant under the Fair Sentencing Act for conspiracy to commit first-degree murder without finding the mitigating factor that he had no record of criminal convictions after peremptorily instructing the jury in the capital sentencing hearing to find the nonstatutory mitigating circumstance that defendant had no prior criminal convictions. **State v. Mickey,** 508.

§ 1335 (NCI4th Rev.). Capital punishment; submission and competence of evidence generally

The trial court did not deprive defendant of his right to confront witnesses against him in a capital resentencing by allowing the State to disregard a stipulation

CRIMINAL LAW—Continued

from the first sentencing proceeding that there was insufficient evidence to prove that defendant had an intent to rape the victim where the doctor who performed the autopsy was deceased at the time of the resentencing. **State v. Adams,** 48.

There was no plain error in a capital resentencing where the trial court admitted medical testimony that the victim may have survived if treated. **Ibid.**

The trial court did not abuse its discretion in a capital resentencing by admitting evidence concerning the punishment defendant received for an infraction of prison rules where defendant argued that the evidence may have left the jury with the impression that defendant was not subject to any real control in prison. **Ibid.**

A videotape of the disinterment of the murder victim's body was properly admitted in a capital sentencing proceeding to illustrate an officer's testimony about defendant's treatment and concealment of the body and to show defendant's intent to kill, malice, premeditation, and deliberation. **State v. Warren,** 309.

§ 1338 (NCI4th Rev.). Capital punishment; submission and competence of evidence; prior criminal record or other crimes

The trial court did not err during a capital sentencing hearing by admitting into evidence four misdemeanor warrants where defendant contended that the warrants contained hearsay. The Rules of Evidence do not apply in capital sentencing proceedings and the evidence on the warrants was probative of an aggravating circumstance. **State v. Gray,** 143.

The trial court did not err in a capital sentencing proceeding by admitting the testimony of the father of a prior murder victim in which he identified photographs of his daughter at the crime scene and the autopsy and testified about the cause of death. **State v. Richmond,** 412.

The trial court did not err in a capital sentencing proceeding by admitting testimony from the father of a prior murder victim that his daughter was survived by two small children. **Ibid.**

§ 1340 (NCI4th Rev.). Capital punishment; submission and competence of evidence; aggravating and mitigating circumstances, generally

There was no plain error in a capital resentencing where the trial court excluded evidence of defendant's remorse; there is no way to know from the record what defendant was "sorry about" when his family saw him in jail. **State v. Adams,** 48.

The trial court did not err during a capital sentencing hearing by preventing defendant from introducing a conversation which occurred between defendant's girlfriend and the wife of his accomplice immediately prior to the murder which defendant contended supported the mitigating circumstance that he played only a minor role in the murders. Although it has been held that the rules of evidence may be relaxed during the sentencing phase when the statements are relevant and trustworthy, the Supreme Court has never stated that the rules of evidence should be totally abandoned. **State v. Stephens,** 352.

§ 1342 (NCI4th Rev.). Capital punishment; submission and competence of evidence; aggravating and mitigating circumstances; prior criminal record or other crimes

The trial court did not err in a capital sentencing proceeding by admitting defendant's previous felony indictments into evidence to support the prior capital felony and prior violent felony aggravating circumstances. **State v. Flowers,** 1.

CRIMINAL LAW—*Continued*

Postmortem photographs of a woman defendant previously murdered in South Carolina were properly admitted in defendant's capital sentencing proceeding to illustrate an officer's testimony and to support the existence of the previous conviction of a violent felony aggravating circumstance. **State v. Warren,** 309.

§ 1348 (NCI4th Rev.). Capital punishment; instructions; parole eligibility

The trial court did not err in a capital sentencing proceeding by rejecting defendant's request for a jury instruction informing jurors that defendant is ineligible for parole under his federal sentence. **State v. Richmond,** 412.

§ 1349 (NCI4th Rev.). Capital punishment; instructions; aggravating and mitigating circumstances generally

A first-degree murder defendant's constitutional rights were not violated by the trial court's instruction to the jury that mitigating circumstances must outweigh aggravating circumstances. **State v. Stephens,** 352.

The trial court did not err in a capital sentencing hearing in its instructions by not allowing the jury to consider evidence as mitigating if it found that the nonstatutory mitigating circumstance had no value. **Ibid.**

§ 1351 (NCI4th Rev.). Capital punishment; unanimous decision as to mitigating circumstances

The Issues and Recommendation as to Punishment form submitted to the jury in a capital sentencing proceeding did not unconstitutionally require unanimity from jurors in order to find the statutory catchall mitigating circumstance. **State v. Smith,** 453.

§ 1353 (NCI4th Rev.). Capital punishment; instructions; duty to recommend death sentence

The pattern jury instruction for capital sentencing imposing a duty upon the jury to return a recommendation of death if it finds the mitigating circumstances insufficient to outweigh the aggravating circumstances and the aggravating circumstances sufficiently substantial to call for the death penalty is constitutional. **State v. Stephens,** 352.

§ 1358 (NCI4th Rev.). Capital punishment; sentence recommendation as binding on court

The trial court did not have the authority to set aside the jury's verdict recommending the death penalty. **State v. Sidden,** 218.

§ 1359 (NCI4th Rev.). Capital punishment; consideration of aggravating circumstances generally

A defendant was not deprived of due process in a capital resentencing where the State was allowed to disregard a stipulation from the first sentencing proceeding that there was insufficient evidence to prove defendant had an intent to rape the victim. **State v. Adams,** 48.

A defendant's right not to be subjected to double jeopardy in the capital resentencing proceeding did not preclude submission of aggravating circumstances not submitted or supported at the first capital sentencing proceeding. **Ibid.**

The trial court did not err by submitting in a capital sentencing proceeding both the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in arson and the (e)(10) aggravating circumstance that defendant know-

CRIMINAL LAW—Continued

ingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, even though both circumstances were based on the fact that defendant committed the murder by means of arson, since the circumstances address different aspects of defendant's character. **State v. Smith,** 453.

§ 1360 (NCI4th Rev.). Capital punishment; consideration of aggravating circumstances; notice

The trial court did not err in a capital sentencing proceeding by denying defendant's motion to require the prosecution to disclose the aggravating circumstances that it intended to rely upon during the sentencing phase of the trial. **State v. Stephens,** 352.

§ 1363 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; previous conviction for capital felony

The trial court did not err in a capital sentencing proceeding by submitting both the aggravating circumstance that defendant had previously been convicted of a capital felony and that defendant had previously been convicted of a felony involving the use or threat of violence where the prior convictions all arose from the same transaction. **State v. Flowers,** 1.

§ 1364 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; previous conviction for felony involving violence

Any error was harmless in a capital sentencing proceeding where the court submitted defendant's 1982 conviction for armed robbery as one of the felonies supporting the aggravating circumstance that defendant had been convicted of a felony involving the use or threat of violence but that conviction was the underlying felony for a felony murder conviction and judgment had been arrested on that robbery conviction. **State v. Flowers,** 1.

The trial court did not err in a capital sentencing proceeding by submitting both the aggravating circumstance that defendant had previously been convicted of a capital felony and that defendant had previously been convicted of a felony involving the use or threat of violence where the prior convictions all arose from the same transaction. The jury logically could not have used evidence of one aggravating circumstance to support the other. **Ibid.**

The trial court properly submitted defendant's conviction for first-degree murder in South Carolina for consideration under the previous conviction for a felony involving violence aggravating circumstance where defendant committed the South Carolina murder before he committed the murder in this case and was convicted of it prior to this capital sentencing proceeding, even though his South Carolina conviction did not precede the murder at issue. **State v. Warren,** 309.

§ 1369 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; capital felony committed during, or because of, exercise of official duty

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstances that the murder was committed to disrupt or hinder the lawful exercise of a governmental function and that the murder was committed against this victim because of the exercise of her official duty as a witness. **State v. Gray,** 143.

CRIMINAL LAW—Continued

There was sufficient evidence in a capital sentencing proceeding to submit the aggravating circumstance that the murder was committed because of the victim's role as a witness where the State introduced four criminal warrants against defendant which were based on acts of violence against the victim, with the victim listed as the complainant on each warrant. **Ibid.**

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that the murder was committed to disrupt or hinder the lawful exercise of a governmental function where defendant and his wife were engaged in a bitter divorce action and the jury could reasonably find that one reason defendant killed his wife was to stop this action against him. **Ibid.**

§ 1370 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; particularly heinous, atrocious, or cruel offense

The trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was not unconstitutionally vague and overbroad. **State v. Flowers,** 1.

The aggravating circumstance that a murder was especially heinous, atrocious, or cruel is not unconstitutionally vague and overbroad. **State v. Gray,** 143.

§ 1372 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; particularly heinous, atrocious or cruel offense; evidence sufficient to support finding

There was sufficient evidence in a capital sentencing proceeding to submit the especially heinous, atrocious or cruel aggravating circumstance. **State v. Gray,** 143.

§ 1374 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; murder as course of conduct

The course of conduct aggravating circumstance for first-degree murder is not unconstitutionally vague and overbroad. **State v. Stephens,** 352.

§ 1375 (NCI4th Rev.). Capital punishment; consideration of mitigating circumstances; instructions

The trial court did not err in a capital sentencing proceeding in its instructions on mitigating circumstances where the defendant alleged that the instructions failed to make a meaningful or readily understandable distinction between statutory and nonstatutory mitigating circumstances. **State v. Flowers,** 1.

The trial court did not err in a capital sentencing hearing in its instructions on statutory mitigating circumstances where a reasonable interpretation of the instructions, construed contextually, could not have misled jurors to believe they could disregard any statutory mitigating circumstances found to exist. **State v. Stephens,** 352.

The trial court did not err in a capital sentencing proceeding by charging the jury as to statutory mitigating circumstances that they had mitigating value but that the weight was up to the jury. **State v. Gray,** 143.

The trial court did not err in instructing the jury that one or more jurors would have to believe a submitted nonstatutory mitigating circumstance had mitigating value in order for the jury to find it. **State v. Sidden,** 218.

§ 1382 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; lack of prior criminal activity

The trial court did not err in capital sentencing proceeding by charging on the mitigating circumstance that defendant has no significant history of prior criminal

CRIMINAL LAW—Continued

activity where defendant had no convictions, but there was evidence that he had committed crimes against his wife, the murder victim, for which he had been charged. **State v. Gray,** 143.

Defendant's murder of the victims' father just prior to the murders of the victims constitutes "prior criminal activity" for purposes of the "no significant history of prior criminal activity" mitigating circumstance even though it was part of the course of conduct in which the victims were murdered. **State v. Sidden,** 218.

The trial court did not err by failing to submit the "no significant history of prior criminal activity" mitigating circumstance to the jury in a capital sentencing proceeding where defendant had been dealing in the illegal sale of alcohol and drugs and murdered the victims' father prior to killing the victims. **Ibid.**

The trial court did not err to defendant's prejudice by submitting, over defendant's objection, the (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity. **State v. Smith,** 453.

§ 1384 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; mental or emotional disturbance

The trial court did not err in a capital sentencing hearing by not submitting the statutory mitigating circumstance of mental or emotional disturbance. **State v. Hill,** 275.

§ 1385 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; intoxication

The proposed capital mitigating circumstances that defendant had long-standing alcohol and cocaine abuse problems and that the use of alcohol and drugs tended to make him violent were subsumed by other circumstances. **State v. Richmond,** 412.

§ 1388 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; impaired capacity

The trial court did not err during a capital sentencing hearing by not submitting the statutory mitigating circumstance of impaired capacity where the testimony did not establish that defendant's personality characteristics affected his ability to understand and control his actions. **State v. Hill,** 275.

§ 1390 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; age of defendant

There was no error in a capital sentencing proceeding where the trial court submitted to the jury the nonstatutory circumstance that defendant led an uneventful, law-abiding life for 42 years and also submitted the statutory mitigating circumstance as to defendant's age, realized the mistake, asked the jury to strike anything that had been said about the nonstatutory mitigator, and correctly charged on it. **State v. Gray,** 143.

§ 1392 (NCI4th Rev.). Capital punishment; other mitigating circumstances arising from the evidence

There was no prejudicial error in a capital sentencing proceeding in not submitting as a mitigating circumstance that the defendant has demonstrated an ability to adjust well in prison and could be of service to fellow prisoners by working as a dental assistant. **State v. Gray,** 143.

The trial court did not err in refusing to submit to the jury in a capital sentencing proceeding the mitigating circumstance that defendant's codefendant received a life sentence. **State v. Sidden,** 218.

CRIMINAL LAW—Continued

Assuming defendant's evidence would have supported the submission of the requested nonstatutory mitigating circumstance that defendant is likely to adjust well in the future in prison, the trial court's failure to submit this mitigating circumstance was harmless error where other mitigating circumstances were submitted which allowed the jury to consider defendant's evidence. **Ibid.**

Although it was not clear in a capital sentencing proceeding that the proposed mitigating circumstance that defendant was never given proper psychological treatment had mitigating value, that circumstance was subsumed by others which were submitted. **State v. Richmond,** 412.

The proposed capital mitigating circumstance that defendant had a positive influence on other inmates was subsumed by submitted circumstances. **Ibid.**

The proposed capital mitigating circumstance that defendant sought forgiveness from God was subsumed in other circumstances. **Ibid.**

§ 1402 (NCI4th Rev.). Death penalty held not excessive or disproportionate

A sentence of death was not disproportionate where defendant was convicted on the theory of premeditation and deliberation and felony murder, multiple aggravating circumstances were found, the especially heinous, atrocious or cruel aggravating circumstance was found, defendant did not exhibit remorse and concern for the victim's life, the victim was murdered in the sanctity of her own home, and there was no evidence of any impairment of defendant's ability to appreciate the criminality of his conduct. **State v. Adams,** 48.

A sentence of death for first-degree murder was not disproportionate where the case was distinguished from those in which the death penalty was disproportionate by the fact that this defendant was lawfully incarcerated because of a prior murder conviction; defendant was convicted under the theory of premeditation and deliberation; the victim's death by beating and stabbing was found to be especially heinous, atrocious, or cruel; the victim suffered great physical and psychological pain before death; and the jury found more than one aggravating circumstance and no mitigating circumstances. **State v. Flowers,** 1.

A sentence of death was not disproportionate. **State v. Gray,** 143; **State v. Tucker,** 235; **State v. Hill,** 275; **State v. Stephens,** 352; **State v. Richmond,** 412.

Sentences of death imposed upon defendant for the first-degree murders of two young boys were not excessive or disproportionate. **State v. Sidden,** 218.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where the jury found the previous conviction of a violent felony aggravating circumstance and defendant had previously been convicted of another first-degree murder. **State v. Warren,** 309.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where the jury found five aggravating circumstances, defendant burned an apartment building in the early morning hours in an attempt to eliminate witnesses who might testify against him regarding his theft of mail from the building, and the victim was killed and two other tenants suffered severe burns and other injuries. **State v. Smith,** 453.

EASEMENTS

§ 16 (NCI4th). Recording of easement

The trial court erred by granting DOT a right-of-way across defendant's land where the predecessor to DOT acquired a right-of-way in 1952 pursuant to an agreement with defendants' predecessors in title, the right-of-way agreement was never recorded, and it was stipulated that defendants were bona fide purchasers for value. **Dept. of Transportation v. Humphries,** 649.

ELECTION OF REMEDIES

§ 2 (NCI4th). When doctrine is not applicable

A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common law negligence. **Meyer v. Walls,** 97.

ESTOPPEL

§ 18 (NCI4th). Equitable estoppel; conduct of party asserting estoppel generally

The doctrine of equitable estoppel could not be applied in defendant pediatrician's favor if the jury finds that plaintiffs' attorney's assurances to defendant that he had no reason to consider her a potential defendant in a malpractice action were premised upon her lack of involvement in an infant's care immediately after his birth and that defendant knowingly misrepresented her involvement and knew that plaintiffs' attorney relied on this misrepresentation in making assurances to her. **Creech v. Melnik,** 520.

EVIDENCE AND WITNESSES

§ 90 (NCI4th). Grounds for exclusion of relevant evidence; conjectural or speculative nature of evidence

The trial court did not err in a capital prosecution for first-degree murder by excluding from evidence a deposit ticket and cash register tape which defendant contends were some proof that the victim had purchased a stun gun found next to the body. The evidence did not show that the sale was to a woman, that it was made to the victim, or there was a sale of a stun gun; there was as much chance of confusion if the evidence had been introduced as there was that any fact would have been proved. **State v. Gray,** 143.

§ 173 (NCI4th). Facts indicating state of mind of victim or witness

An accomplice's testimony about a bad dream she had immediately after her arrest was relevant in a first-degree murder trial to establish the emotional state underlying the accomplice's reason for recanting in her diary her earlier implication of defendant in the victim's murder where the accomplice claimed her recantations were based on fear caused by what she had done and threats to kill her. **State v. Jones,** 193.

§ 221 (NCI4th). Events following crime generally

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by sustaining the State's objection to the proposed testimony of a cellmate of a codefendant concerning a letter written in prison. The proffered testimony involved alleged purposes for the codefendant's actions while in prison and did

EVIDENCE AND WITNESSES—Continued

not concern defendant's motives for the killing or any actions taken by defendant in relation to proving his guilt or innocence, does not go to prove the existence of any fact that is of consequence in the determination of the charge, and was collateral and irrelevant. **State v. York,** 79.

The trial court did not err in a prosecution for first-degree murder by admitting evidence that defendant had attended the funeral of the three victims and had served as a pallbearer for one of the child victims, including his statement that carrying the body of his victim never gave him a bad feeling. **State v. Richmond,** 412.

§ 264 (NCI4th). Character or reputation of persons other than the witness generally; victim

The trial court did not err in a capital prosecution for first-degree murder, arson, felonious breaking and entering, first-degree rape, and first-degree sexual offense by allowing the State's motion in limine to exclude from the guilt and penalty phases evidence of the 16-year-old victim's previous marriage and pregnancy. **State v. Hill,** 275.

§ 292 (NCI4th). Other crimes, wrongs or acts not resulting in conviction

The trial court did not err in a prosecution for first-degree murder and conspiracy to commit murder by denying defendant's motion to exclude evidence of theft and unlawful use of credit cards, prior misconduct for which he had not been charged. Evidence of defendant's financial dealings with his co-conspirator was relevant to understanding the leverage defendant exerted in inducing and conspiring with him to commit murder. **State v. Mickey,** 508.

§ 364 (NCI4th). Other crimes, wrongs, or acts; as part of same chain of circumstances

In a prosecution for the murder of two boys, evidence of the murder of their father was so intertwined with evidence of the murder of the boys that it was admissible to show the circumstances of the charged crimes. **State v. Sidden,** 218.

§ 502 (NCI4th). Relevancy and competency requirement; pleas, plea discussions, and related statements generally

The trial court did not err in a capital prosecution for first-degree murder by admitting a letter from defendant to the district attorney which contained statements concerning defendant's desire to plea bargain. **State v. Flowers,** 1.

§ 742 (NCI4th). Error in admission of miscellaneous evidence in criminal cases; error not prejudicial

The admission of a deputy's unsolicited and brief hearsay testimony in a murder and robbery trial that a witness told him that she had seen what appeared to be blood in the bathtub in defendant's trailer did not constitute prejudicial error requiring a new trial in light of the extensive evidence of defendant's guilt. **State v. Jones,** 193.

§ 762 (NCI4th). Cure of prejudicial error by admission of other evidence; testimony of similar import brought out or established by objecting party

Assuming that an affidavit in which defendant's son lied about his whereabouts at the time of the shooting was not discoverable, it could not have prejudiced defendant because defendant and his son had testified that defendant had told his son to lie and the affidavit could only have been cumulative evidence. **State v. Gray,** 143.

EVIDENCE AND WITNESSES—Continued

§ 763 (NCI4th). Cure of prejudicial error in admission of evidence; substance of incompetent testimony established by competent evidence

There was no plain error in a prosecution for first-degree murder by torture and first-degree kidnapping where the trial court allowed hearsay testimony by an SBI agent regarding blood tests conducted by an SBI lab where blood tests from another report were properly admitted and their substance was identical. **State v. York,** 79.

There was no plain error in a prosecution for first-degree murder by torture and first-degree kidnapping where defendant contended that the trial court allowed DNA testimony without requiring the State to establish a proper chain of custody, but other evidence to the same effect was introduced. **Ibid.**

§ 831 (NCI4th). Transcript or oral testimony of tape recorded statement

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by denying defendant's motion to provide the jury with transcripts of recorded statements given to the police by codefendants where defendant had introduced the tape recordings into evidence. **State v. York,** 79.

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by preventing defendant ex mero motu from using transcripts of codefendants' recorded conversations with police officers. **Ibid.**

§ 873 (NCI4th). Hearsay evidence; statements not offered to prove truth of matter asserted; to explain conduct or actions by witness

An accomplice's testimony in a murder trial about her cellmate's out-of-court statements was not hearsay where the testimony was not offered to prove the truth of any matter asserted within the statements but rather to explain why the accomplice had recanted her earlier statements implicating defendant in the murder. **State v. Jones,** 193.

§ 876 (NCI4th). Hearsay evidence; statements not offered to prove truth of matter asserted; to show state of mind of victim

The trial court did not err in a capital murder prosecution by admitting as a state of mind exception to the hearsay rule testimony from several witnesses as to what the victim told them. **State v. Gray,** 143.

§ 945 (NCI4th). Exceptions to hearsay rule; statements made at time crime was occurring

The trial court did not err in a first-degree murder prosecution by admitting testimony from a jogger that the victim had said, while defendant was holding her on the ground, "Mister, please don't leave. If you leave, he'll kill me." **State v. Gray,** 143.

§ 961 (NCI4th). Exeptions to hearsay rule; statements for purposes of medical diagnoses or treatment generally

There was no plain error in a prosecution for first-degree murder in the admission of the testimony of the victim's doctor, who testified that the victim came to see him at his home and told him that defendant had tried to choke her and sexually assault her, that defendant had threatened to kill her, that the children were screaming, and that she and defendant had been seeing a marriage counselor but that the counselor had stopped seeing them because she was afraid of defendant. **State v. Gray,** 143.

EVIDENCE AND WITNESSES—Continued

§ 1006 (NCI4th). Hearsay evidence generally; residual exception

There was no plain error in a capital prosecution for first-degree murder where the court admitted testimony that the victim had told the witness that defendant had attempted to rape her. **State v. Gray,** 143.

The trial court did not err in a capital prosecution for first-degree murder by admitting under the residual hearsay exception testimony that the victim had displayed a bruise on her hip and had told the witness that defendant, her estranged husband, had forced his way into her apartment, pushed her against a wall, and attempted to force her head into a toilet. **Ibid.**

§ 1064 (NCI4th). Flight as implied admission generally

There was no plain error in a capital prosecution for first-degree murder where defendant contends that the court allowed evidence of flight to be used as evidence of premeditation and deliberation by not giving the portion of the pattern jury instruction which said that the evidence could not be so used. **State v. Gray,** 143.

§ 1256 (NCI4th). Confessions and other inculpatory statements; invocation of right to counsel; particular conduct as police initiation of conversation or interrogation

The trial court did not err in a capital prosecution for first-degree murder by not excluding testimony from a jailer that he had asked defendant if there was anything else he could do for defendant as he was putting him into a cell and defendant replied, "No. At least now I can get a good night's sleep." The question by the jailer was not designed to elicit incriminating evidence. **State v. Gray,** 143.

§ 1260 (NCI4th). Confessions and other inculpatory statements; right to remain silent; post-invocation communication initiated by defendant

The trial court did not err in a capital prosecution for first-degree murder by not suppressing defendant's confession to an SBI agent where defendant initially exercised his right to remain silent, wrote a letter to the district attorney admitting that he committed the murder and requesting removal of his attorneys, the agent met with defendant at the request of the district attorney, defendant was advised of and waived his rights, and defendant then confessed. **State v. Flowers,** 1.

§ 1345 (NCI4th). Confessions and other inculpatory statements; voluntariness of waiver of rights generally

Statements made by a first-degree murder defendant at an interrogation on 4 November were properly admitted as evidence where the court properly found that defendant waived his Fifth Amendment rights prior to making those statements, although defendant had contended that a request for counsel from a prior arrest and interrogation on another charge preserved his right to have counsel present at all future interrogations. **State v. Peterson,** 253.

§ 2171 (NCI4th). Basis or predicate for expert's opinion, generally; necessity to disclose facts underlying conclusion; request to state

The trial court properly permitted the State to cross-examine defendant's expert witness in a capital sentencing proceeding about bad acts defendant committed prior to the murder in this case since (1) defendant opened the door, and (2) the cross-examination was proper to explore the basis for the expert's opinion and diagnosis. **State v. Warren,** 309.

EVIDENCE AND WITNESSES—Continued

§ 2670 (NCI4th). Privileged communications; physician and patient; disclosure by court order; findings required

The trial court did not err by ordering the disclosure of defendant's medical records from jail without a specific finding that disclosure was necessary to a proper administration of justice since such finding is implicit in the admission of the records into evidence. **State v. Smith,** 453.

§ 2671 (NCI4th). Privileged communications; physician and patient; propriety of disclosure of particular privileged information

The trial court did not err by ordering the disclosure of defendant's medical records from jail where defendant sought to suppress statements he made to the police while in jail on the ground that he was suffering from controlled substance withdrawal and was in no condition mentally to give statements to the police. **State v. Smith,** 453.

§ 2812 (NCI4th). Leading questions; hostile witness; determination by court

The trial court did not abuse its discretion in a prosecution for first-degree murder by torture and first-degree kidnapping by denying defendant's request to have one of his witnesses declared hostile where the court allowed defense counsel considerable latitude in examining the witness and defense counsel succeeded in eliciting the full substance of the testimony desired by defendant. **State v. York,** 79.

§ 2851 (NCI4th). Refreshing memory; records

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by allowing a captain in the sheriff's department to read during his testimony from notes he took of his interview with defendant where the use of the notes was for the purpose of refreshing recollection to facilitate accurate testimony and did not violate the present recollection refreshed rule. **State v. York,** 79.

§ 3081 (NCI4th). Impeachment; inconsistent or contradictory statements; statements made to officials or investigators

A deputy sheriff's testimony that a witness had told her that defendant had been taken to Tennessee by a third person was properly admitted to impeach the witness's denial on cross-examination that she had notified authorities of defendant's flight to another state. **State v. Jones,** 193.

§ 3096 (NCI4th). Impeachment of credibility; inconsistent or contradictory statements; generally; material or collateral matter

The trial court did not err in a capital prosecution for first-degree murder by allowing the state to play for the jury on rebuttal a recording of a telephone conversation between defendant and the victim. **State v. Gray,** 143.

§ 3158 (NCI4th). Corroboration and rehabilitation; character and reputation; specific instances of conduct

The admission of an FBI agent's testimony that the FBI had used information provided to it by a State's witness on twenty different occasions did not permit the agent to promote the credibility of the witness by testimony as to specific instances of conduct in violation of Rule 608(b) and was not plain error. **State v. Sidden,** 218.

EVIDENCE AND WITNESSES—Continued

§ 3174 (NCI4th). Corroboration and rehabilitation; opinion as to consistency of statements

The admission of an officer's opinion that the testimony of an eyewitness was basically the same as statements he had made to officers was not plain error. **State v. Sidden,** 218.

§ 3189 (NCI4th). Testimony by particular corroborating witness; law enforcement officials; statements of witnesses generally

The trial court did not err in a conspiracy and murder prosecution by admitting an unsworn statement to an investigating officer where the witness testified that defendant had solicited him to commit the murder and that he had sold defendant the murder weapon, and his earlier statement to investigators, with portions removed, was admitted to corroborate the trial testimony. The removed portions would be more accurately characterized as new or additional facts. **State v. Mickey,** 508.

HOMICIDE

§ 232 (NCI4th). Sufficiency of evidence; first-degree murder; eyewitness and other corroborative evidence

The evidence was sufficient to support defendant's conviction of first-degree murder where it tended to show that defendant entered the home of his mother-in-law carrying a 12-gauge shotgun and shot his wife to death in front of two witnesses without any threat from his wife to him. **State v. Chance,** 566.

§ 262 (NCI4th). Sufficiency of evidence; what constitutes murder in perpetration of felony; unbroken chain of events

The trial court did not err by not dismissing a felony murder charge where the evidence tended to show that defendant stole merchandise from a Super K-Mart Center, shot at two employees in an effort to avoid apprehension, fatally wounding one, and at two law enforcement officers, and that the entire incident consumed less than two minutes. **State v. Tucker,** 235.

§ 349 (NCI4th). Lesser offenses to first-degree murder; second-degree murder generally

The trial court did not err in a capital prosecution for first-degree murder of a mother and two children by refusing to submit second-degree murder in connection with the murder of the two children. A rational trier of fact could not have convicted defendant of second-degree murder under this evidence. **State v. Richmond,** 412.

§ 419 (NCI4th). Instructions; malice; criminal intent

The trial court did not err in its charge on first-degree murder by including in its malice instruction wanton acts manifesting depravity of mind, a heart devoid of a sense of social duty, and the callous disregard for human life. **State v. Richmond,** 412.

§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of premeditated and deliberate murder; lack of evidence of lesser crime

The trial court did not err in the capital prosecution of a prison inmate for the first-degree murder of another inmate by not instructing the jury on second-degree murder as a possible verdict where evidence of the lesser included offense was totally lacking. **State v. Flowers,** 1.

HOMICIDE—Continued

In a prosecution for first-degree murder and attempted first-degree murder arising from an apartment building fire set by defendant, defendant's self-serving statement to officers that he set the fire as a prank was not sufficient evidence of his lack of premeditation and deliberation to entitle him to an instruction on second-degree murder and attempted second-degree murder where the evidence indicated that defendant burned the apartment building in an attempt to eliminate witnesses who might be able to testify against him regarding his theft of mail from the building. **State v. Smith,** 453.

§ 583 (NCI4th). Instructions; acting in concert

There was no plain error in a capital prosecution for first-degree murder in the trial court's instruction on acting in concert. **State v. Flowers,** 1.

§ 603 (NCI4th). Instructions; self-defense; necessity of evidence generally

The trial court did not err in a capital prosecution for first-degree murder by refusing to charge on self-defense where all of the exculpatory evidence was that the shooting was accidental. **State v. Gray,** 143.

§ 688 (NCI4th). Instructions; misadventure or accidental death; where actions of defendant were intentional

The trial court did not err in a prosecution for first-degree murder by torture and first-degree kidnapping by denying defendant's request for jury instructions on accidental death, death by misadventure, and intervening agency. **State v. York,** 79.

INFANTS OR MINORS

§ 35 (NCI4th). Custody and visitation; who may institute proceedings

A natural parent whose parental rights were terminated for abuse and neglect did not have standing to seek custody of his biological children as an "other person" under G.S. 50-13.1(a). **Krauss v. Wayne County DSS**, 371.

§ 99 (NCI4th). Transfer to superior court for trial as adult generally

Once the district court has transferred jurisdiction over a juvenile to the superior court, the superior court has authority to review criminal pleadings filed against the defendant in superior court and to dismiss those pleadings if defendant's rights were flagrantly violated and there is irreparable prejudice to defendant's preparation of his case. **State v. T.D.R.,** 489.

When read in pari materia, G.S. 7A-608, -609, and -610 were intended to provide a juvenile the right to a hearing on the issue of whether his case should be transferred to the superior court for trial as in the case of an adult and the rights to be represented by counsel, to testify as a witness, to call and examine witnesses, and to produce other evidence in his own behalf. **Ibid.**

The district court did not abuse its discretion or commit any constitutional error in denying a juvenile defendant's motion for a further continuance of his hearing on whether jurisdiction of rape and burglary charges should be transferred to superior court for trial of defendant as an adult in order that independent psychological evaluation could be performed and offered as evidence at the hearing where defendant offered no explanation as to why the three months he had to prepare for the hearing was insufficient time for him to secure any necessary evidence. **Ibid.**

The district court did not err in denying a continuance of a transfer hearing on the ground that the juvenile defendant did not have notice that the issue of transfer of

INFANTS OR MINORS—Continued

jurisdiction to the superior court would be considered at the probable cause hearing. **Ibid.**

The superior court erred by vacating indictments against a juvenile and purportedly remanding jurisdiction to the district court on the basis of its findings and conclusion that there was no competent expert evidence before the district court on the issue of the availability of rehabilitative services for defendant as a juvenile. **Ibid.**

§ 121 (NCI4th). Final dispositions generally

The trial court had the authority to permit a county DSS to cease efforts to reunite an abused and neglected juvenile with his parents as part of its order authorizing the DSS to initiate an action to terminate parental rights. **In re Brake,** 339.

§ 141 (NCI4th). Appeal and review; finality of order appealed from

An order of the district court transferring jurisdiction over a juvenile to superior court for trial as an adult is a "final" order of the court in the juvenile matter so that such order is immediately appealable to the Court of Appeals. **State v. T.D.R.,** 489.

INSURANCE

§ 8 (NCI4th). Remedies for unfair fixing of rates

The filed rate doctrine is adopted for application in North Carolina. **N.C. Steel, Inc. v. National Council on Compensation Ins.,** 627.

The filed rate doctrine barred claims by plaintiff employers against defendant workers' compensation carriers and rate organizations for restraint of trade under G.S. 75-1, unfair practices under G.S. 75-1.1, and unfair competition in violation of G.S. 58-63-15 based on allegations that defendants withheld evidence from the Commissioner of Insurance about servicing carrier fees for residual market workers' compensation insurance in a rate case and caused the Commissioner to approve excessive rates for compensation insurance. **Ibid.**

Cases holding that when an insurer makes a representation as to coverage in a filing, it cannot give a lesser coverage in its policies do not apply in an action in which plaintiffs alleged that defendant insurance carriers and rate organizations withheld information from the Commissioner of Insurance in a rate case and caused the Commissioner to approve excessive rates. **Ibid.**

The filed rate doctrine barred plaintiffs' claims for injunctive relief based on alleged illegal activities in the setting of workers' compensation insurance rates. **Ibid.**

§ 472 (NCI4th). Automobile insurance; fire, hail, and the like; insurable interest

The trial court erred in dismissing plaintiff insured's claim against defendant insurer for the value of his leased vehicle which was stolen and destroyed by fire because the insurer paid the named loss payee, the lessor, the actual cash value of the vehicle where the policy provided that a loss was to be paid "as interest may appear to [the insured] and the loss payee." **Hartsell v. Integon Indemnity Corp.,** 385.

§ 509 (NCI4th). Uninsured motorist coverage generally

Defendant UM carriers were entitled to reduce coverage by the amount of workers' compensation benefits received by plaintiff even though the workers' compensation policy was paid for by his employer and the UM policies were paid for by persons other than his employer. **McMillian v. N.C. Farm Bureau Mut. Ins. Co.,** 560.

INSURANCE—Continued

§ 571 (NCI4th). Automobile insurance; what constitutes other or nonowned automobiles; regular use by insured

An exclusion in a personal automobile liability policy for a vehicle not named in the policy but furnished for the regular use of the named insured precluded liability coverage for the named insured while operating a vehicle provided by his employer for his regular use even though the policy provided operator coverage for the named insured for the "use of any auto." **Hester v. Allstate Ins. Co.,** 345.

JUDGES, JUSTICES, AND MAGISTRATES

§ 38 (NCI4th). Censure or removal; willful misconduct; particular illustrations

A district court judge's admitted acts of falsifying official court documents by the false entry of guilty pleas without the knowledge of defendants constituted willful misconduct in office as well as conduct prejudicial to the administration of justice that brings the judicial office into disrepute and would have warranted removal from office, but the Judicial Standards Commission's recommendation of censure is accepted in light of the judge's acknowledgment of wrongdoing, her resignation from office, and her agreement not to hold future judicial office in North Carolina. **In re Renfer,** 382.

JURY

§ 32 (NCI4th). Exemptions and excuses from jury duty generally

The trial court did not err in a capital sentencing hearing by denying defendant's motion to prohibit a district court judge from excusing prospective jurors outside defendant's presence. **State v. Stephens,** 352.

§ 120 (NCI4th). Voir dire examination; propriety and scope of examination; generally

The trial court did not err in a capital first-degree murder prosecution in allowing the State to use leading questions during the jury voir dire. **State v. Gray,** 143.

§ 123 (NCI4th). Questions tending to stake out or indoctrinate jurors

The prosecutor's questions to prospective jurors inquiring into the ability of the jurors to consider the testimony of an interested witness who testified pursuant to a plea bargain and to give it the same weight as the testimony of any other witness if they found the testimony credible did not constitute an attempt to stake out the jurors on the verdict they would render. **State v. Jones,** 193.

§ 141 (NCI4th). Voir dire examination; parole procedures

The trial court did not err during jury selection for a first-degree murder prosecution by not allowing defendant to question prospective jurors about their conceptions of parole eligibility. **State v. Gray,** 143.

The trial court in a capital sentencing proceeding did not err by refusing to allow defendant to inquire into prospective jurors' attitudes and beliefs about parole where defendant was sentenced under the scheme in which the sentencing alternative to the death penalty is life in prison without parole. **State v. Smith,** 453.

The trial court did not err in a capital prosecution for first-degree murder by not permitting voir dire of prospective jurors regarding their conceptions of parole eligibility or related questions. **State v. Richmond,** 412.

JURY—Continued

§ 142 (NCI4th). Voir dire examination; jurors' decision under given set of facts

The trial court did not err in a capital prosecution by refusing to allow defendant to ask prospective jurors whether they would be able to consider mitigating circumstances and impose a life sentence after being informed that defendant had been previously convicted of first-degree murder. **State v. Richmond,** 412.

§ 145 (NCI4th). Voir dire examination; in relation to cases involving capital punishment generally

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by excusing for cause prospective jurors based upon leading questions which defendant contends were used to stake jurors to the position from which they were disqualified. **State v. Flowers,** 1.

§ 146 (NCI4th). Voir dire examination; propriety of instruction to jurors regarding death penalty

It was not error for the trial court in a capital murder trial to tell prospective jurors that they must make a recommendation "setting aside personal feelings." **State v. Sidden,** 218.

§ 150 (NCI4th). Propriety of rehabilitating jurors challenged for cause due to opposition to death penalty

It was within the trial court's discretion to refuse to permit defendant to rehabilitate jurors excused for cause where the excused jurors stated that their feelings would prevent or substantially impair the performance of their duties as jurors. **State v. Sidden,** 218.

§ 153 (NCI4th). Voir dire examination; whether jurors could vote for death penalty

It was not error for the prosecutor to ask prospective jurors in a capital murder trial whether their feelings would prevent or substantially impair their ability to perform their duties to consider fairly the possible punishments even if the question called on the jurors to apply a legal standard subjectively. **State v. Sidden,** 218.

The trial court did not abuse its discretion during jury selection in a capital prosecution for first-degree murder by asking a prospective juror whether she could personally stand up and recommend the death penalty. **State v. Hill,** 275.

§ 215 (NCI4th). Challenges for cause; propriety of seating juror who expressed belief in capital punishment

The trial court did not abuse its discretion during jury selection for a capital prosecution for first-degree murder and first-degree rape by denying defendant's challenge for cause of a prospective juror where the juror indicated that she would be inclined to vote for the death penalty but later stated that she could fairly consider both alternatives. **State v. Richmond,** 412.

§ 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 voir dire for a capital first-degree murder prosecution by excusing potential jurors who said they believed in the death penalty but

JURY—Continued

would not vote to impose it on another human being or who said they would always vote for life in prison and never for the death penalty. **State v. Gray,** 143.

§ 222 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; challenges for cause; necessity that veniremen be unequivocal in opposition to death sentence generally

The trial court did not err in a capital resentencing by striking two jurors because they would be unable to consider a sentence of death. **State v. Adams,** 48.

§ 226 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; rehabilitation of jurors

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by refusing defendant the opportunity to rehabilitate a juror. **State v. Hill,** 275.

The trial court did abuse its discretion in a capital prosecution by not allowing defendant to rehabilitate a prospective juror who expressed opposition to the death penalty. **State v. Stephens,** 352.

The trial court did not abuse its discretion in denying defendant's requests to rehabilitate five jurors excused for cause based upon their death penalty views. **State v. Warren,** 309.

§ 227 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; effect of equivocal, uncertain, or conflicting answers

The trial court did not err during voir dire for a capital first-degree murder prosecution by excusing a potential juror who said he believed in the death penalty only for a second offense and that he would not impose it for first-degree murder, said that he would follow the court's instructions, and reiterated that he would not impose the death penalty for a first offense. **State v. Gray,** 143.

The trial judge did not abuse its discretion in a capital prosecution for first-degree murder and other crimes by excusing a prospective juror for cause. **State v. Hill,** 275.

The trial court did not abuse its discretion by excusing for cause a prospective juror in a capital prosecution where the juror was equivocal but on several occasions clearly stated her inability to fairly consider the death penalty. **State v. Richmond,** 412.

The trial court did not abuse its discretion by excusing for cause a prospective juror in a capital prosecution where the juror was equivocal but made several statements which indicated his inability to follow the law. **Ibid.**

§ 228 (NCI4th Rev.). Exclusion of veniremen based on opposition to capital punishment; equivocal answers viewed in context

The trial court did not abuse its discretion in a capital prosecution by allowing the State's challenge for cause of two prospective jurors who indicated that they might have difficulty voting in favor of the death penalty. **State v. Stephens,** 352.

§ 229 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; where juror initially stated ability to vote for death penalty

The trial court did not err during voir dire in a capital first-degree murder prosecution by excusing a potential juror who made contradictory statements regarding capital punishment. **State v. Gray,** 143.

JURY—Continued

§ 256 (NCI4th). What constitutes prima facie case of racially motivated peremptory challenges; rebuttal

Defendant's showing that he is black and that the State peremptorily struck one black prospective juror was insufficient to establish a prima facie case of racial discrimination. **State v. Smith,** 453.

The prima facie case inquiry does not become moot when the State provides race-neutral reasons for its peremptory strike. **Ibid.**

§ 262 (NCI4th). Use of peremptory challenges to remove jurors with reservations about imposing death penalty

There was no error in a capital prosecution for first-degree murder in allowing the district attorney to exercise peremptory challenges against prospective jurors with reservations about the death penalty. **State v. Gray,** 143.

KIDNAPPING AND FELONIOUS RESTRAINT

§ 18 (NCI4th). Confinement, restraint, or removal as inherent and inevitable feature of another felony

There was sufficient evidence of restraint of one victim separate and apart from that inherent in an armed robbery of a restaurant to support defendant's conviction of second-degree kidnapping of this victim where the evidence tended to show that the robbers, including defendant, put duct tape around the victim's wrists, forced him to lie on the floor, and kicked him in the back twice. **State v. Beatty,** 555.

There was insufficient evidence of restraint of a second victim separate and apart from that inherent in an armed robbery of a restaurant to support defendant's conviction of second-degree kidnapping of this victim where the evidence showed only that one of the robbers approached the victim, pointed a gun at him, and stood guarding him during the robbery. **Ibid.**

LABOR AND EMPLOYMENT

§ 65 (NCI4th). Termination of employment; additional consideration to change contract from at-will employment

An action for breach of an employment contract was remanded for an order entering judgment for defendant notwithstanding the verdict where plaintiff-employee's change of residence in the wake of defendant-employer's statements here does not constitute additional consideration making what is otherwise an at-will employment relationship one that can be terminated only for cause. The society to which the employment-at-will doctrine currently applies is a highly mobile one in which relocation to accept new employment is common; to remove an employment relationship from the at-will presumption upon an employee's change of residence, coupled with vague assurances of continued employment, would substantially erode the rule and bring considerable instability to an otherwise clear area of the law. **Kurtzman v. Applied Analytical Industries, Inc.,** 329.

NEGLIGENCE

§ 6 (NCI4th). Negligent infliction of emotional distress

The trial court erred by dismissing plaintiffs' claim for negligent infliction of emotional distress arising from defendant's failure to inform them of the results of genet-

NEGLIGENCE—Continued

ic tests for sickle-cell disease where plaintiffs alleged that defendant's negligence caused them extreme mental and emotional distress, specifically referring to plaintiff-wife's fears regarding her son's health and her resultant sleeplessness. **McAllister v. Ha,** 638.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 120 (NCI4th). Medical malpractice actions; contributory negligence

The trial court erred by refusing to instruct the jury on contributory negligence in a medical malpractice action arising from defendant's treatment of plaintiff's decedent for depression where the decedent placed restrictions on his treatment, continued with alcohol and drug abuse, ignored and contravened defendant's recommendations to seek treatment for HIV status, and continued unprotected homosexual conduct. **Cobo v. Raba,** 541.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Public officers; personal civil liability generally; negligence

Plaintiff was not limited to a suit against DHR as principal for alleged negligence by a county DSS and its employees. **Meyer v. Walls,** 97.

Whether allegations relate to actions outside the scope of a defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity. **Ibid.**

Plaintiff's complaint seeks recovery from an official of a county DSS in both his official and individual capacities. **Ibid.**

A claim against an official and employees of a county DSS in their official capacities was a claim against DSS and was properly before the superior court along with a claim against DSS. **Ibid.**

Holdings by the Court of Appeals that a director of a county DSS was a public official and that the trial court improperly dismissed a claim against the director in his individual capacity for allegations of willful and wanton conduct will be allowed to stand where defendant did not appeal these holdings to the Supreme Court. **Ibid.**

A conclusory allegation that a public official acted willfully and wantonly is not sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. **Ibid.**

Although plaintiffs in an action arising from a fire in a chicken processing plant which had never received a safety inspection argued that the public duty doctrine bars only claims against local governments for failure to prevent crimes, the policies underlying recognition of the public duty doctrine in those cases apply here. **Stone v. N.C. Dept. of Labor,** 473.

§ 43 (NCI4th). Employees subject to State personnel system

The position of Director of the Highway Beautification Program in the Department of Transportation was properly designated by the Governor as policymaking exempt under the State Personnel Act pursuant to G.S. 126-5. **Powell v. N.C. Dept. of Transportation,** 614.

Assuming that the Director of the Highway Beautification Program properly raised the issue as to whether the reclassification of her position as policymaking exempt constituted an impermissible patronage dismissal that violates the First Amendment to the U.S. Constitution, the State Personnel Commission's conclusion

PUBLIC OFFICERS AND EMPLOYEES—Continued

that the Department of Transportation showed why a political confidant was necessary for the effective performance of this position was supported by evidence and findings. **Ibid.**

The position of Chief of the Internal Audit Section of the Department of Transportation does not come within the definition of policymaking set forth in former G.S. 126-5(b) and therefore may not be designated as exempt from the provisions of the State Personnel Act pursuant to former G.S. 126-5(d)(1). **N.C. Dept. of Transportation v. Hodge,** 602.

Constitutional standards that consider when political affiliation is an appropriate factor in determining which positions are policymaking should not have been considered in determining whether a position was properly designated as policymaking exempt where it was determined that the position did not meet the definition of policymaking under G.S. 126-5(b). **Ibid.**

§ 68 (NCI4th). Public employees; personal civil liability

Plaintiff was not limited to a suit against DHR as principal for alleged negligence by a county DSS and its employees. **Meyer v. Walls,** 97.

A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common law negligence. **Ibid.**

Plaintiff's complaint seeks recovery from employees of a county DSS in both their official and individual capacities. **Ibid.**

A claim against an official and employees of a county DSS in their official capacities was a claim against DSS and was properly before the superior court along with a claim against DSS. **Ibid.**

Holdings by the Court of Appeals that a DSS social worker and a DSS supervisor of adult protective services were public employees and that the trial court improperly dismissed a claim against the employees in their individual capacities for mere negligence were allowed to stand where the defendants did not appeal these holdings to the Supreme Court. **Ibid.**

An action against defendant high school teacher to recover damages for injuries received by an industrial arts student in an accident in a shop classroom was a suit against defendant teacher solely in his official capacity as an agent of defendant board of education, and where it was determined that the board of education is entitled to governmental immunity from suit for the first $1 million in damages which may be awarded, defendant teacher is entitled to governmental immunity to that same extent. **Mullis v. Sechrest,** 548.

Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a public officer or employee liable, the extent of liability claimed should be alleged, and the prayer for relief should indicate whether plaintiff seeks to recover damages from a defendant individually or as an agent of the governmental entity. **Ibid.**

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 7 (NCI4th). Private right of action

A doctor and members of his family who sued the Prolife Action League of Greensboro (PALG) and its president for anti-abortion picketing of the family's residence and the doctor's office failed to establish a causal nexus between PALG's pecu-

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS—Continued

niary gain and defendants' alleged organized unlawful activity as required by the N.C. RICO Act. **Kaplan v. Prolife Action League of Greensboro,** 342.

RAPE AND ALLIED SEXUAL OFFENSES

§ 96 (NCI4th). First-degree rape; prosecution based on force and against victim's will; serious physical or bodily injury

The evidence was sufficient to support a conviction for first-degree rape where defendant contended that there was insufficient evidence that he had inflicted serious personal injury and that serious personal injury does not include injury that results in death. The rule that serious personal injury cannot include injury causing death appears to have had its genesis in an assault prosecution; injury causing death would have elevated the assault to murder, but it would be absurd to allow a defendant to escape a first-degree rape conviction because his victim did not survive. **State v. Richmond,** 412.

SCHOOLS

§ 176 (NCI4th). Liability of board of education and school personnel; injuries to students due to lack of supervision

An action against defendant high school teacher to recover damages for injuries received by an industrial arts student in an accident in a shop classroom was a suit against defendant teacher solely in his official capacity as an agent of defendant board of education, and where it was determined that the board of education is entitled to governmental immunity from suit for the first $1 million dollars in damages which may be awarded, defendant teacher is entitled to governmental immunity to that same extent. **Mullis v. Sechrest,** 548.

SEARCHES AND SEIZURES

§ 48 (NCI4th). Search and seizure incident to arrest; premises at which arrest made

There was no error in a capital prosecution for first-degree murder in the denial of defendant's motion to suppress all of his statements to law enforcement officers and items gathered in a search of his home where defendant came to his door armed with a pistol which was later found to be a toy, an exigent circumstance which justified entry into the house without a search warrant to arrest defendant. **State v. Gray,** 143.

§ 56 (NCI4th). Observation of objects in plain view; officer lawfully present

The trial court did not err by admitting into evidence items seized at a murder scene where the lead investigator on the scene ordered the seizure of evidence in the bedroom where the body was found; officers seized a bloodstained mattress and box springs; and officers found bullets on top of several pornographic magazines addressed to someone other than defendant after the mattress and box springs were removed. The seizure was lawful under the plain view exception. **State v. Mickey,** 508.

STATE

§ 19 (NCI4th). Actions against State generally

Plaintiff was not limited to a suit against DHR as principal for alleged negligence by a county DSS and its employees. **Meyer v. Walls,** 97.

A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common law negligence. **Ibid.**

§ 24 (NCI4th). Actions against State; waiver of immunity

The Industrial Commission erred in an action arising from deaths and injuries in a fire at a chicken plant which had never received a state safety inspection by denying defendants' motions to dismiss plaintiffs' tort claims action. The public duty doctrine, by barring negligence actions against a governmental entity absent a special relationship or a special duty to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person would be liable. **Stone v. N.C. Dept. of Labor,** 473.

§ 30 (NCI4th). State Tort Claims Act generally

The Tort Claims Act applies only to actions against State departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State. **Meyer v. Walls,** 97.

§ 38 (NCI4th). Industrial Commission as court for negligence claims against State

Jurisdiction for a negligence suit against a county DSS lies in the superior court rather than in the Industrial Commission pursuant to the Tort Claims Act. **Meyer v. Walls,** 97.

§ 46 (NCI4th). State Tort Claims Act; claim and affidavit; contents

Plaintiffs' specific claims under the Tort Claims Act arising from injuries and deaths in a fire at a chicken plant failed because the duty to inspect imposed upon defendants by statute is for the benefit of the public, not individual claimants, so that plaintiffs' claims fall within the public duty doctrine. **Stone v. N.C. Dept. of Labor,** 473.

TRIAL

§ 322 (NCI4th). Sufficiency of jury instructions; statement of contentions of parties generally

The trial court's instructions did not give more emphasis to defendant's contentions of contributory negligence than it did to plaintiff's contentions of negligence and did not mislead the jury to the prejudice of plaintiffs. **Cain v. Gencor, Inc.,** 657.

WORKERS' COMPENSATION

§ 85 (NCI4th). Distribution of damages recovered in a third-party action; subrogation claim of insurance carrier

The trial court was without jurisdiction to determine the subrogation amount of a workers' compensation lien where plaintiff was a worker injured by a falling crane; he began receiving workers' compensation; he filed a tort suit against a third party and received a judgment; and the trial court found that the tort award was insufficient for

WORKERS' COMPENSATION—Continued

the subrogation lien by including the present value of future workers' compensation benefits. **Johnson v. Southern Industrial Constructors,** 530.

§ 260 (NCI4th). Calculation of average weekly wages, generally

G.S. 97-2(5) sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed. **McAninch v. Buncombe County Schools,** 126.

§ 261 (NCI4th). Average weekly wages; employment prior to injury of less than fifty-two weeks

Where a Form 21 agreement entered into between the employer and an injured employee (a school cafeteria worker) and approved by the full Commission calculated the employee's average weekly wages using the forty-two weeks she was employed during the school year under the third compensation method in G.S. 97-2(5), the Court of Appeals erred by recalculating the employee's wages through application of the fifth computation method set forth in the statute. **McAninch v. Buncombe County Schools,** 126.

§ 264 (NCI4th). Average weekly wages; earnings from different employers

The calculation of the average weekly wages of an injured employee may not include wages or income earned in employment other than that which produced the injury; the Court of Appeals erred by recalculating the average weekly wages of an injured school cafeteria worker who worked only forty-two weeks per year for defendant school by including her earnings during the ten-week summer vacation period from babysitting, housekeeping and painting. **McAninch v. Buncombe County Schools,** 126.

§ 318 (NCI4th). Insurance rates and premiums

The filed rate doctrine barred claims by plaintiff employers against defendant workers' compensation carriers and rate organizations for restraint of trade under G.S. 75-1, unfair practices under G.S. 75-1.1, and unfair competition in violation of G.S. 58-63-15 based on allegations that defendants withheld evidence from the Commissioner of Insurance about servicing carrier fees for residual market workers' compensation insurance in a rate case and caused the Commissioner to approve excessive rates for compensation insurance. **N.C. Steel, Inc. v. National Council on Compensation Ins.,** 627.

The filed rate doctrine barred plaintiffs' claims for injunctive relief based on alleged illegal activities in the setting of workers' compensation insurance rates. **Ibid.**

The filed rate doctrine barred plaintiff employers' claims for damages based on allegations that a conspiracy by defendant workers' compensation carriers and rating organizations to fix excessive servicing carrier fees forced some employers into the residual market where the premiums are higher and the employers do not receive dividends on their policies. **Ibid.**

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