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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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SARAH PARKER
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JAMES A. WYNN, JR.*

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JAMES G. EXUM, JR.

Former Justices

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*Appointed and sworn in 1 October 1998 to replace John Webb who retired 1 October 1998.

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DISTRICT	JUDGES	ADDRESS
1	J. RICHARD PARKER	Manteo
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5	ERNEST B. FULLWOOD	Wilmington
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	JAY D. HOCKENBURY	Wilmington
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	JAMES CLIFFORD SPENCER, JR.	Burlington
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16B	DEXTER BROOKS	Pembroke
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17B	CLARENCE W. CARTER	King
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19A	W. ERWIN SPAINHOUR	Concord
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HENRY L. STEVENS III	Warsaw

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DONALD L. SMITH	Raleigh

1. Appointed and sworn in 16 April 1999 to replace George L. Wainwright, Jr.
2. Appointed and sworn in 19 March 1999 to replace Robert L. Farmer.
3. Retired 1 March 1999.
4. Appointed and sworn in 1 April 1999 to replace Howard E. Manning, Jr. who was appointed and sworn in 19 March 1999 as Superior Court Judge.
5. Appointed and sworn in 7 January 1999.
6. Appointed and sworn in 8 January 1999.
7. Appointed and sworn in 4 January 1999.
8. Appointed and sworn in 6 January 1999

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SAMUEL M. TATE	Morganton

1. Appointed and sworn in 26 March 1999.
2. Appointed and sworn in 11 April 1999 to replace Arnold O. Jones
3. Appointed and sworn in 22 February 1999.
4. Appointed and sworn in 15 March 1999 to replace James F. Ammons, Jr.
5. Appointed and sworn in 25 February 1999.
6. Appointed and sworn in 15 February 1999.
7. Elected and sworn in 7 December 1998.
8. Elected and sworn in 7 December 1998.
9. Appointed and sworn in 1 January 1999 to replace J. Keaton Fonville who retired 31 December 1998.
10. Appointed and sworn in 4 January 1999.
11. Appointed and sworn in 4 January 1999.
12. Appointed and sworn in 10 December 1998.
13. Appointed and sworn in 7 December 1998.

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SUSANA E. HONEYWELL
FELICIA G. HOOVER
GEORGE K. HURST
DANIEL JOHNSON
STEWART L. JOHNSON
JOY A. JONES
LINDA J. KIMBELL
ANNE E. KIRBY
DAVID N. KIRKMAN
BRENT D. KIZIAH
TINA KRASNER
AMY C. KUNSTLING
FREDERICK L. LAMAR
KRISTINE L. LANNING
SARAH LANNOM
CELIA G. LATA
DONALD W. LATON
THOMAS O. LAWTON III
PHILIP A. LEHMAN
ANITA LEVEAUX-QUIGLESS
FLOYD M. LEWIS
SUE Y. LITTLE
KAREN E. LONG
JAMES P. LONGEST
SUSAN R. LUNDBERG
JOHN F. MADDREY
T. LANE MALLONEE, JR.
CURTIS O. MASSEY
JENNIFER P. MAY-PARKER
JENNIE W. MAU
WILLIAM MCBLIFF
BRIAN J. MCGINN
J. BRUCE MCKINNEY
SARAH Y. MEACHAM
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DAVID SIGSBEE MILLER
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WILLIAM R. MILLER
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ROBERT C. MONTGOMERY
MARILYN R. MUDGE
CHARLES J. MURRAY
DENNIS P. MYERS
BART O. NJOKU-OBI
DANIEL O'BRIEN
JANE L. OLIVER
JAY L. OSBORNE
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SONDRA PANICO
ELIZABETH F. PARSONS
JEFFREY B. PARSONS
CHERYL A. PERRY
ELIZABETH C. PETERSON
ADRIAN A. PHILLIPS
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DOROTHY A. POWERS
NEWTON G. PRITCHETT, JR.
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GERALD K. ROBBINS
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BUREN R. SHIELDS III
T. BROOKS SKINNER, JR.
RICHARD E. SLIPSKY
BELINDA A. SMITH
DONNA D. SMITH
JANETTE M. SOLES
RICHARD G. SOWERBY, JR.
D. DAVID STEINBOCK, JR.
ELIZABETH N. STRICKLAND
KIP D. STURGIS
JOHN C. SULLIVAN
SUEANNA P. SUMPTER
GWYNN T. SWINSON
MELISSA H. TAYLOR
SYLVIA H. THIBAUT
KATHRYN J. THOMAS
JANE R. THOMPSON
STACI L. TOLLIVER
MELISSA L. TRIPPE
J. CHARLES WALDRUP
MICHAEL L. WARREN
KATHLEEN M. WAYLETT
GAINES M. WEAVER
MARGARET L. WEAVER
ELIZABETH J. WEESE
TERESA L. WHITE
CLAUD R. WHITENER III
THEODORE R. WILLIAMS
MARY D. WINSTEAD
DONNA B. WOJCIK
THOMAS B. WOOD
CATHERINE WOODARD
MCKINLEY WOOTEN, JR.
HARRIET F. WORLEY
WILLIAM D. WORLEY
DONALD M. WRIGHT
CLAUDE N. YOUNG, JR.
REUBEN F. YOUNG, JR.

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	FRANK R. PARRISH	Elizabeth City
2	MITCHELL D. NORTON	Washington
3A	THOMAS D. HAIGWOOD	Greenville
3B	W. DAVID MCFADYEN, JR.	New Bern
4	DEWEY G. HUDSON, JR.	Jacksonville
5	JOHN CARRIKER	Wilmington
6A	W. ROBERT CAUDLE II	Halifax
6B	DAVID H. BEARD, JR.	Murfreesboro
7	HOWARD S. BONEY, JR.	Tarboro
8	C. BRANSON VICKORY III	Goldsboro
9	DAVID R. WATERS	Oxford
9A	JOEL H. BREWER	Roxboro
10	C. COLON WILLOUGHBY, JR.	Raleigh
11	THOMAS H. LOCK	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	REX GORE	Bolivia
14	JAMES E. HARDIN, JR.	Durham
15A	ROBERT F. JOHNSON	Graham
15B	CARL R. FOX	Chapel Hill
16A	JEAN E. POWELL	Raeford
16B	L. JOHNSON BRITT III	Lumberton
17A	BELINDA J. FOSTER	Wentworth
17B	CLIFFORD R. BOWMAN	Dobson
18	HORACE M. KIMEL, JR.	Greensboro
19A	MARK L. SPEAS	Concord
19B	GARLAND N. YATES	Asheboro
19C	WILLIAM D. KENERLY	Salisbury
20	KENNETH W. HONEYCUTT	Monroe
21	THOMAS J. KEITH	Winston-Salem
22	GARRY N. FRANK	Lexington
23	THOMAS E. HORNE	Wilkesboro
24	JAMES T. RUSHER	Boone
25	DAVID T. FLAHERTY, JR.	Lenoir
26	PETER S. GILCHRIST III	Charlotte
27A	MICHAEL K. LANDS	Gastonia
27B	WILLIAM CARLOS YOUNG	Shelby
28	RONALD L. MOORE	Asheville
29	JEFF HUNT	Rutherfordton
30	CHARLES W. HIPPS	Waynesville

PUBLIC DEFENDERS

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

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

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CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 5th day of February, 1999, and said person has been issued a certificate of this Board:

Jason D. Ponfil ..... .Applied from the State of Missouri

Given over my hand and seal of the Board of Law Examiners this 8th day of February, 1999.

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 12th February 1999 and said person has been issued a license certificate.

JULY 1998 RECENTLY ADMITTED APPLICANT

Colleen Sheila Hogan ..... .Baltimore, Maryland

Given over my hand and seal of the Board of Law Examiners this the 22nd day of February, 1999.

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 5th day of March, 1999, and said person has been issued a certificate of this Board:

RECENTLY ADMITTED COMITY APPLICANT

Carole Peterson Burley ..... .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 24th day of March, 1999.

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 5th day of March, 1999, and said persons have been issued certificates of this Board:

David Craig Stewart ..... Applied from the State of Colorado
James C. Roscetti ..... Applied from the State of New York
Victor Lee Wallace II ..... Applied from the State of Colorado
Peter J. Brevorka ..... Applied from the State of New York
Richard Mark Feathers ..... Applied from the State of Virginia
Francine M. Kors ..... Applied from the State of New York
Patrick Joseph Fogarty ..... Applied from the State of New York
Robert Childress Jones, Jr. ..... Applied from the State of New York
John E. Lippel ..... Applied from the State of Pennsylvania
Allison Elizabeth Patient ..... Applied from the State of West Virginia
Don H. Phillips ..... Applied from the State of New York
Sharon Amanda Riegel ..... Applied from the State of Ohio
Walter M. Douglas ..... Applied from the State of Illinois
David N. Ventker ..... Applied from the State of Virginia
Diane C. Van Helden ..... Applied from the State of Texas
Kyle W. King ..... Applied from the State of Texas
Amy Marvine Faber ..... Applied from the State of Missouri
Natalie Hulen Diana ..... Applied from the District of Columbia
Debra Kay King ..... Applied from the State of Michigan
Jonathan M. Minnen ..... Applied from the State of Tennessee
Perry John Pelaez ..... Applied from the State of Ohio
Frances Cumberledge Whiteman ..... Applied from the State of West Virginia
Caryn Lisa Zimmerman ..... Applied from the District of Columbia
Judith Crane Godbout Harper ..... Applied from the State of Connecticut
Carena C. McIlwain ..... Applied from the State of Pennsylvania
Gary Hill Collison ..... Applied from the State of New York
Jeffrey Phillip Cantrell ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this 8th day of March, 1999.

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 12th of March, 1999 and said person has been issued a license certificate.

JULY 1998 RECENTLY ADMITTED APPLICANTS

Leigh M. Levine ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 22nd day of March, 1999.

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 20th day of March, 1999 and said persons have been issued a license certificate.

FEBRUARY 1999 NORTH CAROLINA BAR EXAMINATION

Cynthia A. Amann ..... Charlotte
Aaron Brook Anderson ..... Charlotte
Tiffany Lynne Ashhurst ..... Durham
Chad Everett Axford ..... Raleigh
Michael Derek Barnes ..... Charlotte
Jonathan Scott Beane ..... Chapel Hill
Jennifer Jones Bell ..... Greensboro
Kelli W. Bemelmans ..... Wilmington
Juanita L. Boger ..... Greensboro
Timothy William Bouch ..... Charleston, South Carolina
Mark D. Boynton ..... Winston-Salem
David Stuart Bradin ..... Cary
Michael David Bredenberg ..... Raleigh
Joel Micah Bresler ..... Banner Elk
Russell Amos Brinson ..... Raleigh
Annette D. Brown ..... Charlotte
Shawn DeWitt Brown ..... Raleigh
Leonard Gilbert Brown III ..... Greenville
Christopher F. Buchholtz ..... Chapel Hill
Klaus J. Buchstab ..... Charlotte
Thomas More Buckley ..... Cary
John Edward Buerkert, Jr. ..... Charlotte
Eric Leighton Burk ..... Charlotte
Kathryn Marie Burke ..... Cary
Melanie Leticia Byrd ..... Durham
Charles Emory Calhoun II ..... Wilmington
Ian Arbuckle Calvert ..... Alexandria, Virginia
Aimee Marie Cannon ..... Goldsboro
Glynn L. Capell ..... Greenville, South Carolina
Alan Joseph Chadd ..... Charlotte
William Sidney Chase ..... Burnsville
Mirian Ann Chavis ..... Charlotte
Katherine Eleanor Clemm ..... Fayetteville
Anibal Jose Cortina ..... Cary
Richard Michael Cox ..... Hertford
Brian Christopher Cox ..... Charlotte
Joseph Harris Craven ..... Durham
Matthew Hung Crow ..... Monroe
Dionne T. Cuevas-Abreu ..... Raleigh
Julie Renee Curran ..... Charlotte
Quynh-Nhu P. Dam ..... Charlotte
Katherine Elizabeth Davenport Wisz ..... Raleigh
Tiffany Louise Davis ..... Cary
Richard Russell Davis ..... Wrightsville Beach
Patricia K. Davis ..... Charlotte

J. Brett Davis ..... Boone
James Caldwell Davis, Jr. ..... Charlotte
Alexander Dawson III ..... Hyattsville, MD
Christopher K. DeScherer ..... Raleigh
Florence Beretich Dooley ..... Wilmington
Clifford Donatelli Dowell ..... Roaring River
Stephen G. Driggers ..... Raleigh
Josune Drummond ..... Raleigh
Russel Blake Duckworth ..... Charlotte
Amy Elizabeth Echerd ..... Charlotte
Kenneth Edward Eheman, Jr. ..... Chapel Hill
Kirk Edward Eley ..... Apex
Alton Travis Ellis ..... Edenton
Uchendu Ogubie Eronini ..... Matthews
Lance R. Fife ..... Raleigh
Patrick V. Ford ..... Charlotte
Elizabeth Lee Fowler ..... Raleigh
Jill Allison Kaplan Frankel ..... Winston-Salem
Sarah Marie Friede ..... Los Angeles, CA
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Mary B. Grant ..... Raleigh
Schean M. Griffin ..... Winston-Salem
Nina Lucille Gunther ..... Raleigh
Benita A. Gwynn ..... Reidsville
Kathryn Ann Haggerson ..... Raleigh
John Michael Harlow ..... Apex
William Paul Harrill III ..... Raleigh
Paul Ramon Hernandez ..... Virginia Beach, Virginia
Christopher Joseph Hickey ..... Salisbury
Jeffrey S. Hiller ..... Winston-Salem
Gentry Case Merritts Hogan ..... Raleigh
Victoria Majoros Homick ..... Raleigh
Adrian Iapalucci ..... Southport
Marc Connery Ingham ..... Wilmington
Deborah Marie Jackson ..... Charlotte
Robert Wade Jernigan ..... Atlanta, Georgia
Heather Katherine Johnson ..... Winston-Salem
Lenore Adele Jones-Peretto ..... Chapel Hill
Kristin M. Jordan ..... Charlotte
Nahale Freeland Kalfas ..... Durham
Petrina J. Keddell ..... Raleigh
Laura Keohane ..... Durham
Bobby P. Khot ..... Winston-Salem

David W. Kiefer ..... Charlotte
Camille Ladina Kluttz ..... Kernersville
Stacey L. Kraftchick ..... Georgetown, South Carolina
Mathew B. Kushner ..... Charlotte
Janna Dale Allison Kuykendall ..... Canton
Lori Jo Lamoreaux ..... Durham
Amy Lynne Layton ..... Raleigh
William P. Leath ..... Winston-Salem
Michele Price Lee ..... Greensboro
Marie A. Lehr ..... Huntersville
Susan Anne Fine Liggin ..... Cary
Jeremy David Lindsley ..... Raleigh
Adam Lischer ..... Raleigh
Tiffany Yashisca Lucas ..... Atlanta, Georgia
Shelly M. Lynn ..... Raleigh
Melissa T. Marr ..... Charlotte
Alice Elizabeth Mazarick ..... Lillington
David J. Mazza ..... Clemmons
Craig Travis McCall ..... Cary
Warren K. McDonald ..... Charlotte
Heather Marie McElroy ..... Charlotte
Jonathan Scott McElroy ..... Asheville
Shane Michael McGee ..... Columbus, Ohio
Marci M. McGee ..... Little Rock, Arkansas
Jacqueline Dezette McMillian ..... Fayetteville
L. Walter Mills ..... New Bern
Ana Jacqueline del Cristo Minges ..... Kinston
Alisa G. Mitchell ..... Roxboro
Cathy Ridgeway Moore ..... Ridgeway, South Carolina
Benjamin Cranford Morgan ..... Asheboro
Keith Alan Mrochek ..... Birmingham, Alabama
Christine Cecchetti Mumma ..... Durham
Candice Michelle Murphy-Farmer ..... Indianapolis, Indiana
Susan Carolin Newell ..... Raleigh
Luaskya Colleen Nonon-Scott ..... Carrboro
Thomas Henry O'Donnell, Jr. ..... Charlotte
Wendy Anne Owens ..... Virginia Beach, Virginia
Jason R. Pastucha ..... Arden
Roger Allen Peters II ..... Charlotte
Andrea Clara Phillips ..... Durham
John DeWitt Phillips ..... Charlotte
Carolyn S. Pierce ..... Raleigh
Jane Cady Pirtle ..... Charlotte
Joseph E. Propst ..... Raleigh
Lowndes Christopher Quinlan ..... Charlotte
John Frank Renger III ..... Charlotte
Mark E. Ricardo ..... Winston-Salem
Philip Schramm Runkel ..... Charlotte
Elaine Therese Sale ..... Raleigh
Natalie Kay Sanders ..... Greensboro
Robert George Scott ..... Colfax

Barry Keith Simmons ..... Benson
Brian Lee Smith ..... Orlando, Florida
Jeffrey Thomas Smith ..... Raleigh
Marc Xavier Sneed ..... Columbus, Ohio
Karen M. Steffens ..... Charlotte
Marsha Townsend Stevenson ..... Wingate
Virginia Leggett Stevenson ..... Charlotte
LaShawn Lanea Strange ..... Durham
Cynthia King Sturges ..... Louisburg
Ann Logan Spurlock Swearingen ..... Asheville
Benji Forbes Taylor ..... Raleigh
Karen Elizabeth Taylor ..... Pleasantville, New Jersey
Steven N. Terranova ..... Greensboro
Martin A. Tetreault ..... Smithfield
Tricia Annette-Doak Thomas ..... Charlotte
Frederick M. Thurman, Jr. ..... Charlotte
Francis Xavier Trainor, III ..... New Orleans, Louisiana
Brendan W. Turner ..... Durham
John William Van Alst, Jr. ..... Greensboro
Matthew Ivan Van Horn ..... Tulsa, Oklahoma
Richard W. Viola ..... Charlotte
Tejal P. Wadhwani ..... Charlotte
Tiffanie D. Wattleton ..... Cary
Elizabeth Leigh Weddington ..... Raleigh
Andrew Jefferson Whitley ..... Wilson
Sonja Maria Trenkler Wilhelm ..... Apex
Edward Vincent Williams ..... Raleigh
Margaret Louise Willis ..... Raleigh
Isvara Monifa Addison Wilson ..... Charlotte
Stephanie Elaine Wnetrzak ..... Charlotte
Russell Sherlock Woodward ..... Charlotte
Kimberly A. Wylie ..... Hubert

Given over my hand and seal of the Board of Law Examiners this the 1st day of April, 1999.

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 26th day of March, 1999 and said persons have been issued a license certificate.

RECENTLY ADMITTED COMITY APPLICANTS

Don Durant Carter ..... Applied from the State of Pennsylvania
Susan B. Lyons ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 1st day of April, 1999.

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 9th day of April, 1999 and said persons have been issued a license certificate.

FEBRUARY 1999 NORTH CAROLINA BAR EXAMINATION

Gregory Wenzl Brown ..... Raleigh
David Quentin Burgess ..... Fort Mill, South Carolina
Erin Klingensmith Duffy ..... Raleigh
Thomas Patrick Eckerman ..... Charlotte
Douglas R. Edwards ..... Charlotte
James John Eichholz ..... Gastonia
Christopher L. Ekman ..... Charlotte
Robert Joel Fedder ..... Asheville
Houston Foppiano ..... Cary
Christie McCallie Foppiano ..... Cary
Richard Andrew Galt ..... Fayetteville
Scott Burke Garrett ..... Columbia, South Carolina
Andrew A. Gerber ..... Charlotte
Tanya Drahus Greeley ..... Charlotte
Jamison Hall Hinkle ..... Raleigh
Neil S. Hyman ..... Greensboro
Martin Howard Kuner ..... West Orange, New Jersey
Christopher Manning McDermott ..... Charlotte
James Bartlett Merlo ..... Charlotte
Marifrances Morrison ..... Raleigh
Irena Leigh Norton ..... Corona, California
Michael Thomas Novak ..... Lisle, Illinois
Kimberly L. Pross ..... Cornelius
John F. Quill ..... Wake Forest
Sean Ravi Ramkaransingh ..... Chapel Hill
Gregory Scott Richardson ..... Charlotte
Matthew Hayes Robertson ..... Charlotte
Brian J. Schoolman ..... San Diego, California
Tracy Edward Tomlin ..... Coral Gables, Florida
J. Eric Virgil ..... Coral Gables, Florida
Robert A. West ..... Winston-Salem
James Albert Witherspoon ..... Charlotte
Tamara Devon Wroblewski ..... Charlotte
Todd Michael Zimmerman ..... Maumee, Ohio

JULY 1998 NORTH CAROLINA BAR EXAMINATION

Dorothy Lee Donaldson ..... Cary

Given over my hand and seal of the Board of Law Examiners this the 9th day of April, 1999.

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 23rd day of April, 1999 and said person has been issued a license certificate.

FEBRUARY 1999 NORTH CAROLINA BAR EXAMINATION

Russell Flint Crump . . . . . .Winston-Salem

Given over my hand and seal of the Board of Law Examiners this the 26th day of April, 1999.

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 14th day of May, 1999, and said persons have been issued certificates of this Board:

Alfred Nicholas Purrington . . . . . .Applied from the State of New York
James Averett Wilson . . . . . .Applied from the State of Missouri
Dante A. Massaro . . . . . .Applied from the State of New York
Mark Henry Newbold . . . . . .Applied from the State of Oklahoma
Eric James Remington . . . . . .Applied from the State of Virginia
Judy Zecchin Mayo . . . . . .Applied from the State of New York
Nancy Elizabeth Friel Hornik . . . . . .Applied from the State of New York
John W. Breen, Jr. . . . . .Applied from the State of North Dakota
Dominic J. Chiantera . . . . . .Applied from the State of Connecticut
Kimberly Lynn Stitzinger . . . . . .Applied from the State of West Virginia
Brooks T. Baker . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this 17th day of May, 1999.

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 28th day of May, 1999 and said person has been issued a license certificate.

FEBRUARY 1999 NORTH CAROLINA BAR EXAMINATION

Margaret Wilson ..... Cary

Given over my hand and seal of the Board of Law Examiners this the 1st day of June, 1999.

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. JAMES FLOYD DAVIS

No. 452A96

(Filed 9 October 1998)

1. **Jury § 219 (NCI4th)— first-degree murder—jury selection—beliefs regarding the death penalty**

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excusing prospective jurors for cause based on their beliefs regarding the death penalty. Each prospective juror excused stated that he or she would be unable to follow the law and recommend a sentence of death even if that was what the facts and circumstances suggested.

2. **Constitutional Law § 343 (NCI4th)— first-degree murder—competency hearing—ex parte—no state constitutional violation**

A first-degree murder defendant's state constitutional right to be present at every stage of his capital proceeding was not violated by entry of an amended order concerning his evaluation for competency to stand trial where the order appears to have been entered upon motion of Dorothea Dix Hospital, not the State; the order does not indicate that the State took part in the hearing; and the purpose of a competency evaluation is to determine whether defendant is competent to stand trial, does not implicate

defendant's confrontation rights, and does not have a substantial relation to his opportunity to defend. Article I, Section 23 of the North Carolina Constitution.

3. Constitutional Law § 343 (NCI4th)— first-degree murder—right to be present—ex parte competency hearing—no federal constitutional violation

A first-degree murder defendant's federal constitutional right to be present at every stage of his capital trial was not violated by an *ex parte* hearing concerning his evaluation for competency to stand trial where the order appears to have been entered upon motion of the hospital, not the State, it is not clear that an *ex parte* hearing actually occurred, and, even if it did, it did not deny defendant an opportunity for cross-examination or necessitate his presence to assure fairness in the proceedings.

4. Criminal Law § 514 (NCI4th Rev.)— first-degree murder—competency to stand trial—hearing—record

There was a sufficient record for appellate review and defendant did not establish a violation of N.C.G.S. § 15A-1241 in a first-degree murder prosecution regarding the evaluation of his competency to stand trial. There is nothing in the record to suggest that the court conducted a hearing concerning Dorothea Dix Hospital's request to amend the competency evaluation order, a full record exists concerning the hearing on the State's motion for a competency evaluation, and the order entered by the trial court contains all required findings.

5. Constitutional Law § 262 (NCI4th)— first-degree murder—evaluation of competency to stand trial—right to counsel

A defendant in a capital first-degree murder prosecution was not deprived of his constitutional rights to counsel in a proceeding to determine his competency to stand trial where an order was entered pursuant to a request by Dorothea Dix Hospital to assign a specific forensic evaluator and to transfer defendant to Dorothea Dix Hospital but there is no proof that an actual proceeding took place. The amended order does not affect defendant's right to a fair trial.

6. Constitutional Law § 98 (NCI4th)— first-degree murder—competency evaluation—cumulative effect of alleged errors—no due process violation

There was no violation of a defendant's due process rights in a capital first-degree murder prosecution due to the cumulative effect of alleged errors surrounding the evaluation of defendant's competency to stand trial.

7. Constitutional Law § 264 (NCI4th)— first-degree murder—evaluation of competency to stand trial—no right to counsel

A defendant in a capital prosecution for first-degree murder was not denied his Sixth Amendment right to counsel where the court ordered a competency evaluation by a forensic evaluator but declined to allow defense counsel to be present during the examination. Defendant had no constitutional right to have counsel present during his evaluation; the expert in forensic psychiatry who was the evaluator testified that defense counsel's presence would interfere with the process. Furthermore, it was upon motion of defense counsel that defendant was committed for examination of his capacity to proceed.

8. Criminal Law § 181 (NCI4th Rev.)— first-degree murder—capacity to stand trial—sufficiency of evidence

The trial court did not err in a capital first-degree murder prosecution by finding that defendant had the capacity to stand trial where the testimony of an expert in forensic psychiatry clearly indicates that defendant met each prong of the competency test set forth in N.C.G.S. § 15A-1001. The evidence must demonstrate that defendant is capable of understanding the nature and object of the proceedings against him, comprehending his own situation in reference to the proceedings, and assisting in his defense in a rational and reasonable manner.

9. Criminal Law § 468 (NCI4th Rev.)— first-degree murder—prosecutor's argument—defendant's mental competence—defendant's understanding of his rights

There was no gross impropriety requiring intervention *ex mero motu* in the prosecutor's opening statement and closing argument in a capital first-degree murder prosecution where defendant contended that the jury could infer defendant's mental competence from the State's argument that defendant understood his rights. The prosecutor never directly asked the jury to

use defendant's statements to law enforcement officers in determining his competence or sanity, the prosecutor's comments did not indicate that defendant exercised his right to counsel or to silence, and the trial court instructed the jury that it was to be guided by its own recollection of the evidence.

10. Evidence and Witnesses § 264 (NCI4th)— first-degree murder—character of victim—relevant

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence of the victim's character and temperament where the victim had informed defendant that his employment was being terminated as a result of an altercation, defendant returned to the facility with a rifle and killed several people, and defendant contended that the victims had not been willing to assist him and had tried to ruin him. The prosecution was properly permitted to present evidence of the victim's temperament and management style in order to prove the circumstances of the case. As the evidence was properly admitted during the guilt phase, its reconsideration during the sentencing phase was also proper, and did not unduly prejudice defendant.

11. Evidence and Witnesses § 920 (NCI4th)— first-degree murder—conversation between victim and defendant prior to murders—admissible

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence of what a victim and defendant had said in a meeting two days prior to the murder at which the victim had terminated defendant's employment. The conversation showed the circumstances of the crime, particularly the motive for the killings. The State is entitled to prove the circumstances of the crime and to introduce evidence tending to support the theory of the case.

12. Evidence and Witnesses § 920 (NCI4th)— first-degree murder—conversation between victim and defendant—admissible

The trial court did not err in a capital prosecution for first-degree murder by admitting the testimony of a coworker of defendant and the victim who was present at defendant's dismissal conference before defendant returned and began shooting. The State never offered the statements to prove the truth of the matter asserted, but to prove defendant's motive for the crime.

13. Evidence and Witnesses § 735 (NCI4th)— first-degree murder—conversation between defendant and victim—not unduly prejudicial

Testimony relating a conversation between a first-degree murder defendant and his victim at which the victim terminated defendant's employment was highly relevant to the motive of the case and its probative value was not outweighed by the danger of unfair prejudice.

14. Evidence and Witnesses § 3195 (NCI4th)— first-degree murder—State's witnesses—prior written statements—read into the record

The trial court did not err in a capital prosecution for first-degree murder by allowing the State's witnesses to read into the record their prior written statements where the statements were not offered to prove the truth of the matter asserted, but to bolster the testimony given by two of the witnesses. The statements were given by the witnesses immediately after the shooting occurred, were thus present sense impressions, and added weight and credibility to the witnesses' trial testimony.

15. Evidence and Witnesses § 3195 (NCI4th)— first-degree murder—reading of witness's prior statement—no plain error

There was no plain error in a capital first-degree murder prosecution in the reading of a witness's prior written statement where the objection at trial was general and specific statements were identified for the first time on appeal. A review of the evidence reveals that this is not the exceptional case where such a pervasive defect or plain error occurred which would have tainted all results and denied defendant a right to a fair trial.

16. Evidence and Witnesses § 2080 (NCI4th)— first-degree murder—defendant's mental condition—jail nurse's opinion

The trial court did not err in a capital prosecution for first-degree murder by excluding a jail nurse's opinion of defendant's mental condition where the question called for the lay witness to make a psychiatric diagnosis. No foundation had been laid to show that he had the expertise to make such a diagnosis and, while it may have been appropriate for the witness to make a general observation that a defendant appeared "mentally disturbed" upon admission to jail, it was beyond his ability as a lay witness

to make a specific diagnosis as to defendant's being "psychotic." N.C.G.S. § 8C-1, Rule 701.

17. Constitutional Law § 346 (NCI4th)— first-degree murder—defendant's right to testify—instruction by court to defendant—no plain error

There was no plain error in a capital first-degree murder prosecution where the court instructed defendant that he had the right to testify, but that if he did he would be subject to cross-examination on a wide variety of subjects, subject only to the discretion of the court and relevancy. The court did not attempt to give defendant detailed instructions concerning the scope of cross-examination, did not give an instruction inconsistent with any of the rules of evidence, and did not impermissibly chill defendant's right to testify.

18. Homicide § 244 (NCI4th)— first-degree murder—specific intent to kill—evidence sufficient

The trial court did not err in a capital first-degree murder prosecution by failing to dismiss the charge as to a particular victim based upon insufficient evidence that defendant possessed the specific intent to kill that victim where defendant was discharged from his employment, purchased a semi-automatic weapon the morning of the killings, drove to the facility and killed two others who had been involved in his dismissal in a break room, proceeded down a hallway firing shots into offices, this victim was working at his desk and dove underneath the desk to avoid the shots, defendant fired at least three rounds through the office door, one penetrated this victim's wrist and proceeded through his body, defendant stood in a doorway smoking a cigarette while his victims bled to death, and there was no evidence that this victim had provoked defendant. Although defendant's argument appears to be that he had no motive to murder this victim, motive is not an element of first-degree murder and a jury could reasonably find that defendant formed the requisite premeditation and deliberation based upon the doctrine of transferred intent.

19. Homicide § 469 (NCI4th)— first-degree murder—specific intent—instructions on mental capacity—no plain error

There was no plain error in a capital first-degree murder prosecution in the court's instructions on lack of mental capacity regarding specific intent where the court used the phrase "lack of

diminished capacity" as opposed to "lack of mental capacity." The use of the phrase "lack of diminished capacity" appears to be a mere *lapsus linguae*, the court correctly defined the defense, and, read contextually, the instructions properly conveyed to the jury what it must find for the defense to apply.

20. Homicide § 520 (NCI4th)— first-degree murder—instructions—consideration of second-degree murder

The trial court in a capital first-degree murder prosecution properly conveyed the mandatory nature of its instruction that the jury would consider second-degree murder if it found that defendant could not form the specific intent required for first-degree murder.

21. Homicide § 678 (NCI4th)— first-degree murder—diminished capacity defenses—instructions—no error

The trial court did not err in a first-degree murder prosecution in its instructions regarding defendant's diminished capacity defense where defendant contended that the instructions gave the jury the option of finding defendant not guilty if it found that he lacked the mental capacity to commit murder, rather than requiring such a verdict, but the instructions correctly stated the jurors' obligations when read in context.

22. Homicide § 478 (NCI4th)— first-degree murder—doctrine of transferred intent—evidence sufficient to support instruction

The evidence in a capital prosecution for first-degree murder was sufficient to support the transferred intent instruction given by the trial court where defendant returned to his workplace with a rifle after being terminated, headed straight for the hallway where all of the management offices were located, fired into the doors of offices, and, in his statements to law enforcement officials, stated that the people at the facility had set him up, fired him, and ruined him. The evidence demonstrated that defendant's actions were aimed at the employees of the company, particularly those who were involved in management, and this victim was working inside management's offices during the shooting.

23. Homicide § 478 (NCI4th)— first-degree murder—transferred intent—instructions—no plain error

There was no plain error in a capital prosecution for first-degree murder in the trial court's instructions on transferred intent where defendant contended that the instruction was flawed because it did not specify whom defendant intended to kill. The evidence indicates that defendant sought revenge from the management of his former employer because of his allegedly unjustified dismissal and the jury was properly instructed on the doctrine of transferred intent based on his intent to harm the management of the company.

24. Criminal Law § 1335 (NCI4th Rev.)— capital sentencing—hearsay testimony—no error

There was no error in a capital sentencing proceeding where defendant contended that defendant's sister was allowed to give hearsay testimony but the jurors heard defendant's sister deny any knowledge of the conversation about which the prosecutor asked and no improper testimony was admitted.

25. Constitutional Law § 352 (NCI4th)— first-degree murder—determination of competency to stand trial—no Fifth Amendment violation

A capital first-degree murder defendant's Fifth Amendment right to be free from self-incrimination was not violated by the cross-examination at trial of a defense expert regarding the contents of defendant's records from Dorothea Dix Hospital, where he was examined for competency to stand trial. Defense counsel participated in the hearing concerning defendant's competency examination and voiced no opposition to the examination so long as the trial court limited the scope to determination of competency. Defense counsel then sought to rely on the defenses of insanity and diminished capacity during trial and the defense expert testified that in forming his opinion he reviewed defendant's records and referred to the testing done at Dorothea Dix Hospital during the competency examination. The State should not be foreclosed from also relying on that evidence to rebut defendant's contentions.

26. Constitutional Law § 290 (NCI4th)— first-degree murder—use of information from competency evaluation at sentencing—defense counsel not informed—no denial of Sixth Amendment right to counsel

Defendant was not denied his Sixth Amendment right to counsel when defense counsel was not notified in advance that the information generated from a competency evaluation would be used against defendant in the sentencing proceeding. Defendant had the opportunity to discuss with counsel the nature of the psychiatric evaluation and defense counsel should have anticipated the use of the psychological evidence by the prosecution in rebuttal to any defense involving defendant's mental status.

27. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—jury acting on behalf of victims

The trial court did not err by not intervening *ex mero motu* during the prosecutor's closing arguments in a capital sentencing proceeding where defendant contended that the prosecutor improperly urged the jurors to sentence defendant to death on behalf of the victims, but the prosecutor's remarks only reminded the jury that he was an advocate for the State and the victim and nothing in the prosecutor's argument suggested or implied that the jurors should impose the death penalty because the victims or their families demanded it.

28. Criminal Law § 475 (NCI4th Rev.)— capital sentencing—biblical arguments

The prosecutor's biblical arguments in a capital sentencing proceeding were not so improper as to require intervention *ex mero motu* where the prosecutor did not state that the law of this state is divinely inspired or refer to law officers as being ordained by God and, in fact, the argument was a jumble of allusions and catch phrases which were difficult to clearly understand. However, caution is urged in the use of biblical phrases and allusions; it is the prosecutor's duty in closing arguments at the sentencing proceeding to convince the jury that the facts and circumstances of the crime warrant the death penalty and it is not the duty of the prosecutor to preach to the jury.

29. Criminal Law § 1373 (NCI4th Rev.)— capital sentencing—aggravating circumstances—risk of death to more than one person—instruction that rifle is a deadly weapon—no plain error

There was no plain error in a capital sentencing proceeding where defendant contended that the court's instruction that an M-1 .30-caliber rifle is a deadly weapon relieved the State of its burden of proving each element of the aggravating circumstance that defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person. The court's instructions at the guilt phase simply informed the jurors that the rifle constituted a deadly weapon as a matter of law regardless of the weapon's use and the instructions concerning the aggravating circumstance focused on totally separate issues. The fact that a deadly weapon was used is not enough to support a finding that this aggravating circumstance exists. N.C.G.S. § 15A-2000(e)(10).

30. Criminal Law § 1335 (NCI4th Rev.)— capital sentencing—aggravating circumstances—risk of death to more than one person—evidence used to infer malice during guilt phase

There was no error in a capital sentencing proceeding where defendant contended that the court erroneously utilized evidence of a deadly weapon during the sentencing proceeding because it also relied on the use of the weapon to infer malice during the guilt phase. Although the Fair Sentencing Act specifically prohibited utilizing evidence necessary to prove an element of the offense to also prove an aggravating factor, the capital sentencing scheme contains no such prohibition and clearly contemplates a sentencing determination based on evidence presented during both the guilt and sentencing phases.

31. Criminal Law §§ 1373 and 1374 (NCI4th Rev.)— capital sentencing—aggravating circumstances—risk of harm to more than one person—course of conduct—both properly submitted

There was no error in a capital sentencing proceeding where the court submitted both the aggravating circumstance that defendant knowingly created a risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person and the aggravat-

ing circumstance that the murder was part of a course of conduct which included other crimes of violence against another person or persons. Although defendant argues that the circumstances were based on the same evidence, it has been held 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. In this case, defendant during a shooting spree sought out the management of a company from which he had been terminated and disregarded the value of every human life in the building as he randomly fired into offices while walking down the hall. That aspect of defendant's character is not fully captured by the (e)(11) aggravating circumstance. There was independent evidence to support each circumstance, although some of the evidence may have overlapped.

32. Criminal Law § 1346 (NCI4th Rev.)— capital sentencing— consideration of the same evidence to support more than one circumstance—instructions

There was no plain error in a capital sentencing proceeding where defendant contended that the court erred by failing to instruct the jury that it could not utilize the evidence of one aggravating circumstance to prove another. Although the North Carolina Supreme Court has stated that trial courts should instruct the jury in such a way as to insure that jurors will not use the same evidence to find more than one aggravating circumstance, it has not required that trial courts do so.

33. Criminal Law § 1381 (NCI4th Rev.)— capital sentencing— mitigating circumstances—value and weight distinguished

In capital sentencing, the term "value" is found only in the statutory catchall provision, N.C.G.S. § 15A-2000(f)(9), and has also been applied to nonstatutory mitigating circumstances. The term "weight" or "weighing" is used only in N.C.G.S. § 15A-2000(b)(2) and (3), referring to the process of weighing the mitigating circumstances found against the aggravating circumstances found. The term "value" is used under Issue Two and does not enter into either Issue Three or Issue Four.

34. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing— instructions—mitigating circumstances—value and weight

There was no error in a capital sentencing proceeding in the instructions concerning valuing and weighing statutory and non-

statutory mitigating circumstances where defendant contended that the court erred by simply instructing the jurors to answer "yes" for a given statutory mitigating circumstance if one or more jurors found that circumstance to exist and was silent about "whether those circumstances were deemed by law to have mitigating value." The only time "value" comes into play is in determining whether the statutory catchall or the nonstatutory mitigating circumstances exist because jurors must first find that they have mitigating value in order to find that they exist. Jurors are not required to find value as to statutory mitigating circumstances, but this does not mean that the trial court is required to instruct that statutory mitigating circumstances have value as a matter of law. The instructions here properly distinguished between statutory and nonstatutory mitigating circumstances, properly instructed the jurors in Issue Three that they must "weigh the aggravating circumstance or circumstances against the mitigating circumstance or circumstance," and required the jurors to give the statutory and nonstatutory mitigating circumstances they had found weight in determining both Issues Three and Four. Furthermore, the trial court properly instructed that the weight to be given each mitigating circumstance is for the individual juror to decide.

35. Criminal Law § 1345 (NCI4th Rev.)— capital sentencing—response to jurors' questions—reinstruction

The trial court did not err in a capital sentencing proceeding by electing in response to jurors' questions to reinstruct the jurors in the pattern jury instructions in an attempt to avoid a misstatement of the law. When viewed as a whole, the trial court's instructions properly informed the jurors of their duties under the law.

36. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not arbitrary

The evidence in a capital sentencing proceeding supported each aggravating circumstance found and the sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

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

A sentence of death for first-degree murder was not disproportionate where defendant was convicted of three counts of

first-degree murder, was convicted on a theory of malice, premeditation, and deliberation, and the evidence showed that defendant engaged in a shooting rampage at his former workplace which resulted in the murder of three employees, as well as the wounding of two others. He fired multiple rounds from two semi-automatic weapons throughout the facility as employees hid under desks or fled the building in fear for their lives. With the killings completed, defendant stood in the doorway, smoking a cigarette.

Justice WYNN did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from three judgments imposing sentences of death entered by Payne, J., on 1 October 1996 in Superior Court, Buncombe County, upon jury verdicts of guilty of first-degree murder. Heard in the Supreme Court 27 May 1998.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

David G. Belser for defendant-appellant.

ORR, Justice.

This case arises out of the shooting deaths of Gerald Allman, Tony Balogh, and Frank Knox. On 11 September 1995, defendant was indicted for three counts of first-degree murder, one count 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. Defendant was tried before a jury, and on 27 September 1996, the jury found defendant guilty of all charges. Following a capital sentencing proceeding, based upon the jury's finding defendant guilty of all three murders on the basis of premeditation and deliberation and the felony murder theory, the jury recommended sentences of death for each of the murder convictions. In accordance with the jury's recommendation, the trial court entered three sentences of death. The trial court additionally sentenced defendant to 79 to 104 months' imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury conviction and 31 to 47 months' imprisonment for the assault with a deadly weapon with intent to kill conviction, to be served consecutive to each other and to the sentences of death.

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 find no error meriting reversal of defendant's convictions or sentences.

At trial, the State's evidence tended to show the following: Defendant James Floyd Davis had been employed in the warehouse of Union Butterfield since 1991. On 10 May 1995, an altercation occurred between defendant and two other employees. The management of Union Butterfield, including Herb Welsh, Larry Cogdill, Tony Balogh, and Debbie Medford, conducted a fact-finding meeting concerning the altercation. Defendant was suspended with pay until the following Monday, 15 May 1995. Subsequently, management made a decision to terminate defendant's employment.

On 15 May 1995, defendant met with Tony Balogh and Debbie Medford. During the meeting, Balogh informed defendant that his employment was being terminated. Medford informed defendant of the benefits he was entitled to receive upon his termination. Defendant appeared nervous and tearful during the meeting. Balogh and Medford asked defendant if there was anything they could do for him. Defendant responded by saying, "If you were going to help me, you would have."

On 17 May 1995, at approximately 9:00 a.m., defendant purchased from Pawn World a Winchester .30-caliber M1 carbine rifle, two clips, and ammunition. At approximately 11:20 a.m., defendant entered the facility of his former employer, Union Butterfield, carrying the Winchester rifle and a Lorcin .380-caliber semiautomatic pistol. Defendant proceeded to the break room, where he found Robert Walker, Tim Walker, Howard Reece, Gerald Allman, and Tony Balogh. The men were in the middle of a meeting about the building's sprinkler system. Defendant entered the break room and told Robert Walker and Tim Walker, representatives from the sprinkler company, to "get the hell out of here." Defendant aimed the gun at Allman and fired, shooting him in the head. Defendant then turned to Balogh and fired the gun. Reece ran from the room and felt pieces of the wall hitting him as defendant attempted to shoot him.

Defendant then proceeded down the hallway where the plant management offices were located. He began to fire shots into each office as he walked down the hallway. Larry Cogdill was in an office that he shared with Gerald Allman and Herb Welsh. Cogdill looked

out and saw defendant coming down the hallway and slammed the office door shut. Defendant turned the door handle and opened the door slightly until Cogdill slammed his body against the door to keep defendant out. Defendant then shot through the door, with one bullet striking Cogdill in the arm. Cogdill fell to the side and watched as defendant shot holes in the door. At some point, Cogdill was also shot in the leg.

Defendant continued to move down the hallway, shooting into management offices and reloading his gun at least once. Frank Knox, an employee of Dormer Tools, parent company to Union Butterfield, was working in one of the offices. When Knox heard shots being fired, he hid under his desk. Defendant fired three shots through Knox's door, and two of the shots struck Knox in the wrist and chest.

Defendant returned to the office where Cogdill and Welsh were located and fired several more shots through the door. Defendant then entered the warehouse area of the plant. Larry Short then saw defendant standing in a doorway and smoking a cigarette. Short attempted to flag down cars for assistance. When defendant and Short made eye contact, defendant raised his gun and began firing at Short. Short ducked, ran, and then dove and rolled out of defendant's sight. Soon after, defendant surrendered to the Asheville police.

While in police custody, defendant stated, "I got fired. Damn it. I got set up. They drove me crazy out there." Furthermore, when the arrest warrants for the murders were served upon defendant, he pointed to one of the victims' names on the warrant and stated, "That's the son of a bitch that fired me." While looking at another warrant, defendant stated, "That's a troublemaker. He's made my life hell since I've worked there." Finally, while looking at the warrant for the murder of Frank Knox, defendant stated that he did not remember him.

I.

[1] First, defendant contends that the trial court committed reversible error in excusing prospective jurors for cause based on their beliefs regarding the death penalty. Defendant argues that the trial court's ruling denied defendant his rights to a fair and impartial jury, to due process of law, and to freedom from cruel and unusual punishment. We do not agree.

The standard for determining whether a prospective juror may be excused for cause for his or her 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). Prospective jurors with reservations about capital punishment must be able to " 'state clearly that they are willing to temporarily set aside their beliefs in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986)). 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 trial court did not abuse its discretion by excusing the prospective jurors for cause. Our review of the record indicates that each of the prospective jurors excused for cause stated that he or she would be unable to follow the law and recommend a sentence of death, even if that was what the facts and circumstances suggested. Defendant has pointed to nothing in the record to support his contention. Accordingly, we hold that the trial court did not err in allowing the State's challenges for cause of the prospective jurors. This assignment of error is overruled.

II.

[2] Next, defendant contends that the trial court erred in conducting an *ex parte* hearing concerning defendant's competency evaluation in the absence of defendant and defense counsel. Defendant argues that he suffered prejudice when the State allegedly handpicked the forensic psychiatrist to evaluate his competency to stand trial, moved the site of the evaluation from Central Prison to Dorothea Dix Hospital, and subsequently utilized the results of that evaluation to cross-examine the defense's psychiatric expert. Specifically, defendant argues that this procedure violated: (1) his unwaivable right to presence at every stage of his capital proceeding and to confront the witnesses against him pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina

Constitution; (2) his right to a true, complete, and accurate record of the proceedings pursuant to N.C.G.S. § 15A-1241; and (3) his right to counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. Defendant also argues that the cumulative effect of the denial of these rights operated to deprive him of his rights to due process of law. We do not agree.

On 16 October 1995, the State filed a motion for an order directing Dr. Robert Rollins, director of forensic psychiatry at Dorothea Dix Hospital, to examine defendant and prepare a written report describing the state of defendant's mental health. Pursuant to statutory mandate, Judge Loto G. Caviness conducted a hearing on the motion. At the hearing, defendant appeared through counsel. The hearing transcript indicates that both the prosecutor and defense counsel expressed concerns for defendant's capacity to stand trial. After this hearing, defense counsel requested and received an *ex parte* hearing with the trial court. Following these hearings, the trial court entered an order directing defendant's transfer to Central Prison and evaluation by Dr. Rollins of the Dorothea Dix forensic unit. At defendant's request, this order limited the examination to the issue of defendant's competency to stand trial.

Subsequently, on 19 December 1995, Judge Dennis J. Winner entered an "Order to Move Defendant And Assign Specific Forensic Evaluator." In this order, Judge Winner referred to the 16 October 1995 order and explained that

> Dorothea Dix Hospital, Amy Taylor, Forensic Case Analyst, has requested a Court Order assigning Dr. Nicole Wolfe as the forensic evaluator. Ms. Taylor has further requested that the Defendant James Floyd Davis be moved to Dorothea Dix Hospital so that his evaluation can be completed.

Defendant contends that this order was entered after an *ex parte* hearing between the trial court and the prosecutor.

First, we will address defendant's contention that his constitutional right to presence was violated. In *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991), this Court was asked to determine whether defendant's federal and state constitutional rights were violated by conducting bench conferences with defense counsel and counsel for the State outside of defendant's presence. As this Court noted, "the essential characteristic of defendant's constitutional right

to presence is just that, his actual presence during trial." *Id.* at 219, 410 S.E.2d at 842. The Court concluded that defendant's state constitutional right to presence is not violated by such conferences "unless the subject matter of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend." *Id.* at 223-24, 410 S.E.2d at 845.

Here, defendant asserts that his right to presence was violated by an *ex parte* hearing concerning his competency evaluation which resulted in the entry of an amended order. First, we note that it is not clear from the record whether an *ex parte* hearing actually occurred. Although an amended order was entered by the trial court, it does not indicate that the State took part in a hearing. In fact, the amended order states that a case analyst at Dorothea Dix Hospital requested a court order assigning Dr. Nicole Wolfe as the forensic evaluator and transferring defendant to Dorothea Dix Hospital. Thus, the amended order appears to be entered upon motion of the hospital, not the State.

Further, the purpose of a competency evaluation is to determine whether defendant is competent to stand trial for the charged offense. N.C.G.S. § 15A-1001 (1997). This determination does not implicate defendant's confrontation rights and does not have a substantial relation to his opportunity to defend. In fact, the competency evaluation is to ensure that a defendant is able "to understand the nature and object of the proceedings against him" before he is "tried, convicted, sentenced, or punished for a crime." *Id.* For the foregoing reasons, we hold that defendant's state constitutional right to presence was not violated by the entry of this amended order.

[3] Similarly, defendant's federal constitutional claim is without merit. In *Buchanan*, this Court noted that "the United States Supreme Court has addressed the question of whether defendant has a federal constitutional right to presence in terms of whether the conference at issue involves either the receipt of evidence without an opportunity for cross-examination or the usefulness of defendant's presence in assuring fairness in the proceeding." *Buchanan*, 330 N.C. at 211-12, 410 S.E.2d at 837. Although, unlike the present case, *Buchanan* involved a bench conference, the same analysis applies. There is no proof that an actual proceeding took place, and even if it had, it did not deny defendant an opportunity for cross-examination or necessitate his presence to assure fairness in the proceedings.

[4] Defendant has also failed to establish that the trial court violated N.C.G.S. § 15A-1241 by conducting a hearing without recording the proceedings. First, as noted above, there is nothing in the record which suggests that the trial court conducted a hearing concerning the hospital's request to amend the order. Second, a full record exists concerning the hearing on the State's motion for a competency evaluation. The order entered by the trial court on 16 October 1995 contains all required findings. The modified order entered on 19 December 1995 recites that the hospital requested a change in the forensic evaluator and defendant's relocation. Thus, there is a sufficient record for appellate review.

[5] Defendant also contends that he suffered a deprivation of his right to counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. The Sixth Amendment, which is made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. The parallel provision of the North Carolina Constitution, Article I, Section 23, tracks this language. The Sixth Amendment ensures that the accused " 'need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.' " *Estelle v. Smith*, 451 U.S. 454, 470, 68 L. Ed. 2d 359, 373 (1981) (quoting *United States v. Wade*, 388 U.S. 218, 226-27, 18 L. Ed. 2d 1149, 1157 (1967)). Once again, there is no proof that an actual proceeding took place. Further, the amended order does not affect defendant's right to a fair trial.

[6] Finally, because we have found no violation of defendant's constitutional or statutory rights, defendant's argument that the cumulative effect of the denial of these rights operated to deprive him of his rights to due process of law is without merit. Accordingly, this assignment of error is overruled.

III.

[7] Defendant next contends that his Sixth Amendment right to counsel was violated when the trial court ordered a competency evaluation by a forensic evaluator but declined to allow defense counsel to be present during the examination. Defendant argues that defense counsel's presence would have demonstrated the unreasonable and irrational manner in which defendant related to people and also

would have helped defense counsel in preparing to cross-examine Dr. Wolfe concerning her examination. We disagree.

As noted above, the Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. In *Estelle*, the United States Supreme Court determined that defendant's Sixth Amendment right to counsel had attached when he was examined by a psychiatrist. In making the decision whether to proceed with a psychiatric examination, the Court held that "a defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.' " *Estelle*, 451 U.S. at 471, 68 L. Ed. 2d at 374 (quoting *Powell v. Alabama*, 287 U.S. 45, 69, 77 L. Ed. 158, 170 (1932)). However, the Court noted:

> Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination."

Id. at 470 n.14, 68 L. Ed. 2d at 374 n.14 (quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979)).

For the same reasons, we hold that defendant had no constitutional right to have counsel present during his competency evaluation. Here, Dr. Wolfe testified that defense counsel's presence would interfere with the process. She stated that

> [defendant's] concerns about his attorney were the main reason I found him incompetent when I last saw him at Dix, and those are questions that I want to be asking him about, and I think he'd be more likely to tell me about dissatisfaction with his attorneys if they're not present.

Further, it was upon motion of defense counsel that defendant was committed to Dorothea Dix Hospital for examination of his capacity to proceed and sanity. Accordingly, this assignment of error is without merit.

IV.

[8] Next, defendant contends that the trial court erred in finding that defendant had the capacity to proceed to trial. Defendant argues that there was insufficient evidence to support any of the three prongs of the competency test contained in N.C.G.S. § 15A-1001(a).

N.C.G.S. § 15A-1001(a) sets forth the standard for measuring capacity as follows:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

N.C.G.S. § 15A-1001(a). "[This] statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed." *State v. Shytle*, 323 N.C. 684, 688, 374 S.E.2d 573, 575 (1989).

In the present case, defendant was given a competency test on 3 June 1996. Dr. Nicole Wolfe, an expert in the field of forensic psychiatry, testified that she first examined defendant at Dorothea Dix Hospital in January 1996. Following physical examinations, laboratory studies, psychological tests, and a review of defendant's medical records, Dr. Wolfe formed an initial impression that defendant suffered from post-traumatic stress disorder. She also diagnosed defendant as having a schizotypal personality disorder. Subsequently, defendant became increasingly anxious and agitated. On 23 April 1996, Dr. Wolfe determined that defendant was unable to converse in a coherent manner and was incapable of proceeding to trial at that time.

Dr. Wolfe did not see defendant from 23 April 1996 until 3 June 1996 when she met with him at the Buncombe County jail. At that time, defendant expressed distrust of his attorneys. However, Dr. Wolfe testified that defendant appeared to be doing fairly well on the prescribed medications. She also testified that she questioned defendant about his relationship with his attorneys. Dr. Wolfe stated that although defendant exhibited paranoid ideas about his attorneys, he indicated that he had been able to speak with them about his case. She discussed the possibility that defendant might want to obtain different counsel, but defendant declined to do that, stating that he "didn't want to start over."

Dr. Wolfe subsequently testified that when she examined defendant on 3 June 1996, he appeared to understand her explanation of the difference between the question of competency to stand trial and the question of insanity. In Dr. Wolfe's opinion, defendant was capable of

proceeding to trial. She testified that defendant possessed the ability to understand the nature and extent of the charges against him and also possessed the ability to aid and assist his attorneys in his defense. Dr. Wolfe further testified that defendant understood the nature and purpose of the court proceedings, as well as the seriousness of the charges against him. Dr. Wolfe stated that she believed defendant possessed the ability to understand his legal rights and the capacity to give relevant testimony. Dr. Wolfe also testified that the main reason she found defendant incapable of proceeding in April was his paranoia against his attorneys. Based upon the testimony presented at the competency hearing, the trial court concluded that "[defendant] does possess the capacity to proceed to trial at this time" and ordered that the matter proceed to trial.

Defendant now asserts that the record fails to support the trial court's conclusion and that he suffered prejudice when the trial court ordered him to proceed. However, after reviewing the testimony presented at the competency hearing, we do not agree. As noted above, N.C.G.S. § 15A-1001 sets forth the standard for determining capacity to proceed. The evidence must demonstrate that defendant is capable of: (1) understanding the nature and object of the proceedings against him, (2) comprehending his own situation in reference to the proceedings, and (3) assisting in his defense in a rational and reasonable manner. N.C.G.S. § 15A-1001. Dr. Wolfe's testimony clearly indicates that defendant met each prong of the competency test. The trial court properly concluded that defendant possessed the capacity to proceed to trial. Accordingly, this assignment of error is overruled.

V.

[9] Next, defendant contends that the trial court committed error in allowing the State's opening statement and closing argument to include matters outside of the record. Specifically, defendant contends it was error for the State to argue that defendant understood his rights, because the jury may infer defendant's mental competence based upon the exercise of his constitutional rights.

Arguments of counsel are left largely to the control and discretion of the trial judge, and counsel is allowed wide latitude in the argument of hotly contested cases. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Further, the remarks are to be viewed in the context in which they are made and the overall factual circumstances to which they refer. *State v. Womble*, 343 N.C. 667, 692-93, 473

S.E.2d 291, 306 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 719 (1997). Where, as here, defendant failed to object to the arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair. *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

In the present case, during her opening statement to the jury, the prosecutor told the jury that defense counsel will "tell you how [defendant] appeared to understand his rights when they were read to him." The prosecutor continued by stating that the jury would hear defendant's comments to law enforcement officers after the arrest warrants were read to him. Further, during closing arguments, the prosecutor stated:

> I told you in my opening everything that would happen and who would tell you what happened in the break room. And I told you how the defendant acted after he murdered those men, how he held that gun by the trigger guard with his little finger and threw it out so the police didn't shoot him graveyard dead.
>
> And you did hear everything I told you you would hear? I told you [that] you would hear how he understood his rights and when those police officers said, Throw out your weapons and we won't shoot you, after he said, Don't shoot me, and he complied and they did not shoot him.

Defendant asserts that this argument is not supported by the evidence and implies to the jury that it may infer defendant was competent based upon the exercise of his constitutional rights. Defendant cites *Wainwright v. Greenfield*, 474 U.S. 284, 88 L. Ed. 2d 623 (1986), in support of his position. In *Wainwright*, the defendant responded to the officer's *Miranda* warning by stating that he understood his rights and by requesting an attorney. In closing arguments, and over defense counsel's objection, the prosecutor made the following argument:

> He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say "what's going on?" No. He says "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again on [sic] occa-

> sion of a person who knows what's going on around his surroundings, and knows the consequences of his act . . . . And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley—He's down there. He says, "Have you been read your Miranda rights?" "Yes, I have." "Do you want to talk?" "No." "Do you want to talk to an attorney?" "Yes." And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant . . . .
>
> So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.

Id. at 287 n.2, 88 L. Ed. 2d at 627 n.2.

However, the present case is distinguishable from *Wainwright.* Here, the prosecutor never directly asked the jury to use defendant's statements to law enforcement officers in determining defendant's competence or sanity. The prosecutor's comments also did not indicate that defendant exercised his right to counsel or silence as was the case in *Wainwright.* Further, unlike in *Wainwright,* defense counsel did not object to the prosecutor's argument. Finally, prior to the prosecutor's closing arguments, the trial court in the case *sub judice* instructed the jury as follows:

> I will tell you at this point and I will tell you again when I instruct you on the law that you are to apply that if during the course of their arguments one of the lawyers states the evidence a certain way and you recall it differently, one of your duties as a juror is to be guided by your own recollection of the evidence. That's why we've sat here and you've listened to all this evidence as it's being presented.

When taken in context, the remarks about which defendant complains were not so grossly improper as to require the trial court to intervene *ex mero motu.* Accordingly, this assignment of error is overruled.

VI.

[10] Defendant also contends that the trial court erred in admitting certain evidence about the victim Tony Balogh. Defendant argues that the evidence admitted pertained to the victim's character and temperament and is irrelevant to any issue at the guilt phase of the trial.

During direct examination of Debbie Medford, a Union Butterfield employee and the victim's co-worker, the following exchange occurred:

> [THE PROSECUTOR]: Describe Tony's [the victim's] temperament.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [MEDFORD]: Tony was—he was a good listener. He was an easy person to work with. He had a lot of concern for the employees at work. He was involved with everybody that worked there. He had an open-door policy. Anytime—
>
> [DEFENSE COUNSEL]: Objection, Your Honor. This is not responsive to the question.
>
> THE COURT: Well, sustained. I believe she's gone beyond the next question.

The trial court later stated that it was overruling defense counsel's objection "to what's already been testified to."

> Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992). We have said that "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

State v. Macon, 346 N.C. 109, 115, 484 S.E.2d 538, 541 (1997).

Here, evidence concerning Tony Balogh is relevant in showing the circumstances of the Union Butterfield shootings. A review of the record demonstrates that defendant contended that the victims were not willing to assist him with his difficulties and, indeed, tried to "ruin" him. Thus, the prosecution was properly permitted to present evidence of Tony Balogh's temperament and management style in order to prove the circumstances of the crime, and the evidence introduced was in fact relevant.

Defendant also argues that this error was compounded by the trial court's instruction that the jury could consider evidence from

the guilt phase during its penalty phase deliberations. The trial court instructed the jury that

> [t]here is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All the evidence which you have heard in both phases of the case remain[s] competent for your consideration and recommending punishment.

As noted above, it was not error for the trial court to admit the evidence during the guilt phase; therefore, its reconsideration during the sentencing phase is also proper.

Finally, defendant contends that even if the testimony was relevant, any minimal probative value was outweighed by the danger of unfair prejudice. However, we do not agree. The testimony presented by Medford was relevant testimony and did not unduly prejudice defendant. This assignment of error is without merit.

VII.

[11] Next, defendant contends that the trial court erred in admitting hearsay evidence of what victim Tony Balogh and defendant said in a meeting two days prior to the murders. Defendant argues that much of the testimony constituted hearsay and that all of the challenged evidence proved only the victim's good character.

During direct examination by the State, Debbie Medford testified regarding defendant's dismissal conference attended by both Medford and Balogh as follows:

> James [defendant] came in. And he was nervous, a little tearful. He told us that he had missed us, that he was glad to be there, he was glad to see us. He sat down. And Tony told him, he said, "James, I'm sorry. But I'm going to have to terminate your employment."

Defense counsel objected to this testimony, and the trial court subsequently overruled the objection. Medford then continued her testimony in response to an instruction from the prosecutor:

> I can't remember word for word the things that were said. I know that James told him right away that he had gone to the Employee Assistance Program. He wanted him to know that he had done that. And he asked him was there anything that he could do to keep his job.

After Medford's testimony concerning the dismissal conference, the trial court denied defendant's motion to strike.

As we have previously stated, the State is entitled to prove the circumstances of the crime and to introduce evidence tending to support the theory of the case. *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990). Here, the conversation between Balogh and defendant showed the circumstances of the crime, particularly the motive for the killings. This crime was committed at defendant's former place of employment, and his victims were former co-workers. The fact that Balogh terminated defendant's employment two days prior to the murder is clearly relevant to show the motive for the crime. Thus, the trial court properly admitted Medford's testimony concerning the dismissal conference.

[12] Defendant also contends that much of Medford's testimony constitutes hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). Here, the State never offered Balogh's or defendant's statements to prove the truth of the matter asserted. Rather, the statements were offered to prove defendant's motive for the crime. Thus, the trial court did not err in admitting Medford's testimony regarding the conversation between Balogh and defendant at defendant's dismissal conference.

[13] Finally, defendant contends that even if the testimony was relevant, any minimal probative value was outweighed by the danger of unfair prejudice. However, we do not agree. As noted above, the testimony presented by Medford was highly relevant to the motive of the case and did not unduly prejudice defendant. This assignment of error is without merit.

VIII.

[14] Next, defendant contends that the trial court erred by allowing State witnesses Howard Reece, Larry Cogdill, and Helen Pittman to read into the record their prior written statements. Defendant argues that the pretrial statements are inadmissible hearsay admitted under the guise of corroboration. We do not agree.

As previously noted, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). Here, the prior statements were not offered to

prove the truth of the matter asserted, but rather to bolster the testimony given by Reece and Cogdill. "The wide latitude which this jurisdiction grants to the admission of [prior consistent statements] is set forth in recent decisions which state the rule that prior consistent statements are admissible even when the witness has not been impeached." *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). This Court has previously stated that

> "prior statements of a witness can be admitted as corroborative evidence if they tend to add weight or credibility to the witness' trial testimony. New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony."

State v. Francis, 343 N.C. 436, 439, 471 S.E.2d 348, 350 (1996) (quoting *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991)) (citations omitted). Here, the statements were given by the witnesses immediately after the shooting occurred. Thus, they were the witnesses' present-sense impressions and added weight and credibility to the witnesses' trial testimony.

[15] At trial, defense counsel objected to the reading of the prior statements of Reece and Cogdill, but failed to object to the reading of Pittman's statement. The objection was a general objection to the reading of the statements. Also, for the first time on appeal, defendant has specified statements within each pretrial statement which he claims are prejudicial: the statement of Cogdill that "someone yelled it was James, and apparently everyone figured that Davis would do something foolish after he was fired"; the statement of Reece that "[w]ithin seconds, for no apparent reason, he fired and shot Gerald Allman"; and the statements of Pittman that she "felt like he was out to get revenge and was probably targeting employees both in management and in the warehouse" and that "folks knew that he was going to come back some day and do something." None of these statements was specifically objected to at the time of its reading into the record.

Having not objected to this evidence at trial, defendant alleges this error for the first time on appeal under the plain error rule. The plain error rule holds that the Court may review alleged errors affecting substantial rights even though defendant failed to object to the admission of the evidence at trial. *State v. Cummings*, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997), *cert. denied*, — U.S. —,

139 L. Ed. 2d 873 (1998). This Court has chosen to review such "unpreserved issues for plain error when Rule 10(c)(4) of the Rules of Appellate Procedure has been complied with and when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *Id.* at 313-14, 488 S.E.2d at 563. The rule must be applied cautiously, however, and only in exceptional cases 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.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error. *Id.* at 661, 300 S.E.2d at 378-79.

A review of the evidence in the present case reveals that this is not the exceptional case where such a pervasive defect or plain error occurred which would have tainted all results and denied defendant a right to a fair trial. Accordingly, this assignment of error is without merit.

IX.

[16] Next, defendant contends that his constitutional right to confront his accusers with evidence was violated by the trial court's exclusion of a jail nurse's opinion of defendant's mental condition. We disagree.

Jail nurse Pat Orsban was one of the first medical personnel to evaluate defendant after the shootings upon his admission to the jail. Orsban testified that for about fifteen to twenty minutes, he was in close proximity to defendant and observed that defendant appeared very upset, with rapid speech and mood swings. Based on these visual observations, Orsban circled the term "mentally disturbed" on the jail screening form. Orsban's opinion based on this visual perception is not disputed. However, at trial, defense counsel attempted to elicit a psychiatric diagnosis of defendant's mental condition from Orsban. During defense counsel's questioning of Orsban, the following exchange took place:

> Q. Mr. Orsban, as a result of your training as a nurse, your years of experience, your time at Copestone, are you familiar with the term "psychotic"?

A. Yes.

Q. Do you know what that means?

A. Yes.

Q. Do you know what someone who is psychotic looks like?

A. Most of the time.

Q. Based on the time that you saw [defendant] May the 17th, do you have an opinion as to whether he appeared to be psychotic to you?

[PROSECUTOR]: Objection.

THE COURT: Well, sustained.

We disagree that the exclusion of Orsban's opinion violated defendant's constitutional rights to confront his accusers with evidence. Rule 701 establishes the standard for a lay witness' testimony:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1992). The question posed by defense counsel called for Orsban, a lay witness, to make a psychiatric diagnosis of defendant's mental condition. Orsban was not an expert witness, and no foundation had been laid to show that he had the expertise to make such a psychiatric diagnosis. While it may have been appropriate for Orsban to make a general observation that defendant appeared to be "mentally disturbed" upon admission to jail, it was beyond Orsban's ability as a lay witness to make a specific psychiatric diagnosis of defendant's being "psychotic." Thus, this assignment of error is overruled.

X.

[17] Defendant also contends that the trial court committed plain error by instructing defendant on his right to testify on his own behalf. Defendant argues that the trial court's instructions overstated the permissible scope of cross-examination to which defendant might be subjected. Thus, defendant contends that the trial court's instructions impermissibly chilled defendant's right to testify.

Defendant cites to *State v. Autry*, 321 N.C. 392, 364 S.E.2d 341 (1988), as support for his position. In *Autry*, this Court held that the following instruction constituted error:

> [The prosecutor] could, on good faith, ask you about prior misconduct, whether it resulted in convictions in court if they had some good faith reason to ask those questions, and you would be under oath to answer the questions truthfully.

Id. at 402, 364 S.E.2d at 347. This Court stated that "[t]he trial court, though it made an admirable and lengthy effort to explain to defendant his various options, clearly, as to one part, gave instructions inconsistent with Rule 608(b) and therefore committed error." *Id.* at 403, 364 S.E.2d at 347. However, this Court concluded that the error was harmless beyond a reasonable doubt based upon the overwhelming evidence of defendant's guilt. *Id.* The Court further stated:

> We hold that, here, where the trial court's error in its instructions to defendant was insulated by defendant's access to and actual conference with his attorney, the trial court's instructional error is harmless beyond a reasonable doubt.

Id. at 404, 364 S.E.2d at 348.

Here, the trial court did not make the error discussed in *Autry*. Instead, the trial court correctly instructed defendant on the general rules which guide cross-examination. As this Court has previously noted, " '[t]he bounds of cross-examination are limited by two general principles: 1) the scope of cross-examination rests within the sound discretion of the trial judge; and 2) the questions must be asked in good faith.' " *State v. Larry*, 345 N.C. 497, 523, 481 S.E.2d 907, 922 (quoting *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992)), *cert. denied*, — U.S. —, 139 L. Ed. 2d 234 (1997). In the present case, the trial court did not attempt to give defendant detailed instructions concerning the scope of cross-examination and did not give an instruction inconsistent with any of the Rules of Evidence. Further, as demonstrated by the following exchange, defendant had discussed the consequences of testifying with his attorneys:

> THE COURT: Mr. Hufstader, Ms. Burns [defense counsel], I take it you have advised your client about his right to testify and have discussed that with him?
>
> MR. HUFSTADER: We have previously.

THE COURT: I just want Mr. Davis—Mr. Davis, can you hear me, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed with your lawyers whether or not you would want to testify in this matter?

THE DEFENDANT: I have.

THE COURT: Do you understand that you have the absolute right to testify, but if you do that you would be subject to cross-examination on a very wide matter of subjects, subject only to the discretion of the Court and the relevancy of this matter? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You've elected not to testify.

THE DEFENDANT: I elected not to testify.

Accordingly, we hold that the trial court did not err in its instructions regarding the scope of cross-examination and, thus, did not impermissibly chill defendant's right to testify. This assignment of error is overruled.

XI.

[18] Next, defendant contends that the trial court erred by failing to dismiss the charge of first-degree murder of Frank Knox based upon the insufficiency of the evidence. Defendant argues there was no evidence from which the jury could find that defendant possessed the specific intent to kill Knox, or any other person. We disagree.

Defendant argues that there is no evidence that defendant bore any malice toward Knox. In his brief, defendant points out that there was no evidence that he knew Knox and that Knox was not present at the dismissal conference discussed above. Defendant notes that when Detective Romick was reading the arrest warrants to defendant, defendant indicated that he knew and was angry at Balogh and Allman, but when defendant was read his third warrant, he said he did not remember Frank Knox. Essentially, defendant's argument appears to be that he had no motive to murder Knox. However, motive is not an element of first-degree murder. *State v. Van Landingham*, 283 N.C. 589, 600, 197 S.E.2d 539, 546 (1973).

Because a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill. *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983). In discussing premeditation and deliberation, this Court has stated that

> [p]remeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982).

State v. Brown, 315 N.C. 40, 58, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Here, the evidence showed that defendant purchased a semiautomatic weapon the morning of the killings. Defendant then drove to the Union Butterfield facility and killed Balogh and Allman in the break room. He then proceeded down the hallway of management offices, firing shots into the offices as he made his way down the hall. Knox was working at his desk at the time and dove underneath the desk to avoid the shots. As Knox lay behind and underneath his desk, defendant fired at least three rounds through the office door. One round penetrated Knox's wrist and proceeded through his body. After the killings, while his victims bled to death, defendant stood in the doorway of the facility, smoking a cigarette as if nothing had happened. Further, there was no evidence presented that Knox provoked defendant before defendant shot him. Finally, based on the doctrine of transferred intent, as discussed below, a jury could reasonably find that defendant formed the requisite premeditation and deliberation required under first-degree murder. Accordingly, this assignment of error is overruled.

XII.

[19] Next, defendant contends that the trial court committed plain error in its instructions on lack of mental capacity as a factor tending to negate the specific intent required for first-degree murder.

Defendant argues that the instructions regarding the murder of Knox were clearly erroneous, thus entitling him to a new trial. We do not agree.

In the present case, the trial court instructed the jury on the diminished-capacity defense as follows:

> Members of the jury, you would also consider the charge of first degree murder as it relates to Mr. Frank Knox. Members of the jury, the burden of proof is on the State. And they would have to prove beyond a reasonable doubt each of the elements as I have explained those to you as it relates to Mr. Knox. The defense contends that he shall—that the defendant, Mr. Davis, should be found not guilty of first degree murder by lack of diminished capacity as I've previously instructed you on that. That is, he could not form the specific intent required of first degree murder. If you so find, then you would consider second degree murder. And you would also consider the charge of second degree murder if you have a reasonable doubt as to one or more of the things which the State must prove.

Defendant concedes that he did not object to these instructions at trial. Accordingly, defendant is not entitled to any relief unless any error constituted plain error. *See Odom*, 307 N.C. at 659-60, 300 S.E.2d at 378. We have previously explained that plain error is that error in the instructions which is "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Having reviewed the trial court's instructions on lack of mental capacity under this standard, we find no plain error. Defendant contends there are three separate errors with regard to the trial court's instruction. First, the trial court erred by using the phrase "lack of diminished capacity" as opposed to "lack of mental capacity." Second, the reference "as I've previously instructed you on that" reinforced the error in the diminished-capacity instructions given earlier. Third, the jury was told that if it found that defendant could not form the specific intent to commit first-degree murder, then it could *consider* second-degree murder.

First, the trial court's use of the phrase "lack of diminished capacity" appears to be a mere *lapsus linguae*. As we have previously

stated, "a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction." *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994). Here, although the trial court used the term "diminished capacity," it correctly defined the defense by stating that it exists if defendant "could not form the specific intent required of first degree murder." Accordingly, when read contextually, the instructions properly conveyed to the jury what it must find for the defense to apply. Further, the trial court's previous instructions, contrary to defendant's assertions, appear to be correct.

[20] Finally, defendant contends that the trial court instructed the jury that if it found defendant could not form the specific intent for first-degree murder, then it *could* consider second-degree murder. However, the trial court properly instructed that if the jury found defendant could not form the specific intent required for first-degree murder, then it "*would* consider second degree murder." (Emphasis added.) Thus, the trial court properly conveyed the mandatory nature of this instruction. Having reviewed the trial court's instructions on lack of mental capacity, we find no error, much less plain error. This assignment of error is overruled.

XIII.

[21] Next, defendant contends that the trial court committed plain error in its instructions concerning defendant's diminished-capacity defense with regard to the murder of Tony Balogh. Specifically, defendant argues that the instructions improperly gave the jury the option of finding defendant not guilty if it found that he lacked the mental capacity to commit murder, rather than requiring such a verdict.

The trial court gave the following instructions to the jury with regard to the murder of Balogh:

> Now, as to the charge of first degree murder, the defendant[] contend[s] that the defendant should be found not guilty because he lacked the mental capacity at the time of the acts alleged in this case. If you find that there is evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case, you may find him not guilty of first degree murder. However, if you find that the defendant lacked mental capacity, you should consider whether this condition affected his

> ability to formulate the specific intent which is required for conviction of first degree murder. In order for you to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he killed the deceased, in this case Mr. Balogh, with malice and in the execution of an actual specific intent to kill formed after premeditation and deliberation as I have defined those terms to you. If as a result of the lack of mental capacity the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, he is not guilty of first degree murder. Therefore, I charge that if upon considering evidence with respect to the defendant's lack of mental capacity you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first degree murder, you would not return a verdict of guilty of first degree murder. Now, if you so find you would then consider whether the defendant is guilty of second degree murder.

Once again, defendant concedes that he did not object to these instructions at trial. Accordingly, we must determine whether the instructions constitute plain error. Defendant contends that the trial court's use of the phrase "you may find him not guilty of first degree murder" was ambiguous. He argues that this impermissibly gave the jurors the option of finding defendant not guilty of first-degree murder if they found that he lacked the mental capacity necessary, rather than requiring them to find him not guilty.

" '[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " *State v. Holden*, 346 N.C. 404, 438, 488 S.E.2d 514, 533 (1997) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973)), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 132 (1998). " '[I]n determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments.' " *Id.* (quoting *State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981)).

When read in context, the instructions correctly stated the jurors' obligations in determining lack of mental capacity. After stating that the jury "may find him not guilty of first degree murder" if defendant lacks mental capacity, the trial court proceeded to explain to the jury what constituted a lack of mental capacity with regard to first-degree murder. The trial court noted that the jury should consider whether defendant's lack of capacity "affected his ability to formulate the spe-

cific intent which is required for conviction of first degree murder." It was not error for the trial court to qualify what lack of capacity meant in this context. Only if the jury found that defendant could not formulate the required specific intent could it find defendant not guilty of first-degree murder based upon lack of mental capacity. The trial court properly concluded that "if upon considering the evidence with respect to the defendant's lack of mental capacity you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first degree murder, you would not return a verdict of guilty of first degree murder." Thus, when read contextually, the instructions do not amount to error, much less plain error. Accordingly, this assignment of error is without merit.

XIV.

[22] Defendant also contends that the trial court erred by instructing the jury on the doctrine of transferred intent with regard to the murder of Frank Knox. Defendant argues that there was insufficient evidence to support such an instruction and that the instruction itself was flawed. We disagree.

Under the doctrine of transferred intent:

> It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that "[t]he malice or intent follows the bullet." 40 Am. Jur., 2d Homicide, § 11, p. 302 [(1968)].

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (citations omitted).

First, defendant argues that the evidence does not support an instruction on transferred intent. In the present case, all of the management offices were located down one hallway. Larry Cogdill, an employee of Union Butterfield, testified that defendant headed straight for that hallway upon entering the building. Once there, he fired into the door of the office that Cogdill shared with Gerald Allman and Herb Welsh. Mary Zellers testified that she was hiding inside the company president's office when defendant fired through the door. Debbie Medford, the personnel administrator of the com-

pany, testified that she was able to escape from her office before defendant reached that end of the hall. In statements to law enforcement officials, defendant stated that the people at Union Butterfield had "ruined" him. He claimed that they had set him up and fired him. Upon his arrest, defendant commented as to one of the victims, "That's the son of a bitch that fired me." Defendant commented about another victim, "That's a troublemaker. He's made my life hell since I've worked there." This evidence demonstrates that defendant's actions were aimed at employees of Union Butterfield, particularly those who were involved in management. Because Knox was working inside management's offices during the shooting, the evidence is sufficient to support the transferred-intent instruction given by the trial court.

[23] Defendant also argues that the instruction on transferred intent was flawed because "it did not specify any intended victim toward who[m] the defendant's malice and intent to kill were allegedly directed." Defendant again concedes that he did not object to these instructions at trial. Accordingly, defendant is not entitled to any relief unless any error constituted plain error. *See Odom*, 307 N.C. at 659-60, 300 S.E.2d at 378.

In the present case, the trial court instructed the jury on transferred intent as follows:

> I would also instruct you on the matter of Mr. Knox that the law is that if a person intends to harm one person and actually harms a different person, the legal effect would be the same as if he had harmed the intended victim. That is, if a killing of an intended person would be with malice, then the killing of a different person is also with malice.

Defendant contends that this instruction is flawed because it does not specify whom the defendant intended to kill.

In discussing the doctrine of transferred intent, this Court has noted that "it is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward *someone*, that intent suffices as the intent element of the crime charged as a matter of substantive law." *State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992) (emphasis added). It is not necessary that the *someone* be named in the trial court's instructions. Here, the evidence indicates that defendant sought revenge from the management of Union Butterfield because of

his allegedly unjustified dismissal. Thus, the jury was properly instructed on the doctrine of transferred intent based on defendant's intent to harm the management of Union Butterfield. Accordingly, this assignment of error is without merit.

CAPITAL SENTENCING PROCEEDING

XV.

[24] Defendant also contends that the trial court erred by allowing hearsay testimony from defendant's sister Violet Bailey during the sentencing proceeding. Specifically, defendant argues that it was error to permit his sister to testify that his mother had told the police that defendant did not suffer any psychological problems from being in the Vietnam War.

During the prosecutor's questioning of Bailey, the following exchange took place:

> Q. Ma'am, on the 17th day of May, the day that James Floyd Davis was arrested, the officers went and talked to your mama about 8:00 that evening. Are you aware of that?
>
> A. No, I don't.
>
> Q. So—
>
> A. I might not even have been there.
>
> Q. You might not have been where?
>
> A. At my mama's.
>
> Q. [So you] don't know if the police were talking to your mama any?
>
> A. I was living in Statesville. I come up that next day. I don't know what time I got there. I don't know if I was there with her or not.
>
> Q. Well, do you remember your mama telling them that James—
>
> [DEFENSE COUNSEL]: Objection. She says she wasn't there, Judge.
>
> THE COURT: Well, sustained.
>
> [THE PROSECUTOR]: I'm not asking about that time. She said she may have been there other times. I'm asking if she remembers her mama telling them something.

THE COURT: Ask the question.

Q. [THE PROSECUTOR] Do you remember some of the times when you were there and your mama talked to the officers and her telling them [defendant] didn't suffer any psychological problems from being in the war?

A. No.

Q. You don't?

[DEFENSE COUNSEL]: Objection.

Q. Don't that—

A. No.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. She said she didn't remember.

Defendant argues that such questions were highly improper and were designed to place before the jury clearly inadmissible hearsay. However, defendant's argument is without merit. No improper testimony was admitted, and the jurors heard defendant's sister deny any knowledge of such conversation. Further, upon defense counsel's objection, the trial court noted that the witness "said she didn't remember." Accordingly, this assignment of error is without merit.

XVI.

[25] Next, defendant contends that he suffered a deprivation of his protection against self-incrimination pursuant to the Fifth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution, as well as his Sixth Amendment right to counsel.

As noted previously, Dr. Wolfe performed a competency evaluation of defendant at Dorothea Dix Hospital. On 23 April 1996, defendant was moved from the hospital to the Buncombe County jail. Subsequently, on 1 May 1996, Dr. Wolfe completed her report and submitted it to the trial court and counsel for both the State and defendant. On 3 June 1996, Dr. Wolfe performed a competency evaluation. Based upon the evidence presented at a subsequent hearing, the trial court concluded that defendant was competent to proceed. On 5 August 1996, defense counsel filed notice of an intent to present a defense of insanity/diminished capacity and to introduce expert testimony relating to a mental disease, defect, or other condition pur-

suant to N.C.G.S. § 15A-959. Also, shortly before trial, defense counsel filed a "Motion to Commit Defendant to Dorothea Dix Hospital for Examination on Capacity to Proceed and Sanity." The motion requested that Dr. Wolfe reevaluate defendant to form an opinion concerning the defenses of insanity and diminished capacity.

On 3 September 1996, defense counsel filed an additional motion to commit defendant to Dorothea Dix Hospital. The motion also noted that Dr. McKee, the defense expert, first examined defendant on 20 July 1996 to determine defendant's competency, criminal responsibility, and mitigation. Dr. McKee examined defendant and ultimately testified for the defense during the sentencing proceeding. Among other things, Dr. McKee testified that he had reviewed defendant's records from Dorothea Dix Hospital and also referred to testing which defendant underwent at Dorothea Dix Hospital. Subsequently, Dr. McKee faced cross-examination concerning the contents of defendant's records from Dorothea Dix Hospital. The cross-examination included discussion concerning the possibility that defendant faked his mental illness by producing invalid results on tests performed at Dorothea Dix Hospital as part of the competency evaluation.

First, defendant asserts that the State's cross-examination of Dr. McKee using defendant's statements from the records of his competency evaluation at Dorothea Dix Hospital violated his privilege against self-incrimination. Defendant asserts that the State requested the evaluation to determine competency and then used the results for a different purpose. Defendant cites *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed. 2d 359, in support of his contention. In *Estelle*, the United States Supreme Court found a Fifth Amendment violation when the State, without notice to or knowledge of defense counsel, obtained an order for a competency evaluation of defendant and then utilized the records of that evaluation to prove an aggravating circumstance.

In *Estelle*, the United States Supreme Court noted:

> Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so. Instead, the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death. Respondent's future dangerousness was a critical issue at the sentencing hearing, and one on which the State had the burden of proof beyond a reasonable doubt. To meet its burden, the State used respondent's own statements,

> unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated.

Id. at 466, 68 L. Ed. 2d at 371 (citation omitted).

Here, defendant introduced the reports from Dorothea Dix through his expert witness. Dr. McKee's testimony related to defendant's insanity and diminished-capacity defenses. Unlike *Estelle*, this was not a situation in which the State had the burden of proof. In fact, defendant had the burden of proving the defenses asserted by him.

In *Buchanan v. Kentucky*, 483 U.S. 402, 97 L. Ed. 2d 336 (1987), the United States Supreme Court expanded upon its holding in *Estelle* as follows:

> "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." [*Estelle*, 451 U.S.] at 468, 68 L. Ed. 2d [at 372]. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan, 483 U.S. at 422-23, 97 L. Ed. 2d at 355.

Here, defense counsel participated in the hearing concerning defendant's competency examination and voiced no opposition to the examination so long as the trial court limited the scope of the examination to determining competency. Further, defense counsel then sought to rely on the defenses of insanity and diminished capacity during trial. In forming his opinion, the defense's expert, Dr. McKee, testified that he reviewed defendant's records from Dorothea Dix Hospital and referred to testing done at Dorothea Dix Hospital. Because defendant relied on this evidence at trial, the State should not be foreclosed from also relying on it to rebut defendant's contentions. This is the situation contemplated by *Buchanan*. Accordingly, we hold that defendant's Fifth Amendment right to be free from self-incrimination was not violated by the cross-examination of Dr. McKee.

[26] Defendant also contends that he was deprived of his Sixth Amendment right to counsel when defense counsel was not notified in advance that the information generated from the competency evaluation would be used against defendant in the sentencing proceeding. We believe that *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), controls this issue.

In *Huff*, this Court discussed a similar issue and stated:

> In *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed. 2d 359, the United States Supreme Court also held that the sixth amendment was violated by the State's introduction of a psychiatrist's testimony at the penalty phase of defendant's trial. The defendant had not placed his mental state in issue and his attorney had neither been informed that the order for psychiatric examination had been entered nor did he have notice that the scope of the examination would include a determination of defendant's future dangerousness.
>
> Although defendant asserts that *Smith* controls the outcome in this case, we disagree. Instead, we find that *Buchanan v. Kentucky*, 483 U.S. 402, 97 L. Ed. 2d 336, also states the principles that control our sixth amendment analysis. The defendant in *Buchanan* argued that his right to counsel had been violated under *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed. 2d 359, by the admission of this report. However, the Court held that no right to counsel violation had occurred, and that the fact situation presented in *Smith* was critically different from that presented in *Buchanan*. "In *Smith*, defendant had not received the opportunity to discuss with his counsel the examination or its scope." *Buchanan v. Kentucky*, 483 U.S. at 424, 97 L. Ed. 2d at 356. In contrast, in *Buchanan*, defendant had the opportunity to discuss with counsel the nature of the psychiatric examination; in fact, "counsel himself requested the psychiatric evaluation by . . . [the psychiatrist]." *Id.* In *Buchanan*, the Court said, "It can be assumed—and there are no allegations to the contrary—that defense counsel consulted with petitioner about the nature of this examination." *Id.*

Huff, 325 N.C. at 48, 381 S.E.2d at 662.

Similarly, in the present case, defendant had the opportunity to discuss with counsel the nature of the psychiatric evaluation. Indeed,

as defendant notes in his brief, "defendant's attorneys apparently advised him not to discuss the actual facts of the crimes." Defendant argues that defense counsel had no way of knowing that the examination would be used against defendant during the sentencing proceeding. However, this Court noted in *Huff* that

> "the proper concern of this [Sixth] Amendment" does not focus on the potential uses to which the prosecution might put the psychiatric report but on "the consultation with counsel. . . . Such consultation [with counsel], to be effective, must be based on counsel's being informed about the scope and nature of the proceeding [referring to defendant's examination]. . . . To be sure, the effectiveness of the consultation [between defendant and attorney] also would depend on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put." *Buchanan v. Kentucky*, 483 U.S. at 424-25, 97 L. Ed. 2d at 357. The Court concluded, "Given our decision in *Smith*, however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a 'mental status' defense . . . , he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* at 425, 97 L. Ed. 2d at 357 (footnote omitted).

Huff, 325 N.C. at 48-49, 381 S.E.2d at 662 (alterations in original). Here, as in *Huff*, defense counsel should have anticipated the use of the psychological evidence by the prosecution in rebuttal to any defense involving defendant's mental status. Accordingly, this assignment of error is overruled.

XVII.

[27] Defendant also contends that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing arguments in the sentencing proceeding. Defendant argues that the prosecutor's statements were so prejudicial that a new sentencing hearing is warranted. We disagree.

As noted above, arguments of counsel are left largely to the control and discretion of the trial judge, and counsel is allowed wide latitude in the argument of hotly contested cases. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. Further, the remarks are to be viewed in the context in which they are made and in light of the overall factual circumstances to which they refer. *State v. Hipps*, 348 N.C. 377, 501 S.E.2d 625 (1998). Because defendant did not object to the arguments

at trial, he must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair. *Rose*, 339 N.C. at 202, 451 S.E.2d at 229.

Defendant first asserts that the prosecutor improperly urged the jurors to sentence defendant to death on behalf of the victims. Specifically, defendant complains of the following remarks by the prosecutor:

> And I'm urging you on behalf of [Gerald] Allman, Tony Balogh, and Frank Knox—and, again, you will have this question to answer three times. It's the same question. The same factors will be on each sheet—say, yes, the mitigating is insufficient to outweigh the aggravating. Yes.
>
> . . . .
>
> Now, Mrs. Dreher [the prosecutor] and myself are here to speak on behalf of Tony and Gerald and Frank. The folks you've seen here for the last several weeks, Ms. Knox, Tony's boys, Mr. Knox's children, Gerald's family, they relied on the law for justice, and that's why they're here.
>
> . . . .
>
> I'm asking you to find the aggravating factors. I'm asking you to answer Issue Three and Four "yes." And I'm asking you to on behalf of Gerald, Tony, and Frank to put James Floyd Davis to death.

In *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909, (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 100 L. Ed. 2d 756 (1990), the prosecutor told the jury that "[b]eing a prosecutor is not always a pleasant task, for I speak, Mr. Hobgood speaks for two dead ladies who can not speak." *Id.* at 48, 375 S.E.2d at 918. The *McNeil* Court noted that the prosecutor's statement only reminded the jury that he was an advocate for the two victims and concluded that the argument was not so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu*. *Id.* In the present case, the prosecutor's remarks similarly reminded the jury that he was an advocate for the State and the victim. Further, nothing in the prosecutor's argument ever suggested or implied to the jurors that they should impose

the death penalty because the victims or their families demanded it. Rather, the prosecutor argued for a death sentence because the law and evidence supported it. For example, the prosecutor told the jurors that he spoke for the victims and their families, but noted that the victims' families "relied on the law for justice, and that's why they're here." After reviewing the statements in context, we hold that the trial court did not err by failing to intervene *ex mero motu*.

[28] Next, defendant contends that the prosecutor improperly utilized biblical arguments throughout the closing argument. For example, the prosecutor argued to the jury as follows:

> And while I am talking about life is never worse, I want to talk a little bit about the Bible. Our Supreme Court doesn't want us to make Biblical arguments. And I don't wish to offend juries. But some of you expressed concerns of that nature. And so I want to say this. You may recall that when Jesus was questioned by the Herodians at the behest of the Pharisees when they were trying to trip Jesus up, they asked him, "Is it lawful to pay taxes to Caesar?" And Jesus said, "Let me see the coin you pay with." And he looked at the coin, and he said, "Whose inscription appears on this coin?" And they said, "Caesar's." And Jesus said, "Then render unto Caesar what is Caesar's and unto God what is God's." And for the purposes of this sentencing hearing, James Floyd Davis belongs to Caesar. You all promised that you would apply the law as it exists in North Carolina, the law of the state, and not some other law and not the law as you wish it was.

The prosecutor also argued that " 'God may have mercy on him because God can do what man cannot.' And man cannot appropriately address what he did at that plant on May 17, 1995, without a death sentence." The prosecutor continued to make biblical allusions throughout the closing argument.

In *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), this Court discussed the bounds of biblical arguments as follows:

> In their arguments before the jury, counsel for both sides are entitled to argue the law and the facts in evidence and all reasonable inferences that may be drawn therefrom. Neither the "law" nor the "facts in evidence" include biblical passages, and, strictly speaking, it is improper for a party either to base or to color his arguments with such extraneous material. However, this

> Court has repeatedly noted the wide latitude allowed counsel in arguing hotly contested cases, and it has found biblical arguments to fall within permissible margins more often than not. This Court has distinguished as improper remarks that state law is divinely inspired or that law officers are "ordained" by God.

Id. at 331, 384 S.E.2d at 500 (citations omitted).

In the present case, the prosecutor did not state that the law of this state is divinely inspired or refer to law officers as being ordained by God. In fact, as defendant points out, "the prosecutor's argument is . . . a jumble of biblical allusions and legal catch phrases, and it is difficult to clearly understand exactly what the source of the argument is." After reading the remarks in context, we conclude that they were not so improper as to require intervention by the trial court *ex mero motu*. However, we do urge caution in the use of biblical phrases and allusions. In closing arguments at the sentencing proceeding, it is the prosecutor's duty to convince the jury that the facts and circumstances of the crime warrant the death penalty. It is not the duty of the prosecutor to preach to the jury, especially in such a convoluted manner. Because we conclude that the trial court did not err by failing to intervene *ex mero motu*, this assignment of error is overruled.

XVIII.

[29] Next, defendant contends that the trial court committed plain error by instructing the jury that an M-1 .30-caliber rifle is a deadly weapon. Defendant argues that this instruction relieved the State of its burden of proving each element of the (e)(10) aggravating circumstance, that defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person. N.C.G.S. § 15A-2000(e)(10) (1997).

Defendant concedes that he did not object to these instructions at trial. Accordingly, defendant is not entitled to any relief unless any error constituted plain error. *See Odom*, 307 N.C. at 659-60, 300 S.E.2d at 378.

During the guilt phase of the trial, the trial court instructed the jury on the charge of assault with a deadly weapon with intent to kill inflicting serious injury and the lesser included offense of assault with a deadly weapon inflicting serious injury. In instructing the jury on the elements of these offenses, the trial court noted

that "[a] deadly weapon is a weapon which is likely to cause death or serious bodily injury," and "[a]n M1 .30 caliber carbine is a deadly weapon."

Subsequently, during the capital sentencing proceeding, the trial court instructed the jury regarding the (e)(10) aggravating circumstance as follows:

> Did the defendant knowingly create 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?
>
> The defendant does so if at the time he kills he is using a weapon and the weapon would normally be hazardous to the lives of more than one person and the defendant uses . . . it in such a way as to create a risk of death to more than one person and the risk is great and the defendant knows that he is thereby creating such a great risk.

Defendant relies on *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979), and *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344 (1985), in support of his position that the previous instructions relieved the State of its burden of proving each element of the (e)(10) aggravating circumstance. In *Franklin*, the United States Supreme Court held:

> Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause.

Franklin, 471 U.S. at 325, 85 L. Ed. 2d at 360.

However, the trial court's instructions in the present case did not create a mandatory presumption that shifted the burden of persuasion to defendant. The trial court's instructions at the guilt phase of the trial simply informed the jurors that the carbine rifle constituted a deadly weapon as a matter of law, regardless of the weapon's use. The trial court's instructions concerning the (e)(10) aggravating circumstance focused on totally separate issues. In finding this circumstance, the jury must determine whether the weapon in its normal use is hazardous to the lives of more than one person and whether a great

risk of death was knowingly created. *See State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990). Further, this Court has stated that "[a]s to the weapon, the crucial consideration in determining what type of weapon or device is envisioned by G.S. § 15A-2000(e)(10) is its potential to kill more than one person if the weapon is used in the normal fashion, that is, in the manner for which it was designed. The focus must be upon the destructive capabilities of the weapon or device." *State v. Moose*, 310 N.C. 482, 497, 313 S.E.2d 507, 517 (1984). Thus, the fact that a deadly weapon is used by defendant is not enough to support a finding that the (e)(10) aggravating circumstance exists. Accordingly, the trial court's instructions, contrary to defendant's assertions, did not create a mandatory presumption which shifted the burden of persuasion to defendant.

[30] Defendant also contends that the trial court's instructions violated well-settled principles of North Carolina sentencing law. Defendant argues that the trial court, in its instructions, erroneously utilized evidence of the deadly weapon during the sentencing proceeding because it also relied on the use of the weapon to infer malice during the guilt phase. Defendant cites to *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), to support this proposition. However, *Blackwelder* involved interpretation of the statutory provisions of the Fair Sentencing Act. The statute involved in *Blackwelder* specifically prohibited utilizing evidence necessary to prove an element of the offense to also prove an aggravating factor. *See* N.C.G.S. § 15A-1340.1 to .7 (repealed 1993). The capital sentencing scheme provided for within chapter 15A of the General Statutes contains no such prohibition. In fact, the statute clearly contemplates a sentencing determination by the jury based on the evidence presented during both the guilt and sentencing phases. *See* N.C.G.S. § 15A-2000(a)(3). Accordingly, this assignment of error is overruled.

XIX.

[31] Defendant also contends that the trial court erred by submitting both the N.C.G.S. § 15A-2000 (e)(10) aggravating circumstance, that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person, and the N.C.G.S. § 15A-2000 (e)(11) aggravating circumstance, that the murder was part of a course of conduct in which the defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons. Defendant argues that the

circumstances were based on the same evidence and were inherently duplicative on the facts of this case. We do not agree.

"Aggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them." *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). This Court has held that it is 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).

This Court, in discussing the (e)(11) circumstance, has stated that "[e]vidence that a defendant killed more than one victim is sufficient to support the submission of the course of conduct aggravating circumstance." *State v. Conaway*, 339 N.C. 487, 530, 453 S.E.2d 824, 851, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). Here, the evidence showed that defendant killed three people and injured two others.

Further, in *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (1998), in discussing the (e)(10) aggravating circumstance, this Court stated that

> [t]his 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.

Id. at 468, 496 S.E.2d at 366. Similarly, in the present case, defendant not only sought out the management of Union Butterfield during his shooting spree, but also disregarded the value of every human life in the building as he randomly fired into offices while walking down the hall. This aspect of defendant's character is not fully captured by the (e)(11) aggravating circumstance. Based on the facts and circumstances of this case, there was independent evidence to support each of the circumstances submitted, though some of the evidence may have overlapped. Accordingly, it was not error for the trial court to submit both circumstances.

[32] Defendant also contends that the trial court erred by failing to instruct the jury that it could not utilize the evidence of one aggravating circumstance to prove another. However, once again, defend-

ant did not object to the trial court's instruction at trial. Thus, plain error analysis applies. Here, the trial court properly instructed the jury on both the (e)(10) and (e)(11) aggravating circumstances. While we have stated that "trial court[s] *should* . . . instruct the jury in such a way as to ensure that jurors will not use the same evidence to find more than one aggravating circumstance," *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993) (emphasis added), we have not required that trial courts do so. Having reviewed the instructions, we hold that the trial court did not commit plain error by failing to instruct the jury not to consider duplicative evidence with respect to the aggravating circumstances submitted. This assignment of error is overruled.

XX.

[33] Next, defendant contends that the trial court erred in its instructions to the jury regarding mitigating circumstances. Specifically, defendant contends that "[i]n its initial instructions about statutory mitigating circumstances, the trial court was completely silent about whether those circumstances were deemed by law to have mitigating value." Defendant argues that the instructions given by the trial court allowed the jurors to assign no weight to the statutory mitigating circumstances which the jurors may have found. He also argues that a subsequent instruction by the trial court in response to a question submitted by the jury similarly failed to distinguish between statutory and nonstatutory mitigating circumstances. We do not agree.

Before reviewing defendant's argument, we note that the terms "value" and "weight" which are utilized in separate statutory provisions of our capital sentencing scheme have at times been inadvertently used interchangeably. We take this opportunity to point out the statutory distinction between "value" and "weight" to avoid any misunderstanding in this area of the law. The term "value" is found only in the statutory catchall provision, N.C.G.S. § 15A-2000(f)(9), and has also been applied to nonstatutory mitigating circumstances. The term "weight" or "weighing" is used only in N.C.G.S. § 15A-2000(b)(2) and (3), referring to the process of weighing the mitigating circumstances found against the aggravating circumstances found. In Issue Two, the jury is asked, "Do you find from the evidence the existence of one or more of the following mitigating circumstances?" Under Issue Two, the term "value" is used in the trial court's instructions regarding the statutory catchall, as well as its instructions regarding nonstatutory mitigating circumstances. In both the statutory catchall and non-

statutory mitigating circumstances, the jury is instructed that it must first find that a circumstance has mitigating value before it can answer "yes" to that mitigating circumstance. This is the only portion of our sentencing scheme which involves the term "value."

The term "weight" subsequently comes into play in both Issues Three and Four. In Issue Three, the jury is asked, "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?" The jurors are then instructed that in answering this question, they must weigh the aggravating circumstance or circumstances found against the mitigating circumstance or circumstances found. In Issue Four, the jury is asked, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?" The jurors are then instructed that in weighing the circumstances, they may give more weight to one circumstance than another. "Value" does not enter into either Issue Three or Issue Four.

[34] Having clarified this terminology, we turn now to the issue at hand. In the present case, as to each murder, three statutory mitigating circumstances, twenty-six nonstatutory mitigating circumstances, and the statutory catchall were submitted to the jury. The jury was instructed to determine whether any of these circumstances existed prior to answering Issue Two. The three statutory mitigating circumstances submitted were (1) defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (2) this murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (3) the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). The trial court also submitted the statutory catchall, which provides that the jury may consider "any other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9).

With regard to the first statutory mitigating circumstance submitted, the trial court instructed the jury as follows:

> Now, I would instruct you that the defendant has the burden of proving this and establishing this mitigating circumstance by a

> preponderance of the evidence, as I've explained it to you. Accordingly as to this mitigating circumstance[], I charge that if one or more [of] you have found the facts to be as all the evidence tends to show, you will answer "yes" to the mitigating circumstance number 1 on the Issues and Recommendation form. If none of you find this circumstance to exist, you would so indicate by having your foreperson write "no" in that space.

The trial court gave similar instructions regarding each of the two remaining statutory mitigating circumstances.

Prior to listing the nonstatutory mitigating circumstances individually, the trial court instructed the jury as follows:

> Members of the jury, you will also—should also consider the following circumstances arising from the evidence which you find have mitigating value. If one or more of you find by a preponderance of the evidence that any of the following circumstances exist and also are deemed by you to have mitigating value, you would so indicate by having your foreperson write "yes" in the space provided. If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you can so indicate by having your foreperson write "no" in that space.

Then, after reading each nonstatutory mitigating circumstance, the trial court further instructed that "if one or more of you find the facts to be as all the evidence tends to show *and* if you determine that this circumstance has mitigating value, then you will answer 'yes.' " (Emphasis added.)

Finally, the trial court instructed the jury on the statutory catchall mitigating circumstance as follows:

> Now, members of the jury, I would also instruct you as to number 30. You would also consider and you should consider any other circumstance or circumstances arising from the evidence which one or more of you deem to have mitigating value. If one or more of you do so find by the preponderance of the evidence, you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance, that is number 30, on the Issues and Recommendation form. If none of you find any such circumstances to exist, you would so indicate by having your foreperson write "no" in this space.

Subsequently, in response to a question from the jury concerning the meaning of "mitigating," the trial court stated:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a less degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.
>
> Now, 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, record or any other circumstances of this murder that the defendant contends is a basis for a sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value.

First, defendant contends that the trial court erred by simply instructing the jurors to answer "yes" for a given statutory mitigating circumstance if one or more jurors found that circumstance to exist. Defendant argues that the instructions were erroneous because "the trial court was completely silent about whether those circumstances were deemed by law to have mitigating value." Defendant cites *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996), in support of his position.

In *Jaynes*, the trial court instructed the jury as follows:

> A number of mitigating circumstances listed on the form have been submitted to the jury for its consideration; the same being (1) through and including (37). Now as to these listed circumstances, it is for you to determine from the circumstances and the facts in this case whether or not *any listed circumstance* has mitigating effect. And if one or more of you should determine by a preponderance of the evidence that the mitigating circumstance listed exists and that it has mitigating value, then you would find that it existed and answer so. If none of you finds that, then you would indicate, no, as to that.

Id. at 285, 464 S.E.2d at 470 (alteration in original). Subsequently, after the jury submitted a question to the trial court, the trial court informed the jury that it was

> not able to answer your question any more clearly than to say that it is for you to determine as a juror whether or not the listed circumstance has mitigating value or effect.

Id. This Court concluded that the trial court committed error by combining both the statutory and nonstatutory mitigating circumstances and instructing that "if one or more of you should determine by a preponderance of the evidence that the mitigating circumstance listed exists and that it has mitigating value, then you would find that it existed and answer so."

These instructions improperly placed a higher burden on the jury's finding statutory mitigating circumstances than is required by law. Under our law, in order to find that a statutory mitigating circumstance exists, one or more of the jurors have only to find that it exists factually by a preponderance of the evidence. The jurors are not required by law to determine whether it has mitigating value. As noted above, the only time "value" comes into play is in determining whether the statutory catchall or the nonstatutory mitigating circumstances exist. In order to find that these exist, the jurors must first find that they have mitigating value. By distinguishing between statutory and nonstatutory mitigating circumstances, "[t]he General Assembly has determined as a matter of law that statutory mitigating circumstances have mitigating value." *Id.* This means that jurors are not required to find value as to statutory mitigating circumstances, as in the case of nonstatutory mitigating circumstances. It does not mean that the trial court is required to instruct that statutory mitigating circumstances have value as a matter of law. However, the trial court's instructions in *Jaynes* failed to appropriately distinguish between statutory and nonstatutory mitigating circumstances and, in fact, required the same finding as to both. Accordingly, the Court vacated the defendant's sentence of death and ordered a new capital sentencing proceeding.

In the present case, the trial court properly instructed the jurors from the pattern jury instructions regarding both statutory and nonstatutory mitigating circumstances. *See* N.C.P.I.—Crim. 150.10 (1997). For example, with regard to the first statutory mitigating circumstance, the trial court instructed that "if one or more [of] you have found the facts to be as all the evidence tends to show, you will answer 'yes' to the mitigating circumstance number 1 on the Issues and Recommendation form." With regard to the nonstatutory mitigating circumstances, the trial court instructed the jurors that "[i]f one

or more of you find by a preponderance of the evidence that any of the following circumstances exist and *also are deemed by you to have mitigating value*, you would so indicate by having your foreperson write 'yes' in the space provided." (Emphasis added.) Thus, the trial court properly informed the jurors that in order to find a statutory mitigating circumstance to exist, all they must find is that the circumstance is supported by a preponderance of the evidence. However, unlike statutory mitigating circumstances, the trial court instructed the jurors that in order to find nonstatutory mitigating circumstances, they must (1) find by a preponderance of the evidence that the circumstance existed, *and* (2) find that the circumstance has mitigating value. These instructions properly distinguished between statutory and nonstatutory mitigating circumstances and informed the jurors of their duty under the law. We have upheld instructions virtually identical to the ones given in the present case. *See State v. Conner*, 345 N.C. 319, 480 S.E.2d 626, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134 (1997); *State v. Simpson*, 341 N.C. 316, 462 S.E.2d 191 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996); *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).

In the present case, as noted on the Issues and Recommendation as to Punishment forms submitted for each of the three murders, each of the three individual statutory mitigating circumstances was found to exist by the jury, as well as the twenty-six nonstatutory mitigating circumstances submitted. The only circumstance submitted which the jury did not find was the statutory catchall. Because the jurors found mitigating circumstances to exist, they were required to answer Issue Two "yes." Once Issue Two is answered "yes," the jury then must answer both Issues Three and Four. Here, the trial court properly instructed the jurors in Issue Three that they must "weigh the aggravating circumstance or circumstances against the mitigating circumstance or circumstances." Thus, the jurors were required to take into account any statutory and nonstatutory mitigating circumstance or circumstances they found prior to answering Issue Three. The jurors were also instructed on Issue Four as follows: "In deciding this issue you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you." Thus, the jurors were required to give the mitigating circumstances they had found, both statutory and nonstatutory, weight in determining both Issues Three and Four. Further, the trial court properly instructed that the weight to be given each mitigating circumstance is for the individual

jurors to determine. *See State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991). As we stated in *Daniels*, "[t]hese instructions are in accord with the pattern jury instructions. We conclude that the instructions here were given in accordance with the law and that the jury was able to follow the instructions as they were given." *Daniels*, 337 N.C. at 275, 446 S.E.2d at 318.

[35] Defendant also contends that the trial court erred in instructions given in response to a question sent out by the jury, which stated: "Are the mitigating questions under Issue #2 to be answered yes or no in relation to (1) [b]eing a factor that contributed to the crime on May 17th or (2) [b]eing true that the defense presented this evidence and we agree/disagree to its truth[?]" As noted above, the trial court responded to the question as follows:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a less degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.
>
> Now, 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, record or any other circumstances of this murder that the defendant contends is [sic] a basis for a sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value.

These instructions track the language of the pattern jury instructions. *See* N.C.P.I.—Crim. 150.10. The instructions provide a general discussion of what constitutes a mitigating circumstance and a summary of what Issue Two is about, that is, considering mitigating circumstances submitted by defendant that would be a basis for a sentence less than death. Generally, these instructions are given in Issue Two, prior to the trial court's instructions on the statutory and nonstatutory mitigating circumstances. In fact, the jurors in the present case had previously received instructions identical to those set out above. However, the instructions above do not affect the trial court's previous instructions, which specifically addressed the distinction between statutory and nonstatutory mitigating circumstances and the method the jury must utilize to find them. In responding to the jurors' question, the trial court elected to reinstruct the jurors using

the pattern jury instructions in an attempt to avoid a misstatement of the law. These instructions do not constitute error.

Further, as this Court has previously stated, " 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " *State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990) (quoting *Cupp*, 414 U.S. at 146, 38 L. Ed. 2d at 373), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991). "If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for reversal." *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994). When viewed as a whole, the trial court's instructions in the present case properly informed the jurors of their duties under the law. Accordingly, this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises sixteen additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred by denying defendant's motion to prohibit death-qualification of the prospective jurors; (2) the trial court erred by denying defendant's motion to strike the death penalty from consideration; (3) the trial court erred by denying defendant's motion for a bill of particulars regarding aggravating circumstances; (4) the trial court erred by denying defendant's motion for individual, sequestered jury *voir dire*; (5) the trial court erred by giving a blanket instruction that all evidence offered by the State during the guilt phase could be considered as evidence in aggravation during the sentencing phase; (6) the trial court erred by instructing on the definition of mitigating circumstances which did not adequately focus the jury on the culpability of defendant, as opposed to the facts of the murder; (7) the trial court erred by denying defendant's motion to declare the North Carolina capital sentencing statute unconstitutional because it places a burden on defendant to overcome the weight of aggravation; (8) the trial court erred by incorporating the terms "recommend" and "recommendation" when referring to the capital sentencing decision in its instructions; (9) the trial court erred by making jury unanimity a condition to a "no" answer by the jury on sentencing Issue Four; (10) the trial court erred in its instructions on defendant's burden of proof on mitigating circumstances; (11) the trial court erred by permitting jurors to reject submitted nonstatutory mitigating circumstances on the basis that they had no mitigating value; (12) the trial court erred

by using the term "may" in its instructions in sentencing Issues Three and Four; (13) the trial court erred by failing to instruct on the meaning of a life sentence; (14) the trial court erred by submitting aggravating circumstances not supported by the evidence; (15) the trial court erred by denying defendant's motion to strike the death penalty; and (16) the trial court erred by making jury unanimity a condition to a "no" answer by the jury on sentencing Issues One and Three.

Defendant raises these issues so that this Court may reexamine its prior holdings and also to preserve the issues for any possible further judicial review. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[36] 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 three counts of first-degree murder on the basis of malice, premeditation, and deliberation and also under the felony murder rule. With respect to each murder, the jury found the aggravating circumstances that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, N.C.G.S. § 15A-2000(e)(10), and that the murder was part of a course of conduct in which the defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

We conclude that the evidence supports each aggravating circumstance found. We further conclude, based on a thorough review of the record, that the sentences of death were 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.

[37] Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine "whether the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 161 (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.* at 244, 433 S.E.2d at 164. 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. ——, 139 L. Ed. 2d 177 (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 that the present case is distinguishable from each of these seven cases. First, defendant was convicted of three counts of first-degree murder. As this Court has previously noted, we have never found the sentence of death disproportionate in a case where the defendant was found guilty of murdering more than one victim. *State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995). Further, the jury convicted defendant on the theory of malice, pre-

meditation, 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." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

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). "We note that in deciding whether a death sentence is disproportionate, this Court independently considers each individual defendant and the nature of the crimes that defendant has committed." *State v. Lynch*, 340 N.C. 435, 483, 459 S.E.2d 679, 703 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996).

The evidence in the present case shows that defendant engaged in a shooting rampage at the Union Butterfield facility which resulted in the murder of three employees, as well as the wounding of two others. Defendant fired multiple rounds from two semiautomatic weapons throughout the facility as employees hid under desks or fled the building in fear for their lives. With the killings completed, defendant stood in the doorway, smoking a cigarette.

Based on the nature of this crime, and particularly the distinguishing features noted above, we cannot conclude as a matter of law that the sentences of death were excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. RANDY LYNN ATKINS

No. 9A94

(Filed 9 October 1998)

1. **Criminal Law § 1359 (NCI4th Rev.)— first-degree murder—plea agreement—dismissal of sexual offense charge—aggravating circumstance not precluded**

The trial court's acceptance of a plea agreement in which defendant agreed to plead guilty to first-degree murder of his eight-month-old son and the State agreed to dismiss a pending sexual offense charge and not to submit any evidence pertaining to a sexual offense did not improperly permit the State to preclude the submission of a statutory aggravating circumstance supported by the evidence where there was no evidence indicating any sexual offense during the four-week period of physical abuse and battery that caused the child's death.

2. **Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—medical experts—injury comparisons—heinous, atrocious, or cruel aggravating circumstance**

Testimony by four medical experts in a capital sentencing proceeding as to the severity of the child victim's injuries in comparison to injuries suffered by other children whom the experts had treated in their respective medical practices was properly admitted to establish the "especially heinous, atrocious, or cruel" aggravating circumstance by showing that the brutality of the child's death exceeded that normally present in a homicide. The trial court simply allowed comparative expert testimony, within the framework of the experts' experiences, which provided a measure or benchmark for the jury's consideration.

3. **Evidence and Witnesses § 694 (NCI4th); Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—remorse by defendant—questions excluded—no offer of proof of testimony—absence of prejudice**

Defendant failed to preserve for appellate review the issue of whether the trial court erred by excluding in a capital sentencing proceeding testimony by a DSS worker which defendant contended would have shown remorse and a suicide threat by defendant where defendant did not make an offer of proof developing the witness's responses to the excluded questions.

Assuming that the issue was properly preserved, the exclusion of this testimony did not amount to prejudicial error where the excluded testimony was hearsay; the trial court did not restrict defendant from inquiring as to the witness's personal observations concerning defendant's demeanor and emotional state at the time she interviewed him; to the extent that the desired result from this testimony was evidence of defendant's history or an incident of attempting suicide, such evidence was introduced through the testimony of an expert witness; and defendant was free to seek testimony from correctional officers to verify a potential or actual suicide threat rather than trying to introduce this impression by the witness's hearsay testimony. N.C.G.S. § 8C-1, Rule 103(a)(2).

4. Constitutional Law § 346 (NCI4th); Evidence and Witnesses § 2956 (NCI4th)— capital sentencing—whether witness could receive death penalty—legal conclusion—proper exclusion

The trial court did not deny defendant the right to confront a witness against him in a capital sentencing proceeding by refusing to permit a witness who had been charged with aiding and abetting first-degree murder in this case to answer a question as to whether she could receive the death penalty since defendant was allowed to inquire into any potential bias of the witness based upon any arrangement between the witness and the prosecution, and it was proper for the trial court to sustain an objection to a question that required the witness to reach a legal conclusion.

5. Criminal Law § 1348 (NCI4th Rev.); Jury § 116 (NCI4th)— capital sentencing—voir dire—comments about parole—court's failure to instruct—plain error rule inapplicable

The plain error rule did not apply to the trial court's failure to instruct the jury in a capital sentencing proceeding that "life means life" when a prospective alternate juror expressed concern about his ability to make a sentencing decision unless he could be assured that a life sentence included a stipulation that there could be no parole, the juror was excused for cause, and defendant did not request that the trial court give such an instruction and thus waived this issue under Rule 10(b)(2). The plain error doctrine will not be extended to situations in which the trial court has failed to give an instruction during jury *voir dire* which has not been requested.

6. Criminal Law § 432 (NCI4th Rev.)— capital sentencing—prosecutor's argument—lack of remorse—not comment on post-arrest silence

In a capital sentencing proceeding for the first-degree murder of defendant's eight-month-old son, the prosecutor did not impermissibly comment on defendant's post-arrest silence in violation of defendant's constitutional right to remain silent by statements that drew attention to a police officer's testimony that defendant did not express remorse when informed that his son had died but stated, "You don't know how bad it is in the jail"; rather, the statements were directed to the State's contention that the jury should assign no mitigating value to the submitted mitigating circumstance that "defendant is remorseful."

7. Evidence and Witnesses §§ 2954, 2970 (NCI4th)— capital sentencing—bias of witness—compensation—other death penalty cases

The prosecution was properly permitted to cross-examine defendant's psychiatric expert in a capital sentencing proceeding concerning fees charged by the expert and his role in two other death penalty proceedings for the purpose of showing bias where there were significant discrepancies between the diagnosis made by defendant's expert and that made by the State's expert.

8. Criminal Law § 447 (NCI4th Rev.)— capital sentencing—prosecutor's argument—bias of expert—compensation and participation in death penalty cases

There was no gross impropriety in the prosecutor's argument in a capital sentencing proceeding concerning the potential bias of defendant's psychiatric expert based upon his compensation and his participation in two other death penalty proceedings when viewed in context of the conflicting evidence about defendant's psychological condition at the time of his assaults on the child victim.

9. Criminal Law § 462 (NCI4th Rev.)— capital sentencing—prosecutor's argument—expert's participation in appeals—bias—no impropriety

The prosecutor's argument in a capital sentencing proceeding about defendant's psychiatric expert's participation in other death penalty appeals was intended solely to suggest that the expert's involvement in numerous criminal cases indicated a bias in favor of defendant and did not impermissibly suggest that

jurors should abdicate their responsibility and rely on appellate review to determine an appropriate sentencing recommendation.

10. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—heinous, atrocious, or cruel aggravating circumstance—lingering death

The prosecutor's closing argument in a capital sentencing proceeding did not mislead the jury into concluding that a decision of the N.C. Supreme Court required a finding of the (e)(9) especially heinous, atrocious, or cruel aggravating circumstance in all cases in which the victim did not die instantly; rather, the prosecutor's reference to the decision merely illustrated that a lingering death may be a factor supporting a finding of the (e)(9) aggravating circumstance. N.C.G.S. § 15A-2000(e)(9).

11. Criminal Law § 447 (NCI4th Rev.)— capital sentencing—prosecutor's argument—diagnosis of defendant's expert

The prosecutor's closing argument in a capital sentencing proceeding suggested to the jury only that the diagnosis of defendant's expert psychiatrist should not be believed and did not improperly contend that all psychiatrists routinely characterize depravity as a type of mental illness.

12. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—mitigating circumstance—prosecutor's argument—misstatement of law—intervention not required

The trial court did not err by failing to intervene *ex mero motu* when the prosecutor misstated the law by arguing that a mitigating circumstance "has to have something to do with the death of that child." Moreover, the trial court adequately corrected any possible harm from the prosecutor's misstatement by properly instructing the jury during its charge on what constitutes mitigating circumstances and the weight to be given to them.

13. Criminal Law § 1390 (NCI4th Rev.)— capital sentencing—age mitigating circumstance—submission not required

The trial court was not required to submit the age statutory mitigating circumstance to the jury in this capital sentencing proceeding where defendant was twenty-nine years old at the time he killed his eight-month-old son, and defendant presented evidence that he suffered from conditions or disorders commonly found in adolescents and participated in an activity (playing

Nintendo) often enjoyed by youngsters, but the uncontroverted evidence also showed that defendant was functioning in the average to high-average range of intelligence with an IQ of 107, had a relatively good understanding of social nuances, graduated from high school and joined the Air Force, and worked at a cleaners operating complicated machinery.

14. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—mitigating circumstances—no significant criminal history—submission not required

The trial court did not err by failing to submit to the jury in a capital sentencing proceeding for the murder of defendant's eight-month-old son the (f)(1) mitigating circumstance of no significant history of prior criminal activity where the evidence showed that defendant was involved in an illegal sexual relationship with his son's mother and another male; defendant had a history of violent attacks, including fights in the military and repeated assaults on his son's mother even while she was pregnant; and defendant repeatedly and viciously beat his own infant son, which ultimately resulted in the son's death. N.C.G.S. § 15A-200(f)(1).

15. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstances—peremptory instructions—no plain error

The trial court's peremptory instruction on nonstatutory mitigating circumstances that "this factor has been established by the evidence. It is for you . . . to determine whether or not it has mitigating value" was not plain error since the instruction accurately conveyed the applicable law to the jurors.

16. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstances—peremptory instructions—instruction on impartiality of court

The trial court's concluding instruction in a capital sentencing proceeding on the impartiality of the court did not negate the potential value of the court's peremptory instructions on nonstatutory mitigating circumstances.

17. Criminal Law § 358 (NCI4th Rev.)— capital sentencing—leg restraints on defendant—no abuse of discretion

The trial court did not abuse its discretion in ordering defendant to wear leg restraints during a capital sentencing pro-

ceeding where the court conducted a hearing pursuant to N.C.G.S. § 15A-1031 following a report of a possible escape attempt by defendant from his jail cell; the trial court found evidence of numerous factors supporting the physical restraint of defendant; and the court limited any potential prejudice to defendant by having a cloth draped over the counsel table to conceal the leg restraints from the jury's view and by having defendant enter and leave the courtroom while the jury was not in the courtroom.

18. Criminal Law § 115 (NCI4th Rev.)— discovery—written report and notes of defendant's expert

The trial court did not err by issuing a discovery order requiring defendant's psychiatric expert to disclose a written report and by ordering the expert, during defendant's competency hearing, to supply to the prosecution "all of his notes," including those from conversations and interviews with defendant, where the expert relied on the discovery materials in testifying at defendant's competency hearing and at defendant's capital sentencing proceeding. N.C.G.S. § 15A-905(b).

19. Criminal Law § 1338 (NCI4th Rev.)— capital sentencing—murder of child—prior abuse of child and child's mother—admissibility

In a capital sentencing proceeding for the murder of defendant's eight-month-old son, the trial court properly admitted testimony by the child's mother about earlier abuse of the child and herself by defendant, and testimony by another witness indicating abuse by defendant of the child dating back to the time the child was three weeks old, since the testimony about abuse of the mother tended to explain why the child's mother did not seek earlier medical treatment for the child during the four-week period leading up to the child's death, and testimony about abuse of the child supported the submitted aggravating circumstance that the murder was "especially heinous, atrocious, or cruel."

20. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—defendant's reading horror books and playing Nintendo—relevancy

The trial court did not err by permitting the State to present evidence concerning defendant's reading of horror books and his playing of Nintendo in a capital sentencing proceeding for the murder of his eight-month-old son where the prosecutor con-

tended that defendant's alleged mental or emotional disorder was simply a recitation of stories gleaned from horror books, and the evidence about Nintendo was presented to show defendant's lack of remorse following his various assaults on his son.

21. Criminal Law § 152 (NCI4th Rev.)— guilty plea—first-degree murder—premeditation and deliberation—factual basis—voluntariness

A sufficient factual basis for the trial court's acceptance of defendant's plea of guilty of a premeditated and deliberate murder of his eight-month-old son was presented by the State's summary of the evidence and medical evidence tending to show that multiple, brutal injuries had been inflicted by defendant upon his son over a sustained period of time. Furthermore, the record shows that defendant's guilty plea was knowingly and voluntarily entered.

22. Evidence and Witnesses § 2266 (NCI4th)— capital sentencing—battered child syndrome—evidence admissible—cause of death

In a capital sentencing proceeding for the murder of defendant's eight-month-old son, testimony by a neurologist and a pediatric radiologist that the child suffered from battered child syndrome was admissible to show premeditation and deliberation and to support the (e)(9) aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." Although battered child syndrome is merely a diagnostic profile and cannot be a technical cause of death, testimony that battered child syndrome was the cause of the child's death did not justify a new sentencing proceeding where it is apparent that neither the witnesses nor the prosecutor in closing argument claimed that the syndrome itself was the cause of death; rather, they asserted that the cumulative effect of injuries suffered by the child as a result of battering by defendant, which also qualified him for the diagnosis of battered child syndrome, was the cause of death.

23. Constitutional Law § 345 (NCI4th)— capital sentencing—off-the-record bench conferences—defendant's right to presence not violated

Defendant's constitutional right to be present at all stages of his capital trial was not violated by three off-the-record bench conferences involving only counsel during his capital sentencing proceeding where the conferences were conducted in the court-

room with defendant present and able to observe the context of the discussions and free to inquire of his attorneys as to the nature of the discussions, and the conferences were all reconstructed for the record following each conference. Assuming *arguendo* that the trial court erred by conducting the conferences off the record, the reconstruction shows beyond a reasonable doubt that any error was harmless. N.C. Const. art. I, § 23.

24. Jury § 30 (NCI4th)— challenge to panel—statutory procedures not followed—question not before appellate court

An assignment of error that the trial court failed to properly determine the statutory qualifications of jurors was not before the appellate court where defendant failed to follow the procedures set out in N.C.G.S. § 15A-1211(c) for jury panel challenge and further failed to alert the trial court to the alleged improprieties. N.C.G.S. § 15A-1446.

25. Jury § 226 (NCI4th)— capital sentencing—jury selection—death penalty views—challenge for cause—rehabilitation not allowed

The trial court did not abuse its discretion by denying defendant's request to attempt to rehabilitate prospective jurors in this capital sentencing proceeding when they were challenged for cause for their death penalty views where the record shows that all of the jurors ultimately responded to questions by the prosecutor and the trial court in a manner which unequivocally indicated that they would be unable to follow the law and recommend a death sentence if appropriate.

26. Jury § 187 (NCI4th)— excusal for cause—waiver of appellate review

Defendant's claim that the trial court erred by failing to excuse a prospective juror for cause in a capital sentencing proceeding on the ground that she had formed fixed opinions prior to the hearing was not preserved for appellate review where defendant never challenged the prospective juror for cause but exercised a peremptory challenge excusing her. N.C.G.S. § 15A-1214(h).

27. Jury § 111 (NCI4th)— capital sentencing—pretrial publicity—individual voir dire denied

The trial court did not abuse its discretion by denying defendant's motion for individual *voir dire* during jury selection in a

capital sentencing proceeding on the ground that pretrial publicity exposed jurors to misleading and prejudicial statements where no juror was selected who indicated that he or she would have difficulty setting aside any pretrial impressions if selected for service; challenges for cause were appropriately granted when any prospective juror stated that he or she could not set aside any preconceived notions; and although the trial court informed defense counsel that reassertion of the motion was not precluded as the *voir dire* was carried out, the motion for individual *voir dire* was not renewed as jury selection proceeded. N.C.G.S. § 15A-1214(j).

28. Criminal Law §§ 20, 1335 (NCI4th Rev.)— capital sentencing—expert witness—testimony at competency hearing—cross-examination

The trial court did not err by permitting the prosecutor to cross-examine a defense expert witness in a capital sentencing proceeding concerning testimony presented at a previous competency hearing since (1) N.C.G.S. § 15A-959(c), by its plain language, prohibits the subsequent use of testimony introduced at hearings for pleas of insanity and does not apply to competency hearings, and (2) defendant himself, through his expert witness, first introduced evidence referring to the testimony of a Dorothea Dix psychiatrist initially presented at the competency hearing.

29. Constitutional Law §§ 266, 352 (NCI4th); Criminal Law § 1335 (NCI4th Rev.)— capital sentencing—substantive use of competency evaluation—no constitutional violation

Defendant's constitutional rights against self-incrimination and to counsel were not violated when the State made substantive use of defendant's Dorothea Dix competency evaluation at his capital sentencing proceeding where the competency evaluation was performed at defendant's request; defendant presented a defense strategy at the sentencing hearing alleging a learning disorder, an adjustment disorder, and disturbances of emotion and conduct; defendant first introduced expert testimony concerning his mental status; and defendant's expert witness admitted that he relied upon the Dorothea Dix report as a basis for his expert opinions at the sentencing hearing. The use of state-conducted psychiatric evaluations to rebut defendant's psychiatric testimony when defendant asserts a mental status defense does not violate either the Fifth or the Six Amendment to the United States Constitution.

30. Criminal Law § 112 (NCI4th Rev.)— capital case—post-conviction discovery—State's attorney work product—exclusion by trial court

The trial court did not violate N.C.G.S. § 15A-1415(f) by excluding portions of the State's attorney work-product materials from defendant's post-conviction discovery in a capital case since the expedited post-conviction discovery provided by § 1415(f) applies only to cases following completion of direct appeal, and defendant had not completed appellate review when the trial court made its discovery order. Assuming *arguendo* that § 1415(f) did apply to defendant's discovery request, the trial court complied with the statute by reviewing certain work-product materials *in camera* and by ultimately withholding the materials from discovery where the State challenged the release of what it deemed to be sensitive documents, and the trial court, after reviewing the documents *in camera*, concluded that the documents would not assist defendant.

31. Constitutional Law § 344.1 (NCI4th)— hearing impairment—no denial of presence at capital trial

Defendant's right to be present at all stages of his capital trial was not violated by the trial court's denial of defendant's motion for appropriate relief made on the ground that the trial court failed to accommodate a hearing impairment which rendered defendant unable to hear and fully participate in his competency and capital sentencing proceedings where all parties agreed that defendant suffered some degree of hearing impairment, but defendant's trial counsel testified that defendant consistently responded or reacted in his hearings in a way which indicated that he could hear what was going on; defendant's co-counsel testified that defendant never indicated throughout his competency and sentencing hearings that he could not hear the witnesses, the attorneys, or the instructions of the court; and defendant indicated during his plea colloquy with the trial court that he was able to hear and understand the court.

32. Constitutional Law § 313 (NCI4th)— failure to investigate hearing impairment—not ineffective assistance of counsel

Defendant was not denied the effective assistance of counsel by the alleged failure of his attorney to investigate his hearing impairment and to take measures to protect his rights where nothing in the record suggests that defendant's trial counsel failed to deliver an appropriate level of representation, and defendant presented no evidence that he informed trial counsel

that he was unable to hear and understand any part of the evidence or proceedings against him.

33. Handicapped, Disabled, or Aged Persons § 15 (NCI4th)— capital sentencing—hearing impairment—no violation of Americans with Disabilities Act

The trial court did not violate the Americans with Disabilities Act during defendant's capital sentencing proceeding by failing to accommodate defendant's hearing impairment where defendant failed to produce evidence that he was unable to hear or participate in the sentencing proceeding because of his purported hearing impairment, and the evidence supported findings by the trial court to the effect that defendant's hearing condition did not prevent him from reasonably hearing and understanding what occurred in the sentencing proceeding. Assuming *arguendo* that the Americans with Disabilities Act applied to defendant's situation, the evidence did not indicate that defendant was denied participation in the sentencing proceeding because of his hearing impairment.

34. Criminal Law § 1402 (NCI4th Rev.)— murder of infant son—death penalty not disproportionate

A sentence of death imposed upon defendant for the first-degree murder of his eight-month-old son was not excessive or disproportionate where defendant entered a plea of guilty to first-degree murder pursuant to a plea agreement; the infant victim endured a protracted series of severe beatings inflicted by defendant which resulted in multiple fractures; the jury found the existence of the especially heinous, atrocious, or cruel aggravating circumstance; defendant, a twenty-nine-year-old adult, was alone responsible for the child's death; the victim was killed in his home; and defendant attempted to conceal his assaults upon his child, forbidding the child's mother from seeking medical care for him during the four-week ordeal leading up to his death.

Justice WYNN did not participate in the consideration or decision of this case.

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 Saunders, J., at the 29 November 1993 Criminal Session of Superior Court, Buncombe County. Additionally, defendant appeals from an order denying his motion for appropriate relief entered by Ferrell, J., on 16 May 1997. Heard in the Supreme Court 27 May 1998.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

Center for Death Penalty Litigation, by Kenneth J. Rose, for defendant-appellant.

LAKE, Justice.

Defendant was indicted on 12 April 1993 for first-degree sexual offense and for the first-degree murder of his eight-month-old son, Lyle James Atkins. On 18 November 1993, defendant entered into a plea agreement in which he agreed to plead guilty to the first-degree murder charge and the State agreed to dismiss the pending sexual offense charge and not to submit any evidence pertaining to this or any other sexual assaults purportedly committed by defendant. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for the murder of his infant son. Judge Saunders sentenced defendant accordingly.

The State presented evidence at the sentencing proceeding tending to show that, on 16 March 1993, defendant inflicted fatal injuries to his son, Lyle. Defendant, Lyle, and Lyle's mother were living together at the time at the Lazywood Mobile Home Park in Buncombe County.

Lyle's mother, Ms. Colleen Shank, testified that on the morning of 16 March 1993, she asked defendant to watch Lyle while she washed some clothes. Ms. Shank stated that she heard a "bang." Following the "bang," Ms. Shank heard Lyle begin to cry, and she rushed to the living room. Ms. Shank testified that she then observed defendant hitting Lyle's head against the trailer wall a "few times." She testified further that she saw defendant "swing him [Lyle] very strong" and that "Lyle hit the wall very hard." Ms. Shank tried to comfort Lyle and attempted to lay the child down to rest. However, Lyle soon began to cry, and Ms. Shank noted that he was turning blue. The mother administered CPR and requested that defendant go to a neighbor's home to call 911 for emergency assistance.

Defendant then went to the home of a neighbor and called 911. The 911 operator testified that defendant responded to her questions concerning medical history related to Lyle's emergency by replying "it [Lyle] may have been sick two or three days, but no other." Lyle's mother testified that while waiting for emergency personnel to

arrive, defendant told her, "Don't say anything, because I will hurt you too."

Following the arrival of emergency medical personnel, Lyle was transported by helicopter to Mission Memorial Hospital in Asheville. Upon admission to the hospital, Lyle was noted to be limp, not moving, and exhibiting a slow heart rate. The admitting physician noted numerous injuries to the small child, including bruising on both sides of his head, an older bruise on his left elbow, bruising on his right wrist and right hand, a deformation of his pelvis, and an improperly healed fracture of his right lower leg.

A detective from the Woodfin Police Department questioned defendant and Ms. Shank in the waiting room of the hospital. Defendant initially told the officer that Lyle had stopped breathing "because of the Ker-O-Sun heater." Defendant responded to the officer's further inquiry by adding that "a couple of days ago I was holding him, and he slipped and fell, and he hurt his arm." The officer subsequently arrested both defendant and Ms. Shank and transported them to the Buncombe County jail. Later that day, while in police custody, defendant issued a written statement in which he admitted the following:

> Today Lyle was crying as I was holding him, and my temper and patience snapped again, as he was crying and crying no matter how soothing and gentle I was. He just kept crying, and I couldn't handle him any more, and I started hitting him on the side of his head and trying to get him to stop crying, and he wouldn't. I kept telling him to stop it, and he wouldn't, and I kept on hitting him with my hand on his head.

Despite aggressive medical efforts to save Lyle's life, he died at Asheville's Mission Memorial Hospital on 18 March 1993. Following Lyle's death, defendant was indicted for the first-degree murder of his infant son. Defendant entered into a plea agreement dated 18 November 1993, consenting to a guilty plea to first-degree murder. As a condition to the plea, the State agreed to dismiss the first-degree sexual assault charge pending against defendant.

A capital sentencing proceeding was held in Superior Court, Buncombe County, beginning on 29 November 1993. The State presented evidence in support of one statutory aggravating circumstance: that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988) (amended 1994). An experienced

pediatric radiologist testified at the sentencing proceeding concerning the extent of injuries suffered by Lyle. The testimony indicated that the eight-month-old infant exhibited the following injuries upon admission to Mission Memorial Hospital on 16 March 1993: healing fracture of the right clavicle, healing bone along the midshaft of the right upper arm, extensive injury of the left upper arm, dislocation of the left elbow, healing bone indicative of a fracture of the right hip, skull fractures and bruising on both the left and right sides, and a compression fracture of the spine. Further testimony indicated that the injuries occurred in at least two episodes of injury to Lyle. The pediatric radiologist estimated that the time of the origin of injuries ranged from four weeks prior to the hospital admission up to within a day of the admission. Several treating physicians also testified at the sentencing proceeding that Lyle exhibited symptoms of "battered child syndrome." The State presented expert testimony by Dr. Cynthia Brown, a pediatrician, who defined a "battered child" as a "child that presents with multiple purposely inflicted injuries that are of varying ages."

Defendant presented evidence of twenty-five potential mitigating circumstances in addition to the statutory "catchall" mitigating circumstance during the capital sentencing proceeding. The jury rejected all but two of these potential mitigating circumstances, finding only (1) "the [d]efendant qualifies as having a learning disability due to his IQ variations," and (2) "the [d]efendant was diagnosed by Dr. Clabe Lynn in April of 1993 as having a personality disorder and adjustment disorder with a mixed disturbance of emotions and conduct." On 8 December 1993, the jury unanimously recommended that defendant be sentenced to death.

On 21 June 1995, defendant filed a motion for appropriate relief, and this Court remanded the motion in order that an evidentiary hearing could be held. At the 11 December 1996 session of Superior Court, Buncombe County, Judge Ronald K. Payne denied defendant's motion for discovery of all documents in the State's possession concerning the case, including attorney work-product material. This Court denied review of this order on 15 January 1997. An evidentiary hearing was conducted at the 10 March 1997 session of Superior Court, Buncombe County, Judge Forrest A. Ferrell presiding. By order dated 16 May 1997, defendant's motion for appropriate relief was denied. Defendant appeals the denial of this motion to this Court, along with his sentence of death for the first-degree murder. We consider both in this review.

[1] In his first assignment of error, defendant contends the trial court erred by permitting the State to enter into a plea agreement requiring the court to withhold evidence in support of an aggravating circumstance. Defendant argues that evidence of the first-degree sexual offense was relevant to two statutory aggravating circumstances: (1) "[t]he capital felony was committed while the defendant was engaged . . . in the commission of . . . a sex offense"; and (2) "[t]he capital felony was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(5), (9). Defendant asserts that the plea agreement creates reversible error, as it introduces an impermissible, arbitrary factor into capital sentencing proceedings, in violation of the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. We hold that the plea agreement did not preclude the introduction of aggravating circumstances supported by the evidence, and therefore the trial court did not err by accepting the agreement.

Defendant is correct to note that this Court has held a district attorney may not exercise his discretion as to when an aggravating circumstance supported by the evidence will or will not be submitted to the jury. *See State v. Case*, 330 N.C. 161, 163, 410 S.E.2d 57, 58 (1991). The mandatory submission of all statutory aggravating circumstances is necessary to ensure the integrity of the capital sentencing procedure and "to prevent capital sentencing from being irregular, inconsistent and arbitrary." *Id.*

However, the principle enunciated by this Court in *Case* is clearly contingent upon the presence of genuine evidence supporting the statutory aggravating circumstances. *Id.* In the case *sub judice*, the plea agreement did not require the trial court to withhold submission of a statutory aggravating circumstance supported by credible evidence. The uncontroverted medical evidence indicated that Lyle endured an extended series of beatings, resulting in broken bones and bruises. Expert testimony further indicated that these injuries occurred during a four-week period prior to Lyle's death on 18 March 1993. The only evidence indicating a potential sexual assault was the presence of a relaxed rectal sphincter. The evidence relating to this potential sexual offense indicated that the relaxed sphincter was present in January 1993, two months prior to Lyle's murder. There was no apparent connection between this prior condition and the circumstances leading to or causing Lyle's death. The total absence of evidence indicating any sexual offense during the four-week period of physical abuse and battery that caused Lyle's death leads to the

inevitable conclusion that the trial court did not err by accepting the plea agreement which excluded evidence detrimental to defendant. We hold that defendant's initial assignment of error is without merit.

[2] In his second assignment of error, defendant asserts the trial court erred by permitting evidence and argument as to whether various medical experts had seen injuries as severe as those exhibited by Lyle. Over defense objections, four medical experts individually testified as to the severity of the victim's injuries in comparison to other injuries occurring to other children which the experts had treated in their respective medical practices. Dr. Jon Silver, a neurosurgeon, testified that Lyle's injuries were worse than the injuries sustained by a child he had previously treated who had been run over by a tractor. Dr. Robert Wiggins, a pediatric ophthalmologist, indicated that he had seen only one other patient with retinal hemorrhages as severe as Lyle's. Dr. David Merten, a pediatric radiologist, testified that, "In the twenty-two years that I have been doing pediatric radiology and in the nine years that I practiced pediatrics before becoming a pediatric radiologist, I have never seen as extensive bone injuries as this baby had." Dr. Cynthia Brown, the pediatrician initially responsible for Lyle's care upon his hospital admission on 16 March 1993, testified that Lyle was "probably the most severely battered child I've ever seen."

Defendant contends that the admission of such comparative expert testimony was irrelevant and prejudicial. Defendant asserts that allowing the introduction of such expert testimony potentially opens a Pandora's box, ultimately leading to battles among experts over the limits of their subjective experiences supporting or denying a description of a particular event as "especially heinous, atrocious, or cruel." Defendant suggests the trial court should have limited the evidence and testimony to the issue of whether the injuries to Lyle were caused by a brutality greater than that normally found in other first-degree murder cases, not whether the injuries were worse than other injuries encountered in particular medical experts' prior experiences. We conclude the admission of such comparative expert testimony was not error, as defendant has misstated the purpose and relevance of the testimony.

Admissibility of evidence at a capital sentencing proceeding is not subject to a strict application of the rules of evidence, but depends on the reliability and relevance of the proffered evidence. *State v. Rose*, 339 N.C. 172, 451 S.E.2d 211 (1994), *cert. denied*, 515

U.S. 1135, 132 L. Ed. 2d 818 (1995). However, even strict application of the evidentiary rules supports the admission of the testimony offered by Drs. Silver, Wiggins, Merten and Brown. The expert medical testimony in question fully comports with the standards set forth in Rule 702, which provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education[] may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(1) (1992). Drs. Silver, Wiggins, Merten and Brown all qualified as expert witnesses based upon the standard set forth in Rule 702. The State submitted only one aggravating circumstance supporting a sentence of death, that the crime was "especially heinous, atrocious, or cruel." The State bore the ultimate burden of establishing the presence of the (e)(9) aggravating circumstance by showing that the brutality of Lyle's death exceeded that normally present in a homicide. *See State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). The trial court appropriately allowed the State to present testimony and evidence attempting to quantify and qualify the extent of injuries sustained and thus the amount or degree of suffering endured by Lyle. Comparisons of the extent of Lyle's injuries in relation to other injuries previously treated by the respective physicians clearly was evidence of a matter "relevant to sentence," which the trial court correctly deemed to have "probative value" in assisting the jury in evaluating the sole aggravating circumstance. N.C.G.S. § 15A-2000(a)(3). The trial court did not permit the State to usurp the jury's function by eliciting expert testimony that Lyle's death met the standard set forth in N.C.G.S. § 15A-2000(e)(9) as "especially heinous, atrocious, or cruel." Rather, the trial court simply allowed comparative expert testimony, within the frame of the experts' experiences, which provided a measure or benchmark for the jury's consideration. We hold that the trial court did not commit error by permitting this testimony.

[3] In his third assignment of error, defendant asserts the trial court erred by excluding potential mitigating testimony by Department of Social Services worker Audrey Bryant. The testimony concerned an interview the social worker conducted with defendant while he was in police custody. Defendant contends the social worker should have been allowed to testify that defendant was distraught, was suffering from emotional distress and was suicidal. Defendant suggests that this excluded testimony was essential to contradict evidence presented by the State depicting defendant as remorseless.

The trial court limited the testimony as follows:

Q. Was there any indication of a suicide attempt [by defendant] or threat concerning that time?

A. I was told that there was.

[PROSECUTOR]: Objection; move to strike.

[THE] COURT: Sustained; disregard, members of the jury.

Q. When you interviewed Mr. Atkins, was the door open or shut?

A. It was open.

Q. And why was that?

[PROSECUTOR]: Objection, calls for hearsay.

[THE] COURT: Sustained.

Q. Was there anyone else present within a few feet or so of you during your interview?

A. There was a deputy outside the door.

Q. And why was that?

[PROSECUTOR]: Objection; calls for hearsay.

[THE] COURT: Sustained.

Defendant did not make an offer of proof developing the witness's responses to the questioning. Accordingly, defendant has failed to preserve this issue for appellate review according to the standard set forth in N.C.G.S. § 8C-1, Rule 103(a)(2). We do not agree that the substance of the excluded testimony was necessarily "apparent from the context within which questions were asked" and that therefore no offer of proof was necessary to preserve this issue for appeal. Although the initial thrust of the questioning related to suicide, the substance of Ms. Bryant's full testimony in response is not readily apparent. Ms. Bryant may very well have responded to the inquiries by stating that she did not know why the cell door was open or why an officer was stationed outside the cell. It is speculative for this Court to attempt to presume her testimony.

Assuming *arguendo* that this issue had been properly preserved and that the testimony may have indicated a suicide threat and arguably remorse by defendant, the exclusion of this testimony did not amount to prejudicial error. Our review of the record and tran-

script indicates that the trial court did not restrict defendant's counsel from inquiring as to Ms. Bryant's personal observations concerning defendant's demeanor and emotional state at the time of her interview. Moreover, to the extent the desired result from this testimony was evidence of defendant's history or an incident of attempting suicide, such evidence was introduced through the testimony of Dr. Joseph Horacek. Defendant also was free to seek testimony from correctional officers to verify a potential or actual suicide threat, rather than trying to introduce this impression by Ms. Bryant's hearsay testimony. Defendant chose not to pursue these avenues, and we thus hold that the trial court properly exercised its discretion in excluding the testimony, which had no mitigating value.

[4] In his fourth assignment of error, defendant contends the trial court erred by denying him the right to confront a witness testifying against him. Specifically, defendant contends the trial court improperly limited his ability to impeach the testimony of the State's primary witness at the sentencing proceeding, Lyle's mother, Colleen Shank. The trial court refused to permit defendant's counsel to inquire of Ms. Shank as to whether she could receive the death penalty for her involvement in Lyle's death.

Defendant asserts that this Court's holding in *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997), should mandate an order directing a new capital sentencing proceeding. In *Prevatte*, this Court ordered a new sentencing hearing following a review of a trial court decision denying the defendant the opportunity to ask a prosecution witness about promises or expectations of preferential treatment in the resolution of pending charges against the witness. We conclude that, in the matter *sub judice*, the trial court properly restricted the questioning of Colleen Shank and did not thereby deny defendant the opportunity to confront a witness against him.

The trial court allowed exactly the type of questioning mandated by *Prevatte*. A review of the record reveals the following testimony:

Q. What are you charged with in this case?

A. Aiding and abetting first-degree murder.

Q. So you can't get the death penalty, can you?

[PROSECUTOR]: Objection.

A. I don't know.

THE COURT: Sustained. It's a question of law.

Q. What kind of promises, Ms. Shank, has the State made you in exchange for your testimony?

A. None.

Defendant was clearly allowed to inquire into any potential bias of Ms. Shank based upon any arrangement between the witness and the prosecution. The trial court properly sustained an objection to a question that required Ms. Shank to reach a legal conclusion. The trial court specifically allowed inquiry into any potential arrangement, and Ms. Shank responded that no such arrangement existed. It is entirely proper for a trial court, in the exercise of its discretion, to sustain an objection calling for the legal knowledge of a lay witness. *State v. Mason*, 295 N.C. 584, 248 S.E.2d 241 (1978), *cert. denied*, 440 U.S. 984, 60 L. Ed. 2d 246 (1979); *accord State v. Greene*, 285 N.C. 482, 206 S.E.2d 229 (1974). We hold that the trial court committed no error by refusing to allow the questions posed to Ms. Shank concerning her potential punishment.

[5] In his fifth assignment of error, defendant contends the trial court committed plain error by failing to instruct the jury not to consider parole in its deliberations, thus violating this Court's holding in *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955). During *voir dire*, a prospective alternate juror expressed concern about his ability to make a sentencing decision based only upon the facts and the law unless he could be assured that a life sentence included a stipulation that there could be no parole. Based upon this expression, the trial court properly excused the prospective juror for cause. Defendant contends this discussion, which took place in the presence of the other jurors, triggered a duty for the trial court to issue a "life means life" instruction.

Defendant did not request that the trial court give a "life means life" instruction following the prospective juror's comments. Defendant's failure to raise this issue constitutes waiver under Rule 10(b)(2). This Court has applied the plain error analysis only to instructions to the jury and evidentiary matters. We decline to extend application of the plain error doctrine to situations in which the trial court has failed to give an instruction during jury *voir dire* which has not been requested. Accordingly, we conclude that this assignment of error is without merit.

[6] In his sixth assignment of error, defendant contends the trial court erred by permitting the prosecutor to comment on defendant's

post-arrest silence, in violation of his constitutional right to remain silent. The State presented testimony from a Buncombe County police officer who indicated that defendant did not express remorse when informed that Lyle had died. According to the testimony, defendant responded to the news of Lyle's death by stating, "You don't know how they're treating me in here. You don't know how bad it is in the jail." The prosecutor commented on defendant's callous response to Lyle's death during his closing argument, noting, "He didn't say 'I'm sorry.' He didn't say, 'Bless that baby's heart.' He said, 'You don't know how tough it is where I'm staying.' That was his statement. Now, if he felt remorse, you don't think there's [sic] been some mention of that?"

This Court has consistently recognized that, as a general rule, "[p]rosecutors are granted wide latitude in the scope of their argument." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Counsel may properly argue "the facts in evidence and all reasonable inferences to be drawn therefrom." *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). A prosecutor may not, however, refer to a defendant's election to exercise his constitutional right not to testify. *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976); *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993).

We do not find that the comments and testimony challenged by defendant impermissibly address defendant's choice to exercise his right to remain silent or not to testify. The comments were clearly directed toward providing an accurate portrayal of defendant's emotionless response to Lyle's death. This evidence was relevant and necessary to adequately support the State's contention that the jury should assign no mitigating value to the submitted circumstance that "[t]he defendant is remorseful." The testimony in question and the prosecutor's closing comments did not focus on defendant's decision to remain silent. The comments simply drew attention to the relevant evidence of defendant's conduct and voluntary statements following his receipt of the news of Lyle's death. Accordingly, we hold that the trial court properly permitted this argument, and this assignment of error is overruled.

In his seventh assignment of error, defendant asserts the trial court erred by allowing cross-examination of defendant's expert witness concerning fees charged by the expert, as well as the expert's

role in two other death-penalty appeals. Defendant further contends the trial court permitted the prosecutor to distort the expert's testimony by characterizing the witness as a "hired gun" attempting to overturn death-penalty sentences on appeal. Defendant also suggests that the mention of Dr. Horacek's potential role in an appeal in the prosecutor's closing argument mandates the award of a new sentencing proceeding under *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979).

[7] With respect first to the expert witness, the State appropriately attempted to illustrate a potential source of witness bias, as revealed by the expert witness's own *curriculum vitae*. The subject of compensation of a defendant's expert witness is clearly an appropriate matter for cross-examination. North Carolina's Rules of Evidence permit cross-examination of a witness "on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1992). This Court has additionally stated that the scope of cross-examination is subject to the control of the trial court, and "questions must be asked in good faith." *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971). Our review of the trial transcript reveals significant discrepancies between the diagnosis made by defendant's psychiatric expert and the diagnosis reached by the State's expert. In view of this, it was entirely proper to elicit testimony indicative of potential witness bias. This Court specifically approved of such inquiry in *State v. Wilson*, 335 N.C. 220, 436 S.E.2d 831 (1993).

[8] With respect to mention of the expert's compensation during the prosecutor's closing argument, we further conclude that the argument did not violate the scope of permissible prosecutorial conduct. As we held in *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988):

> "[C]ounsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law, so as to present his side of the case. *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 [1975]; *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 [(1974), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976)]. Whether counsel abuses [t]his privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury."

Allen, 322 N.C. at 195, 367 S.E.2d at 636 (quoting *State v. Covington*, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976)).

When viewed in context of the conflicting evidence concerning defendant's psychological condition at the time he committed his assaults upon Lyle, we determine that it was not a "gross impropriety" to argue the witness's potential bias related to his compensation and his similar participation in other death-penalty proceedings.

[9] With regard to the mention of appellate review, defendant misstates the extent of our holding in *Jones*. We did not conclude that *every* mention of appellate review mandates a new sentencing proceeding. Rather, we adopted a "rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility." *Jones*, 296 N.C. at 502, 251 S.E.2d at 429. In the case *sub judice*, the prosecutor's argument was intended solely to suggest that Dr. Horacek's involvement in numerous criminal cases indicated bias in favor of defendant. The argument in no way suggested that jurors could or should abdicate their responsibility and rely on appellate review to determine an appropriate sentencing recommendation, as prohibited by this Court in *Jones*. Accordingly, we hold that defendant's seventh assignment of error is without merit.

In his eighth assignment of error, defendant argues that the trial court erred by failing to intervene *ex mero motu* to restrict the prosecutor's closing argument in several respects. Defendant suggests the prosecutor's closing arguments, when viewed as a whole, violated N.C.G.S. § 15A-1230, as well as defendant's rights to due process, fundamental fairness and a nonarbitrary capital sentencing proceeding. It is important to note at the outset that defendant's counsel did not object to any portion of the closing argument at the sentencing proceeding. When a party fails to object to a closing argument, the appellate court must decide whether the argument was so improper as to require the trial court's intervention *ex mero motu*. *State v. Craig*, 308 N.C. 446, 457, 302 S.E.2d 740, 747, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). This Court has further stated that the trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial. *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). A review of the record reveals the prosecutor's comments during closing arguments were appropriate when viewed in light of the brutality of the crime and the fact that the State was seeking the imposition of the death penalty.

[10] First, defendant suggests the trial court allowed the prosecutor to misstate North Carolina case law to his prejudice. Specifically, defendant argues the prosecutor's closing argument misled the jury into concluding that our holding in *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), required a finding of the "especially heinous, atrocious, or cruel" aggravating circumstance in all cases in which the victim did not die instantly. Our review of the record reveals that, when viewed in context, the prosecutor's closing arguments created no such impression. The prosecutor appropriately pointed out the four-week ordeal of pain and suffering endured by Lyle prior to his death. Lyle's torment was adequately supported by competent evidence and testimony. The prosecutor's reference to *Stokes* illustrated that a lingering death may be a factor supporting a finding of the (e)(9) statutory aggravating circumstance, that the crime was indeed "especially heinous, atrocious, or cruel."

[11] Continuing his eighth assignment of error, defendant also contends the trial court erred by permitting the prosecutor to characterize mitigating circumstances as, in effect, aggravating circumstances. In this regard, defendant suggests the prosecutor equated an alleged mental illness with a depraved mind, attempting to discredit the credibility of the entire psychiatric profession. We do not read the prosecutor's comments in that manner. Rather, we discern that the prosecutor suggested to the jury only that the diagnosis of defendant's expert psychiatrist should not be believed. The prosecutor, in his argument, contended only that this particular defendant was not mentally ill; the prosecutor did not contend that all psychiatrists routinely characterize depravity as a type of mental illness.

Defendant further contends the trial court erred by allowing the prosecutor to argue law and facts not supported by the evidence. As previously discussed, this Court has held that trial counsel are allowed wide latitude in their arguments to the jury and may argue any fact in evidence and all reasonable inferences drawn from them. *Craig*, 308 N.C. at 454, 302 S.E.2d at 745. Our careful review of the record as to each specifically challenged assertion does not lead us to conclude that the trial court permitted the argument of any fact which was not either supported by testimony or reasonable inference from testimony or based upon established knowledge. In reviewing the prosecutor's closing argument, we must consider the context in which the remarks were made and the overall factual circumstances to which they refer. *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). The pros-

ecutor has a duty to strenuously present the State's case and to " 'use every legitimate means to bring about a just conviction.' " *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980) (quoting *State v. Monk*, 286 N.C. at 515, 212 S.E.2d at 130). We also dismiss defendant's suggestion that the prosecutor attempted to introduce an additional nonstatutory mitigating circumstance, the age of the victim. These assertions by defendant are without merit.

[12] Continuing his eighth assignment of error, defendant further argues the trial court erred by allowing the State in closing argument to distort the meaning and application of mitigating circumstances. Specifically, defendant argues the trial court failed to respond to the prosecutor's misstatement of the law concerning mitigating circumstances by not giving instructions designed to clarify and correct the misstatement. Defendant challenges the prosecutor's following statement to the jury: "They've told you the aggravating has to do with the death. Well, so do mitigating. It has to have something to do with what happened to that child."

Defendant is correct in that this comment in the prosecutor's argument was not a proper description of North Carolina law. A mitigating circumstance does not have to relate to what happened to the victim but rather may relate to "any aspect of defendant's character, record or circumstance of the particular offense." *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981) (citing *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978)). However, as to this comment, we conclude that the trial court did not err by failing to intervene *ex mero motu*, in the absence of defense counsel's objection. Moreover, the record reveals the trial court adequately corrected any possible harm from the prosecutor's statement by properly instructing the jury during its charge on what constitutes mitigating circumstances and the weight to be given to them.

Defendant makes several other contentions of improper statements by the prosecutor during closing argument. However, our careful review finds each statement to be well within the wide discretion accorded by this Court during closing argument, within the context of hotly contested cases, and thus we conclude each contention is without merit. This assignment of error is overruled.

[13] In his ninth assignment of error, defendant asserts the trial court erred by failing to submit the statutory mitigating circumstance of defendant's age at the time of the crime. *See* N.C.G.S. § 15A-2000(f)(7). Notwithstanding the fact that defendant was

twenty-nine years old at the time of the offense, he argues that there was substantial evidence to support the mitigating circumstance and that the trial court was required to submit the issue to the jury. We conclude that the evidence did not support the circumstance and that the trial court did not err by failing to submit the (f)(7) mitigating circumstance.

In support of the (f)(7) mitigating circumstance, defendant elicited the testimony of Dr. Horacek, who stated that defendant suffered from a dissociative identity disorder, as well as an attention deficit disorder. Dr. Horacek further noted that defendant exhibited a "learning disability profile" and reportedly spent long periods of time playing Nintendo. Lyle's mother, Colleen Shank, confirmed defendant's interest in Nintendo.

When evaluating the (f)(7) mitigating circumstance, this Court has characterized "age" as a "flexible and relative concept." *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986). We have also noted that "the chronological age of a defendant is not the determinative factor under G.S. § 15A-2000(f)(7)." *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 332 (1983). However, while defendant has presented evidence that he suffered from conditions or disorders commonly found in adolescents and participated in an activity or activities often enjoyed by some youngsters, our review of the record reveals no evidence that defendant exhibited decisional skills and understanding equivalent to an adolescent. To the contrary, uncontroverted evidence showed defendant had an IQ of 107, was functioning in the average to high-average range of intelligence, and had a relatively good understanding of social nuances. Additional evidence indicated that defendant graduated from high school and joined the Air Force, where a recruiter described him as a "positive force." More recently, defendant worked at a cleaners, operating complicated machinery, ultimately leaving that job to assume a better-paying position. Therefore, we hold the trial court had no duty to submit the age statutory mitigating circumstance based on the evidence presented at the sentencing proceeding.

[14] In his tenth assignment of error, defendant contends the trial court erred by failing to submit the (f)(1) mitigating circumstance, that "defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1). Prior to submitting this circumstance, a trial court must "determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity."

State v. Wilson, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). If the trial court decides that a rational jury could so conclude from the evidence, the jury is entitled to determine whether the evidence reveals a significant history. *Id.* A significant history of prior criminal activity for purposes of N.C.G.S. § 15A-2000(f)(1) is one likely to influence the jury's sentence recommendation. *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). Because defendant's history of prior criminal activity was so excessive, we conclude the trial court did not err in deciding that no rational juror could determine that the circumstance existed. Therefore, we hold that the trial court did not err in failing to submit the (f)(1) mitigating circumstance.

Substantial evidence of defendant's prior criminal activity included references to defendant's extensive and recent pattern of criminal behavior. Defendant was involved in an illegal sexual relationship with Lyle's mother and another male. Evidence indicated that defendant abused drugs from an early age. Further, defendant was involved in three alcohol-related fights, which resulted in his being discharged from the Air Force after only three months. Defendant assaulted Lyle's mother during her pregnancy and threatened further violence if she informed police of his assaults on Lyle. Finally, defendant repeatedly abused his infant son Lyle over the course of Lyle's brief life, ultimately killing him as a result. Given the extent of this criminal activity, the trial court properly could have determined that no reasonable juror could conclude that defendant's history of prior criminal activity was insignificant.

This case is substantially similar to *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996), where we upheld the trial court's nonsubmission of the (f)(1) mitigating circumstance. The defendant in *Daughtry* was sentenced to death for beating his girlfriend to death with a large stick or log. The evidence of defendant Daughtry's prior criminal history included numerous beatings of the victim, shooting an acquaintance in the leg, being convicted of driving under the influence, and pleading guilty to a prior assault in which defendant hit a man in the head with a large stick causing serious injuries. There, we stated that "[g]iven the extent of this history, particularly defendant's *prior use of a large stick as a dangerous weapon and his multiple beatings of the victim*, the trial court properly could have determined that no reasonable juror could have concluded that defendant's criminal history was insignificant." *Id.* at 522, 459 S.E.2d at 765 (emphasis

added). In the case *sub judice*, defendant's prior history of criminal activity, like that in *Daughtry*, is mainly related to assaultive behaviors which were primarily directed toward the ultimate victim of his violence and the ultimate cause of his being convicted of murder. Defendant here had a significant history of violent attacks, including fights in the military and repeated assaults on Colleen Shank even while she was pregnant. He also repeatedly and viciously beat his own son, a completely defenseless infant and the victim of murder in this case. Combined with the evidence of his other prior criminal activities, these assaultive criminal activities make defendant's case for submission of the (f)(1) mitigating circumstance at least as weak, if not weaker, than the argument which we rejected in *Daughtry*. Therefore, we hold the trial court did not err by declining to submit the (f)(1) circumstance, and defendant's assignment of error is overruled.

[15] Defendant's eleventh assignment of error asserts the trial court committed plain error by failing to properly instruct the jury concerning eighteen nonstatutory mitigating circumstances uncontroverted by the evidence. Assuming this Court finds the instructions to be without error, defendant contends that comments made by the trial court following the instructions served to invalidate them and caused the jury to improperly consider the mitigating circumstances at issue. We find these contentions to be without merit.

At the sentencing charge conference, defendant's counsel requested a peremptory instruction on the nonstatutory mitigating circumstances established by the evidence. The trial court agreed to issue the following instruction: "The Court instructs the jury that this factor has been established by the evidence. It is for you, the jury, however, to determine whether or not it has mitigating value." The trial court gave substantially this same instruction on all the nonstatutory mitigating circumstances requested by defendant. Defendant did not object to the jury instructions at the close of the charge.

Defendant's failure to object to the instructions requires us to consider this challenge under a plain-error analysis. *State v. Neal*, 346 N.C. 608, 487 S.E.2d 734 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 131 (1998). Defendant, in his brief to this Court, relies on our holding in *State v. Lynch*, 340 N.C. 435, 459 S.E.2d 679 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996), for support of his argument that the instructions in the matter *sub*

judice were insufficient. In *Lynch, this* Court suggested the use of the following peremptory instructions for nonstatutory mitigating circumstances:

> All the evidence tends to show [named mitigating circumstance]. Accordingly, as to this mitigating circumstance, I charge that if you find the facts to be as all the evidence tends to show, you will answer, "Yes," as to the mitigating circumstance Number [#] on the issue and recommendation form if one or more of you deems it to have mitigating value.

Id. at 476, 459 S.E.2d at 700.

Defendant's case was tried two years prior to our decision in *Lynch.* However, even application of the *Lynch* standard does not lead us to the conclusion that the instructions here were inadequate. A trial court is not required to give a requested instruction verbatim. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982). The trial court's instructions conveyed the proper message to the jury—that the nonstatutory mitigating circumstances in question were established as existing circumstances by the evidence but that the jurors could " 'reject the nonstatutory mitigating circumstance if they [did] not deem it to have mitigating value.' " *State v. Green*, 336 N.C. 142, 174, 443 S.E.2d 14, 32-33 (quoting *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993)), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). We conclude the peremptory instructions challenged by defendant accurately conveyed the applicable law to the jurors.

[16] Furthermore, we determine that defendant's argument that the trial court's concluding instruction negated any potential value of the peremptory instructions lacks merit. Defendant objects to the following instruction:

> The law requires the presiding judge to be impartial. You're not to draw any inference from any ruling I may have made or inflection in my voice or expression on my face or anything else I may have said or done during the trial that would lead you to believe that I have an opinion or have intimated one as to whether any part of the evidence should be believed or not, as to whether any aggravating or mitigating circumstance has been proved or not, or as to what your recommendation ought to be. It is your exclusive province and duty to find the true facts of this case and make a recommendation reflecting the truth as you find it.

When viewed in proper context, the trial court's concluding instruction, which is verbatim from North Carolina's pattern jury instructions, did not negate the earlier peremptory instructions. The trial court was simply advising the jury, in the customary language, that the law requires the presiding judge to be completely impartial. Accordingly, we hold that the trial court did not err by stressing the impartiality of the court in its closing charge to the jury.

[17] In his twelfth assignment of error, defendant contends the trial court erred by permitting the placement of leg irons on defendant during the sentencing proceeding. Defendant argues that the trial court violated the statutory provisions of N.C.G.S. § 15A-1031, as well as defendant's right to due process. We hold that the trial court did not commit error in this regard.

N.C.G.S. § 15A-1031 provides the following:

> A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. If the judge orders a defendant or witness restrained he must:
>
> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
>
> (2) Give the restrained person an opportunity to object; and
>
> (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.
>
> If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.

N.C.G.S. § 15A-1031 (1997).

Our review of the record reveals the trial court followed the procedure mandated by N.C.G.S. § 15A-1031. The trial court conducted a hearing pursuant to the statute, following a report of defendant's possible escape attempt from his jail cell. Additional evidence indicated, and the trial court noted, that defendant had a propensity towards

violence, as illustrated by his guilty plea to the brutal beating of his infant son and expert testimony at defendant's prior competency hearing reflecting a violent disposition.

The ultimate decision concerning the restraint of a defendant rests within the trial court's discretion. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976). The trial court is in the best position to balance the conflicting interests between defendant's right to a proceeding free of prejudice and the State's need to maintain control over and prevent disruption of the court proceedings. The trial court's discretion is not unbridled and must be exercised in a manner that is "not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by reason and conscience of the judge to a just result." *Langnes v. Green*, 282 U.S. 531, 541, 75 L. Ed. 520, 526 (1931). The circumstances appropriate for the trial court's consideration include, *inter alia*: defendant's temperament and character, his age and physical attributes, his past record, his past escapes or attempted escapes, evidence of a present plan to escape, and threats to harm others or to cause a disturbance. *See State v. Tolley*, 290 N.C. at 368, 226 S.E.2d at 368.

The trial court in the instant case found evidence of numerous factors supporting the physical restraint of defendant. A hearing was conducted to allow argument by all parties concerning the need for restraint. All discussions concerning the need for physical restraint took place outside of the presence of the jury. The trial court ensured that a cloth was draped over defendant's counsel table to completely conceal the leg restraints from view by the jurors, thus limiting any potential prejudice to defendant. Defendant always entered the courtroom before the jurors and left the courtroom after the jurors so they would not view his leg irons. It is abundantly clear from the record that the trial court did not abuse its discretion in ordering defendant to wear restraints during the proceeding. Rather, it is apparent that the trial court took every conceivable precaution to evaluate the need for restraints and to minimize any potential prejudice to defendant. Accordingly, defendant's twelfth assignment of error is overruled.

[18] In his thirteenth assignment of error, defendant argues the trial court erred by requiring a defense expert to issue a written report and to produce materials beyond those required by the applicable statute. Defendant objects to the trial court's order which mandated the disclosure of the following:

> [A]ll results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with this case, or copies thereof, within the possession or control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness or the agent or employee of a witness whom the defendant intends to call at the trial.

Furthermore, at the competency hearing, the trial court ordered defendant's expert witness, Dr. Horacek, to supply "all of his notes," including those from conversations and interviews with defendant. Defendant argues the trial court erred by requiring such extensive discovery, which was later used to cross-examine defendant's witness. Defendant suggests the discovery order violated not only N.C.G.S. § 15A-905(b), but also violated defendant's attorney's work-product privilege, his right against self-incrimination and his right to counsel. We hold that the discovery order did not result in reversible error.

N.C.G.S. § 15A-905 provides the procedures for court-ordered pretrial discovery in criminal cases. The statute addresses mental examinations and tests, in relevant part, as follows:

> If the court grants any relief sought by the defendant under G.S. 15A-903(e), the 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 or of tests, measurements or experiments made in connection with the case, or copies thereof, 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.

N.C.G.S. § 15A-905(b) (1997).

The issue before this Court regarding defendant's challenge to the discovery order is not whether defendant intended to introduce specific tests at trial, but whether the expert relied on or gleaned any information from the tests and answers which related to the expert's testimony. *See State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). Our review of the record clearly reveals that Dr. Horacek relied on the challenged discovery material at the competency hearing, as well as at the sen-

tencing proceeding. Accordingly, we conclude the trial court did not err by issuing the discovery order, and we overrule this assignment of error.

[19] Defendant, in his fourteenth assignment of error, contends the trial court erred by allowing State witnesses to testify to specific prior acts of misconduct by defendant based on hearsay, without adequate notice and unrelated to any aggravating circumstance. Specifically, defendant objects to (1) the testimony of Lyle's mother, in which she related earlier abuse of Lyle and herself by defendant; and (2) the testimony of Wanda Frady, in which she indicated potential child abuse dating back to the time when Lyle was only three weeks old. We conclude that this assignment of error is without merit.

As an initial matter, we note that defendant did not object to the testimony during the sentencing proceeding. Accordingly, this has not been preserved for review. N.C.G.S. § 15A-1446 (1997); N.C. R. App. P. 10(b). However, assuming *arguendo* that defendant had preserved this claim for appellate review, this assignment of error nevertheless fails. Formal rules of evidence do not apply at a capital sentencing proceeding. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). The trial court has latitude and discretion to allow any evidence it deems relevant to sentencing. *State v. Heatwole*, 344 N.C. 1, 473 S.E.2d 310 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997). The evidence in question was clearly related to defendant's sentencing. Defendant's treatment of Lyle and Lyle's mother tended to explain why Lyle's mother did not seek earlier medical treatment during the four-week period leading up to Lyle's death. The testimony also revealed important information concerning the parental relationship between defendant and Lyle, supporting the jury's recognition of the sole submitted aggravating circumstance, that the crime was "especially heinous, atrocious, or cruel."

[20] In his fifteenth assignment of error, defendant contends the trial court committed reversible error by permitting the State to present evidence and argument concerning defendant's activities, which included reading horror books and playing Nintendo. Defendant contends that this issue is controlled by the United States Supreme Court's decision in *Dawson v. Delaware*, 503 U.S. 159, 117 L. Ed. 2d 309 (1992), where the Court held that evidence of gang membership had no relevance to the issues being decided in the proceeding and that admission of the evidence violated the First Amendment. The

Court noted that "the evidence proved nothing more than [defendant's] abstract beliefs." *Id.* at 167, 117 L. Ed. 2d at 318. For the following reasons, we reject this assignment of error.

Unlike the evidence in *Dawson*, the challenged evidence presented at defendant's sentencing proceeding was directly relevant to issues before the jury. Defendant offered numerous circumstances which he suggested mitigated his culpability for the murder. Among these mitigating circumstances were suggestions that defendant was under the influence of a mental or emotional disturbance and that defendant was remorseful. The State's evidence and arguments concerning defendant's interest in horror books were used to impeach defendant's contention that he suffered a mental or emotional disorder. The prosecutor argued the alleged mental illness was simply a recitation of stories gleaned from the horror books. The evidence concerning Nintendo use was presented to show defendant's lack of remorse following his various assaults on Lyle. *Dawson* did not prohibit all evidence related to activities protected by the First Amendment, but merely required the evidence to be relevant to an issue in the capital sentencing proceeding. Contrary to defendant's argument, we conclude the evidence was not employed for the purpose of inflaming the jury's moral sensibilities. We hold the trial court did not err when it permitted the testimony in question.

[21] In his sixteenth assignment of error, defendant argues the trial court erred by accepting defendant's guilty plea to first-degree murder. Defendant contends that the trial court lacked sufficient factual basis for the plea, and that the plea was accepted without a knowing and voluntary waiver of defendant's rights. As to the first part of this contention, defendant maintains the plea proceeding record is devoid of any evidence to support a plea of premeditated and deliberate murder. Defendant calls our attention to N.C.G.S. § 15A-1022, which provides in pertinent part:

> (c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.

(4) Sworn testimony, which may include reliable hearsay.

(5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (1997).

The statute clearly does not require the trial court to find evidence from each, any or all of the enumerated sources. The trial court may consider any information properly brought to its attention, and the trial record must reflect the information and evidence relied upon in reaching the decision that an adequate factual basis does exist. *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980); *State v. Dickens*, 299 N.C. 76, 261 S.E.2d 183 (1980). In the present case, the trial court relied on the State's summary of the evidence, as well as medical evidence detailing Lyle's injuries. Our review of the record leads us to conclude that the evidence provides a sufficient factual basis to support defendant's plea of guilty to premeditated murder.

In defendant's presence in open court, the State presented an evidentiary recitation showing the following: Lyle was not breathing when medical personnel first responded to his emergency; Lyle ultimately died of a fractured skull, which the doctors said took "tremendous force"; Ms. Shank witnessed defendant attacking Lyle; and Lyle had endured a series of bruises and broken bones occurring over a several-week period. Moreover, at a competency hearing conducted the day prior to the guilty plea, the same trial court heard Dr. Clabe Lynn testify that defendant made a statement admitting that he was "playing with [Lyle] and the next thing he knew he was hitting him on the top of the head." We hold that this recitation was sufficient to provide a factual basis for defendant's plea.

Further, it is well settled that premeditation and deliberation can be inferred from circumstances such as the brutality of the killing, the nature and number of the victim's injuries, and the dealing of lethal blows after the victim has already been incapacitated. *State v. Rasor*, 319 N.C. 577, 356 S.E.2d 328 (1987). The medical evidence presented by the State tended to show that multiple, brutal injuries had been inflicted upon Lyle by defendant over a sustained period of time. From this, one can readily infer that defendant totally abdicated his parental role, providing Lyle not with support and nurturing, but rather providing continued, deliberate pain and violence which culminated in the child's death. This evidence provided a sufficient basis from which premeditation and deliberation could be inferred. We

therefore perceive no error in the trial court's acceptance of defendant's plea of guilty to murder in the first degree.

Turning to the second part of defendant's assignment of error concerning the guilty plea, defendant argues the trial court erred by accepting the plea without a sufficient showing that the plea was knowingly and voluntarily entered. A plea of guilty involves the waiver of several fundamental rights, including freedom from self-incrimination and the right to a trial by jury. *See State v. Barts*, 321 N.C. 170, 174, 362 S.E.2d 235, 237 (1987). It is therefore imperative that guilty pleas represent a voluntary, informed choice. *Sinclair*, 301 N.C. at 197-98, 270 S.E.2d at 421.

Our review of the record of defendant's plea proceeding reveals the plea was knowingly and voluntarily given, as evidenced by the following exchange between the trial court and defendant:

> Q. Mr. Atkins, I'm going to now ask you a series of questions from this Transcript of Plea. If you would please speak up so the Court Reporter over here can make a notation for the record, it would be appreciated. First of all, are you able to hear and understand me?
>
> A. Yes, sir.
>
> Q. Do you understand you have the right to remain silent and any statement you make may be used against you?
>
> A. Yes, sir.
>
> Q. Are you under the influence of any alcohol, drugs, narcotics, medicines, pills, or any other intoxicants?
>
> A. No.
>
> Q. Have you discussed your case fully with your attorneys, and are you satisfied with their services?
>
> A. Yes, sir.
>
> Q. Do you understand that you're pleading guilty to the felony of first-degree premeditated and deliberated murder?
>
> A. Yes.
>
> Q. And that there are two parts to a potential capital case, the guilt or innocence phase and the sentencing phase, do you understand that?

A. Yes, sir.

Q. Have the charges been explained to you by your lawyer, do you understand the nature of the charges, and do you understand each and every element of the charge?

A. Yes, sir.

Q. Do you understand that upon your plea, depending upon the sentencing phase, that the jury could recommend life or death as the verdict?

A. Yes, sir.

Q. Do you understand you have the right to plead not guilty, to have a jury trial, and at the trial to confront and cross examine the witnesses against you, and by this plea you're giving up all of your other Constitutional Rights, as well as your confrontation rights related to a trial by jury?

A. Yes, sir.

Q. Do you plead guilty, and are you in fact guilty?

A. Yeah.

. . . .

Q. Other than the plea arrangement, has anybody made any promises or threatened you at all to cause you to enter this plea against your will?

A. No.

Q. Are you entering this plea of your own free will, fully understanding what you are doing?

A. Yes, sir.

Q. Do you have any questions about what has been said to you or anything else connected with your case?

A. No.

Q. You are thirty years of age and completed the twelfth grade?

A. Yes, sir.

Following this discussion with defendant, the trial court heard the prosecutor present a summary of the facts and evidence against defendant. Following a brief recess, the trial court held that "there's

a factual basis for the plea, which is freely, voluntarily and understandingly entered; the defendant is satisfied with his attorney, is competent to stand trial, and the pleas are his informed choice and being freely, voluntarily and understandingly made, it is accepted and is ordered recorded." We agree with the trial court's decision that the plea was made knowingly and voluntarily, and accordingly we overrule this assignment of error.

[22] In his seventeenth assignment of error, defendant contends the trial court committed reversible error by permitting the prosecutor to introduce evidence and testimony indicating that Lyle suffered from "battered child syndrome" and that such syndrome was a cause of Lyle's death. Defendant argues that the introduction of such evidence was error as a matter of law and that the evidence was extremely confusing and its probative value substantially outweighed by prejudice to defendant. We disagree.

The evidence concerning "battered child syndrome" was extemely relevant to the jury in reaching an appropriate sentencing decision. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992). This Court has stated that "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

Relevant evidence may, however, be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). We conclude the trial court did not abuse its discretion by permitting a neurologist and a pediatric radiologist to testify that battered child syndrome was the cause of Lyle's death.

This Court has previously approved the admission of expert testimony with respect to battered child syndrome. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). Evidence demonstrating battered child syndrome " 'simply indicates that a child found with [certain injuries] has not suffered those injuries by accidental means.' " *Id.* at

570, 247 S.E.2d at 911 (quoting *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971)).

This Court approved the use of battered child evidence in a capital proceeding in *State v. Elliott*, 344 N.C. 242, 475 S.E.2d 202 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997). In the present case, the evidence of battered child syndrome was relevant both to the circumstances of the crime and to the sole submitted aggravating circumstance. Concerning the circumstances of the offense, the evidence was relevant to demonstrate premeditation and deliberation. The State presented evidence that Lyle suffered extensive injuries over a four-week period, leading to his ultimate death. This evidence supported the State's contention that defendant did not simply "snap" and "lose control" on 16 March 1993. Rather, the evidence indicated that defendant engaged in a deliberate, prolonged process of severely beating and torturing Lyle.

The battered child syndrome evidence was also relevant to support the (e)(9) aggravating circumstance that the crime was "especially heinous, atrocious, or cruel." The evidence revealed a horrifying picture of a crippled, helpless, eight-month-old infant who slowly died at the hands of his father, the defendant. This evidence was probative and necessary to demonstrate to the jury the presence of the (e)(9) circumstance, that this crime demonstrated a killing which was " 'conscienceless, pitiless, or unnecessarily torturous to the victim.' " *State v. Lynch*, 340 N.C. 435, 459 S.E.2d 679 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996) (quoting *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986)). Given the high probative value of the testimony concerning battered child syndrome, we hold the trial court did not err by permitting the introduction of this evidence.

Furthermore, while defendant is technically correct in his assertion that battered child syndrome cannot be a cause of death, his argument is of no avail. According to the expert witnesses who testified at trial, battered child syndrome is nothing more than a profile of indicative symptoms, which, when noticed by a medical professional either in isolation or in combination, lead to the conclusion that a child is being battered or has been battered in the past. Such symptoms might include such things as distinctive burns, extensive bruising, head and abdominal injuries, bones broken in patterns which correlate with those of known cases of abuse, and retinal hemorrhaging (indicating violent shaking or beating of the child's head).

Since battered child syndrome is merely a diagnostic profile, it cannot therefore be a technical cause of death.

The distinction drawn here, however, is largely semantic and does not justify a new sentencing proceeding in the instant case. When examined closely, it is apparent that neither the witnesses in their testimonies nor the prosecutor in his closing argument were claiming that the "syndrome" itself was the cause of death. What they were asserting was that the cumulative effect of injuries suffered by Lyle as a result of his horrific battering, which also qualified him for the diagnosis of battered child syndrome, was the cause of death. Thus, we find no error in the trial court's admission of such evidence and argument. This assignment of error is overruled.

[23] In his eighteenth assignment of error, defendant contends the trial court denied defendant's constitutional right to be present at all stages of his capital trial. Defendant argues the trial court conducted three separate off-the-record bench conferences involving only counsel. Defendant contends this Court's holding in *State v. Meyer*, 345 N.C. 619, 481 S.E.2d 649 (1997), mandates the award of a new capital sentencing proceeding. Our review of the record and applicable precedent leads us to hold that the off-the-record bench conferences did not violate defendant's constitutional right to be present at all stages of his trial.

Defendant correctly states that, in a capital trial, a defendant must be present at every stage of the proceeding. N.C. Const. art. I, § 23. This constitutional mandate serves to safeguard both defendant's and society's interests in reliability in the imposition of capital punishment. *State v. Huff*, 325 N.C. 1, 30, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). This constitutional protection imposes upon the trial court the affirmative duty to ensure defendant's presence at every stage of a capital trial. Additionally, defendant's right to be present at every stage of his capital trial is not waivable. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Huff*, 325 N.C. at 31, 381 S.E.2d at 652.

However, defendant's reliance on *State v. Meyer* is misplaced. In *Meyer*, this Court disapproved of unrecorded, in-chambers discussions between the trial court and attorneys, noting that "the nature and content of the discussion cannot otherwise be gleaned

from the record." *Meyer*, 345 N.C. at 623, 481 S.E.2d at 652. The Court further determined that "the State has failed to meet its burden of showing the error was harmless beyond a reasonable doubt. Accordingly, we are required to order a new sentencing proceeding." *Id.*

In contrast, our review of the record in the case *sub judice* indicates the three off-the-record conferences were conducted not in chambers, but in the courtroom with defendant present and able to physically observe the context of the discussion and free to inquire of his attorneys as to the nature of the discussions. Additionally, the off-the-record bench conferences were all reconstructed for the record following each conference. The record reveals the three conferences concerned the following: a request by defense counsel to lodge a *Batson* challenge, a discussion of a scheduling problem with a State witness, and scheduling for the final week of defendant's sentencing proceeding. Assuming *arguendo* the trial court did err by conducting the conferences off the record, the reconstruction permits the State to clearly show beyond a reasonable doubt that any error was harmless. *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). Based upon the aforementioned reasons, we reject this assignment of error.

[24] In his nineteenth assignment of error, defendant contends the trial court erred by failing to properly determine questions of juror competency, purportedly violating defendant's rights pursuant to N.C.G.S. §§ 9-3 and 15A-1211. Defendant alleges the trial court failed to determine the statutory qualifications of the jurors and singled out a single juror for questioning about citizenship. Our review of the record leads us to conclude that the trial court complied with the statutory mandates in the selection of the jurors.

The trial court "must decide all challenges to the panel and all questions concerning the competency of jurors." N.C.G.S. § 15A-1211(b) (1997). In the case *sub judice*, the record reflects that defendant never challenged the jury panel selection process in any manner. The applicable statute specifically states that while a defendant may make a challenge to the jury panel, the challenge:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.

(2) Must be in writing.

(3) Must specify the facts constituting the ground of challenge.

(4) Must be made and decided before any juror is examined.

N.C.G.S. § 15A-1211(c).

In light of the fact that defendant failed to follow the procedures clearly set out for jury panel challenges and further failed, in any manner, to alert the trial court to the alleged improprieties, we hold that this assignment of error is not properly before this Court for review. N.C.G.S. § 15A-1446; *see State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996).

[25] In his twentieth assignment of error, defendant argues that the trial court erred by refusing to allow defense counsel to attempt to rehabilitate jurors who expressed opposition to the death penalty. Defendant argues that this Court's decision in *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993), supports a right of rehabilitation of prospective jurors who express uncertainty about their ability to impose the death penalty according to the laws of North Carolina. We disagree with defendant's analysis of purported "uncertainty." In his brief, defendant draws this Court's attention to the following *voir dire* of prospective juror Barbara Robison by the trial court:

Q. Could you make a decision in this matter based only on the evidence and the law and not on anything else?

A. I'm not in favor of the death penalty.

Q. Are you indicating then that as a matter of conscience and regardless of what the facts and circumstances were that you could not render a verdict based upon the evidence and the law?

A. Probably not.

Q. If you were selected to serve as a juror and the State proved the three things it's required to prove, it would be your duty as a juror, if you were going to give the State a fair trial, to recommend the death penalty. Do you understand that?

A. Yes.

Q. Could you do that duty if you were convinced that they proved everything they were required to prove notwithstanding your reservations?

A. I don't know if I could do it.

Q. Is that a no or you're not sure?

A. I'm not sure, but I don't think I could do it.

Q. Then are your views concerning the death penalty such that you would be prevented or substantially impaired from performing your duties as a juror in accordance with the instructions and your oath?

A. If I made a decision like that, I think I would probably regret it.

Q. Okay. Are you indicating that your views concerning the death penalty then would impair you from making a decision recommending it even if the State proved each and every one of the things they were required to prove so that it would be your duty to make that recommendation?

A. Yes, sir.

THE COURT: Tender for cause?

[THE PROSECUTOR]: Yes, sir.

THE COURT: The court will excuse you, ma'am, for cause—you may step downstairs, ma'am—concluding that as a matter of conscience regardless of the facts and circumstances, she couldn't render a verdict with respect to the charge in accordance with the law and that her views concerning the death penalty would prevent or impair her from performing her duties in accordance with the instructions and her oath.

Our review of the record clearly reveals that, while prospective juror Robison initially struggled with her convictions, she ultimately responded in a manner which unequivocally indicated that she would be unable to follow the law and recommend a death sentence if appropriate. Therefore, it was entirely proper for the trial court to exercise its discretion in permitting the State's challenge for cause.

The record further indicates that all other prospective jurors excused for this cause likewise expressed opinions and answers supporting the trial court's decisions. The trial court is best situated to make such determinations, as it hears the jurors' answers and observes the jurors' demeanor. "The defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court. The reasoning behind this rule is clear. It prevents

harassment of the prospective jurors based on their personal views toward the death penalty." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). We will not disturb the trial court's ruling on a challenge for cause absent a showing of an abuse of that discretion. *See State v. Brogden*, 334 N.C. at 43, 430 S.E.2d at 908. We hold the trial court in the case *sub judice* did not abuse its discretion when denying defendant's request to attempt to rehabilitate various prospective jurors. This assignment of error is overruled.

[26] In his twenty-first assignment of error, defendant asserts the trial court erred by failing to excuse prospective juror Denise Sales for cause on the ground that she had formed fixed opinions prior to the sentencing proceeding. The record reveals Ms. Sales clearly indicated to the trial court that she had strong personal feelings about child abuse. However, Ms. Sales never unequivocally stated she would be unable to follow the law and fulfill her duties as a juror. She stated, "I can be fair, but a baby being involved I'd be more harsh about it. That's all I can tell you." Following this expression, defense counsel never challenged prospective juror Sales for cause. Counsel chose instead to make a peremptory challenge excusing her from jury selection. This claim has not been preserved for appellate review according to the requirements of N.C.G.S. § 15A-1214(h). *See State v. Hartman*, 344 N.C. 445, 476 S.E.2d 328 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 708 (1997). In the absence of a proper challenge for cause during the trial court proceeding, it is impossible for us to attempt to evaluate this assignment of error.

[27] In his twenty-second assignment of error, defendant assigns as error the trial court's denial of individual *voir dire* during jury selection. Defendant contends that excessive pretrial publicity caused prospective jurors to be exposed to misleading and prejudicial statements during the jury selection process. Defendant argues the trial court abused its discretion by denying defense counsel's motion for individual *voir dire*.

The North Carolina General Assembly has provided guidance concerning individual *voir dire* and the sequestering of jurors during the selection process. The applicable statute provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." N.C.G.S. § 15A-1214(j) (1997). A trial court's ruling on whether to grant sequestration and individual *voir dire* of prospective jurors

will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134 (1997), *and cert. denied*, —— U.S. ——, 140 L. Ed. 2d 473 (1998). While it is true that many prospective jurors indicated that they had read about or heard about the present case prior to trial, our review of the record does not reveal the selection of any juror who indicated that he or she would have difficulty setting aside any pretrial impressions if selected for service. Conversely, the record reveals that challenges for cause were appropriately granted whenever any prospective juror stated that he or she could not set aside any preconceived notions. Moreover, the trial court advised the defense, when issuing the order denying defendant's motion for individual *voir dire*, "[The] motion is denied at this time. It does not preclude reassertion, depending upon the circumstances, as the *voir dire* is carried out." Defendant's counsel never renewed the motion for individual *voir dire* as jury selection proceeded. Defendant has failed to demonstrate any abuse of discretion in the trial court's order denying individual *voir dire*. This assignment of error is overruled.

[28] In his twenty-third assignment of error, defendant argues the trial court erred by permitting the prosecutor to cross-examine a defense expert witness concerning testimony presented at a previous competency hearing. Defendant attempts to support this position with reference to N.C.G.S. § 15A-959(c), which provides in pertinent part:

> (c) Upon motion of the defendant and with the consent of the State the court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect. The court's denial of relief under this subsection is without prejudice to the defendant's right to rely on the defense at trial. If the motion is denied, no reference to the hearing may be made at the trial, and recorded testimony or evidence taken at the hearing is not admissible as evidence at the trial.

N.C.G.S. § 15A-959(c) (1997).

We determine the trial court did not err by permitting the cross-examination. N.C.G.S. § 15A-959(c) prohibits subsequent use of testi-

mony introduced at hearings concerning pleas of insanity. The testimony used to cross-examine defendant's expert was presented at a competency hearing, not at an insanity hearing. Contrary to the suggestion in defendant's brief, N.C.G.S. § 15A-959(c), by its plain language, does not refer or apply to competency hearings.

Additionally, we note that our review of the record reveals that defendant himself, through his expert witness, first introduced evidence referring to the testimony of a Dorothea Dix psychiatrist initially presented at the previous competency hearing. The defense expert testified that he was provided with a copy of the Dorothea Dix evaluation and "relied on the report and things contained therein." During direct examination, the defense expert also took pains to explain why his evaluation differed from that provided by the Dorothea Dix psychiatrist. Defendant cannot now be heard to complain about evidence which he initiated and introduced into the proceeding. Accordingly, we find this assignment of error meritless.

[29] Defendant, in his twenty-fourth assignment of error, contends the trial court erred by permitting the State to make substantive use of defendant's Dorothea Dix competency evaluation at the sentencing proceeding. Defendant suggests the introduction and use of such evidence violated his Fifth and Sixth Amendment rights, relying on the United States Supreme Court's holding in *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed. 2d 359 (1981). We disagree and hold that the trial court's admission of the report did not violate defendant's constitutional rights.

The United States Supreme Court, in *Estelle*, determined that under the facts present in that case, the petitioner's challenge to the introduction of a psychiatric evaluation must be upheld. However, the Court emphasized the limited scope of that holding, stating that the decision turned on the "distinct circumstances" of that case. *Id.* at 466, 68 L. Ed. 2d at 371. The distinguishing characteristics of the *Estelle* controversy included the following: the trial court had ordered, *ex mero motu*, the psychiatric examination; the petitioner had not asserted an insanity defense; and the petitioner never offered any psychiatric evidence at trial. In stark contrast, in the case *sub judice*, the competency hearing was performed at defendant's request; defendant presented a defense strategy alleging, *inter alia*, a learning disorder, an adjustment disorder, and disturbances of emotion and conduct; and defendant introduced expert testimony concerning his mental status. The instant case is clearly distinguishable from *Estelle*. As the Supreme Court noted in *Buchanan v. Kentucky*,

483 U.S. 402, 97 L. Ed. 2d 336 (1987), the use of state-conducted psychiatric evaluations for the limited purpose of rebuttal of a defendant's psychiatric testimony does not constitute a Fifth Amendment violation. *Id.* at 423, 97 L. Ed. 2d at 355. Additionally, the Court noted that no Sixth Amendment violation occurs when such evaluations are used at a trial in which a defendant asserts a defense including "mental status," as defense counsel are certainly on notice that following the use of such a "mental status" defense, the use of psychological evidence by the prosecutor is expected. *Id.* at 423, 97 L. Ed. 2d at 356. Defendant initially introduced expert testimony concerning his mental status. Defendant's expert witness admitted that he relied upon the very report to which defendant now objects as a basis for his expert opinions at the sentencing hearing. The State was clearly entitled to use this same evidence to rebut defendant's assertions. We hold that this assignment of error is without merit.

[30] Defendant also raises additional assignments of error associated with the trial court's rulings on his motion for appropriate relief, on remand from this Court. Defendant first contends the trial court erred and violated N.C.G.S. § 15A-1415(f) by excluding portions of the State's attorney work-product materials from his discovery request. Defendant suggests that N.C.G.S. § 15A-1415(f) fails to exclude work-product materials from post-conviction discovery in capital cases, and as such, the trial court committed error by reviewing certain work-product materials *in camera* and by ultimately withholding the material from discovery. We hold the trial court did not err in reviewing the requested material *in camera* for two reasons: (1) the expedited post-conviction discovery provided by N.C.G.S. § 15A-1415(f) applies only to cases following completion of direct appeal, and defendant had not reached such a stage when he made his motion; and (2) despite the fact that we are not required to review defendant's discovery request, the trial court nevertheless complied with the requirements of N.C.G.S. § 15A-1415(f) when evaluating defendant's request.

On 21 June 1996, the North Carolina General Assembly ratified "An Act to Expedite the Postconviction Process in North Carolina." Ch. 719, 1995 N.C. Sess. Laws 389, 397. Among other things, the Act amended N.C.G.S. § 15A-1415 to add this new subsection:

> (f) In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial or appellate counsel shall make available to the capital defend-

> ant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the capital defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

N.C.G.S. § 15A-1415(f) (1997).

As recently noted by this Court, N.C.G.S. § 15A-1415(f) applies only to the post-conviction process and only to defendants who have been convicted of a capital crime and sentenced to death. *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998). Defendant's allegation of error does not come under the provisions of N.C.G.S. § 15A-1415(f), as defendant had not exhausted his direct appeal opportunities at the time of his discovery request. Accordingly, the trial court was not obligated to utilize the more liberal discovery provisions of N.C.G.S. § 15A-1415(f), and it did not abuse its discretion when reviewing the documents *in camera*.

Defendant correctly notes that the apparent legislative intent of N.C.G.S. § 15A-1415(f) is to "expedite the post-conviction process in capital cases while ensuring thorough and complete review." *Bates*, 348 N.C. at 37, 497 S.E.2d at 280-81. It is apparent the statute fits into a broader statutory scheme designed to provide full disclosure to counsel for capital defendants so that "they may raise all potential claims in a single motion for appropriate relief." *Id.* As again noted in defendant's brief, a "thorough review of the conviction avoids piecemeal and delayed presentation of claims." However, defendant is asking this Court to sanction exactly such piecemeal analysis.

Defendant had not completed appellate review when the trial court made its discovery order. Both cases relied on by defendant involved discovery motions made following completion of direct appellate review. *See State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998); *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276. Accordingly, we

conclude the trial court was not bound by N.C.G.S. § 15A-1415(f) and therefore did not err when making the decision to review the requested materials *in camera.*

Moreover, assuming *arguendo* that N.C.G.S. § 15A-1415(f) did apply to defendant's discovery request, the trial court fully complied with and satisfied the statutory mandate by conducting an *in camera* review of the work-product materials. This Court has held that N.C.G.S. § 15A-1415(f) "does not provide an express or implied protection for work product of the prosecutor or law enforcement agencies." *Bates*, 348 N.C. at 37, 497 S.E.2d at 281. However, N.C.G.S. § 15A-1415(f) does not mandate disclosure of all materials relating to a capital conviction which may be in the possession of the State pursuant to a motion for appropriate relief. The statute specifically, by clear and unequivocal language, allows the State, upon "reasonable belief that allowing inspection of any portion of the files by counsel for the capital defendant would not be in the interest of justice," to initially submit the documents not to a defendant, but to the trial court for inspection of such portion. The statute authorizes a trial court to deny access to such portions of the files, providing that when the "court finds that the files could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files." N.C.G.S. § 15A-1415(f).

In the matter *sub judice*, the State challenged the release of what it deemed to be sensitive documents. The trial court appropriately reviewed the documents *in camera*, ultimately concluding that the documents would not assist defendant. Accordingly, we conclude the trial court acted pursuant to this statute and did not abuse its discretion in reviewing and denying access to the work-product documents.

In his final assignment of error, defendant alleges that the trial court's dismissal of his motion for appropriate relief resulted in denial of his statutory and constitutional rights during the capital trial. Specifically, defendant contends the following: (1) that because of his hearing impairment and poor conditions inside the Buncombe County courthouse, he was unable to hear and fully participate in all of the proceedings against him; (2) that due to physical restraints, defendant was unable to see significant portions of the evidence against him when witnesses utilized exhibits outside the witness stand; (3) that the trial court failed to accommodate his hearing impairment, denying defendant his constitutional right to be present

at all stages of his capital trial; (4) that defendant's trial counsel's failure to investigate his hearing loss and take appropriate measures to protect his rights denied defendant his constitutional right to effective assistance of counsel; and (5) that defendant's capital sentencing proceeding violated the Americans with Disabilities Act of 1990, as well as North Carolina law. Our review of the record leads us to conclude the trial court did not err by denying defendant's motion for appropriate relief, as defendant failed to meet his burden of "proving by a preponderance of the evidence every fact essential to support the motion." N.C.G.S. § 15A-1420(c)(5) (1997).

[31] This Court has held that the decisions of a trial court concerning a motion for appropriate relief are binding on defendant if they were supported by evidence, "even though the evidence is conflicting, . . . and notwithstanding defendant's testimony at the hearing to the contrary." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). The evidence and testimony presented at the hearing on defendant's motion for appropriate relief amply support the trial court's decision denying the motion. All parties present at the motion hearing agreed that the acoustics inside the Buncombe County courthouse were less than ideal. However, the acoustics and audiometer measurements of the courthouse were not the real issue concerning the court at the motion hearing. The real issue concerned defendant's actual ability to hear, understand and participate in the capital proceedings.

Both the State and defendant proffered evidence evaluating defendant's hearing abilities. Again, all parties agree that defendant suffered some degree of hearing impairment. There was, however, a marked difference of opinion between the parties concerning defendant's ability to hear and understand the proceedings. William Auman, defendant's trial counsel, testified at the hearing that defendant consistently "respond[ed] or react[ed] in a way throughout the trial that led you to believe that he could hear what was going on during his trial." Mr. Auman's co-counsel, Curtiss Graham, likewise testified that throughout the competency hearing and sentencing proceeding defendant never indicated that he could "not hear the witnesses against him or the instructions of the Court or anything that any of the lawyers were saying." Defendant himself indicated during his plea colloquy with the trial court that he was able to hear and understand the court. This evidence, combined with other testimony at the hearing on the motion for appropriate relief, amply supports the trial court's decision denying defendant's motion in this regard.

[32] We also conclude the trial court did not err when dismissing defendant's ineffective assistance of counsel claim. The United States Supreme Court has held that in order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy a two-pronged test. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Our statutorily enacted test for prejudice mirrors the *Strickland* test. N.C.G.S. § 15A-1443(a) (1988); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). To satisfy this test, a defendant must initially show that counsel's performance was so deficient that counsel was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. A defendant must then show that counsel's deficient performance deprived him of a fair trial. *Id.* Application of this standard to the case before this Court establishes that defendant was not denied effective assistance of counsel. Nothing in our review of the record and transcript suggests that defendant's trial counsel failed to deliver an appropriate level of "counsel" or representation. Importantly, defendant presented no evidence at the hearing which indicated that he informed trial counsel that he was unable to hear and understand any part of the evidence or proceedings against him. This contention is meritless.

[33] Finally, defendant argues the trial court's failure to adequately address his hearing impairment violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101-213 (1997). Defendant's claim is based primarily on section 12132 of the Act, which provides that "no qualified individual with a disability shall, by reason of such disability, . . . be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." A regulation promulgated under the Act elaborates this particular provision by requiring public entities to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 C.F.R. § 35.160(b)(1) (1998). Since defendant failed to produce any evidence that he was unable to hear or participate in the instant proceedings because of his alleged hearing impairment, we hold the trial court did not violate the provisions of the Americans with Disability Act during defendant's sentencing proceeding.

As previously discussed, the trial court was presented with conflicting evidence as to the extent of defendant's hearing impairment.

From this evidence, the trial court made numerous findings of fact, including the following:

> 29. At times during the trial, counsel for the defendant met with the defendant on evenings and weekends. Discussions regarding what had occurred in court were had. The defendant never indicated to his counsel that he wasn't hearing or understanding what was going on in the trial.
>
> . . . .
>
> 39. In open court during the arraignment and the court's inquiry from the Transcript of Plea, the defendant was able to hear and understand and respond to the questions put to him by the presiding judge.
>
> . . . .
>
> 65. The defendant's hearing condition was not such that he could not reasonably hear and understand the proceedings.

Our review of the record clearly indicates that the above findings of fact are amply supported by competent evidence. Assuming *arguendo* the Americans with Disabilities Act applies to defendant's situation, it is apparent the trial court complied with the provisions of the Act by providing defendant an opportunity to participate in the proceedings. The evidence does not indicate that defendant was denied participation based upon his hearing impairment. This assignment of error is without merit.

PRESERVATION ISSUES

Defendant raises ten issues which he concedes have been decided against his position by this Court: (1) the trial court erred by excusing prospective jurors for cause based on their feelings about capital punishment; (2) the trial court erred by limiting the questioning of jurors opposed to a life sentence, violating defendant's rights pursuant to Article I, Section 19 of the North Carolina Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (3) the trial court erred by issuing North Carolina pattern jury instructions imposing a "duty" upon the jury to return a recommendation of death if it finds the mitigating circumstances were insufficient to outweigh the aggravating circumstances and the aggravating circumstances were sufficiently substantial to call for the death penalty; (4) the trial court erred by instructing the jury in a manner requiring the jurors to consider only the mitigating

circumstances they individually found and not to consider mitigating circumstances found by other jurors; (5) the trial court erred by failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and by placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence; (6) the trial court's use of the term "may" in sentencing Issues Three and Four made consideration of proven mitigating circumstances discretionary with the sentencing jurors; (7) the trial court erred by instructing the jury that mitigating circumstances must outweigh aggravating circumstances; (8) the trial court erred by submitting to the jury the "especially heinous, atrocious, or cruel" aggravating circumstance within the context of instructions that "failed adequately to limit the application of this inherently vague and overly broad circumstance"; (9) the trial court erred by instructing the jurors that they could reject nonstatutory mitigating evidence on the basis that it had no mitigating value; and (10) the death penalty is discriminatory and arbitrary on its face and as applied to this case. We have fully considered defendant's arguments relating to these assignments of error and find no compelling reason to depart from our prior holdings on these issues. Therefore, we overrule each of these assignments of error.

PROPORTIONALITY REVIEW

Having concluded that defendant's plea and capital sentencing proceeding were free of prejudicial error, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstance found by the jury; (2) whether passion, prejudice or "any other arbitrary factor" influenced the imposition of the death sentence in this case; and (3) whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). After thoroughly reviewing the record, transcript and briefs in the present case, we conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another

is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We defined the pool of cases for proportionality review in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), and we compare the instant case to others in the pool that "are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. at 198, 443 S.E.2d at 47.

[34] In the case *sub judice*, defendant entered into a plea agreement, pleading guilty to the first-degree murder of his infant son, Lyle Atkins. At sentencing, the trial court submitted the sole aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). The jury unanimously found the existence of this aggravating circumstance. The jury at sentencing did not find either of the two statutory mitigating circumstances submitted for its consideration: (1) that the capital felony was committed while defendant was under the influence of a mental or emotional disturbance, or (2) that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. *See* N.C.G.S. § 15A-2000(f)(2), (6). The jury also did not find the existence of any other statutory or nonstatutory mitigating circumstance not specifically submitted pursuant to the "catchall" provision mandated by N.C.G.S. § 15A-2000(f)(9). The jury did, however, find the existence of two of the twenty-three nonstatutory mitigating circumstances submitted for its consideration: (1) that defendant qualifies as having a learning disability due to his IQ variations, and (2) that defendant was diagnosed by Dr. Clabe Lynn in April of 1993 as having a personality disorder and adjustment disorder with mixed disturbance of emotions and conduct.

This case has several distinguishing characteristics: the victim was a helpless, defenseless infant; the victim's brutal murder was found to be especially heinous, atrocious, or cruel in that the victim suffered great physical pain before his death; and finally, the victim endured a protracted series of severe beatings inflicted by his father,

resulting in multiple fractures. These characteristics collectively distinguish this case from those in which we have held the death penalty disproportionate.

In our proportionality review, it is appropriate to compare the present case to those cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Of the cases in which this Court has found the death penalty disproportionate, only two involved the "especially heinous, atrocious, or cruel" aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *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. This Court vacated the sentence of death because defendant Stokes was only a teenager, and it did not appear that he was more deserving of death than an older accomplice, who received only a life sentence. In the present case, defendant alone, a twenty-nine-year-old adult, was responsible for Lyle's death. 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 series of senseless beatings amply supports an inference of premeditation and deliberation. Finally, in *Stokes*, the victim was killed during a robbery, at his place of business. In this case, the victim was killed in his home, at the hands of his father. 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). The violation of the right to security in one's own home is even more shocking when the victim is a small infant, totally dependent upon others for care.

In *Bondurant*, the victim was shot while riding with the defendant in a car. *Bondurant* is distinguishable because the defendant immediately exhibited remorse and concern for the victim's life by directing the driver to go to the hospital. The defendant also went into the hospital to secure medical help for the victim. In the present case, by contrast, defendant attempted to conceal his assaults upon Lyle, forbidding Lyle's mother from seeking medical care for him during the four-week ordeal leading up to Lyle's death. It was only after

defendant inflicted injuries rendering Lyle totally unresponsive that the victim's mother demanded medical care. While it is true that defendant did call 911 following a demand from Lyle's mother, he continued to conceal the cause of Lyle's injuries from emergency medical personnel.

For the foregoing reasons, we conclude that each case where the jury has found the "especially heinous, attrocious, or cruel" aggravating circumstance and 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 to those in which juries have consistently returned recommendations of life imprisonment.

Of particular note is the similarity of this crime to the crime in *State v. Elliott*, 344 N.C. 242, 475 S.E.2d 202, resulting in the imposition of the death penalty. In *Elliott*, as in the case *sub judice*, an individual entrusted with providing care for a young child betrayed that trust and inflicted fatal injuries upon the child. While both cases involve "boyfriends" of the victim's mother, the instant case is even more heinous, as defendant was not only a "boyfriend," but also the victim's father. Both defendants engaged in violent assaults upon the helpless victims, and both defendants attempted to conceal the victims' injuries rather than seeking emergency medical care.

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

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

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ROBBIE DEXTER LOCKLEAR

No. 235A96

(Filed 9 October 1998)

1. Criminal Law § 122 (NCI4th Rev.)— first-degree murder—arraignment—notice

There was no error in a capital prosecution for first-degree murder where defendant was arraigned one week before he was scheduled for trial and objected on the grounds that his arraignment was not on a calendar published for that session, the trial court continued the proceeding until later in the day, and a calendar containing defendant's arraignment was published in the meantime. Assuming that the State requested a hearing on arraignment outside of defendant's presence, this communication occurred prior to trial and did not constitute a stage of defendant's capital trial. Defendant's right to due process was in no way impaired by a lack of notice, if any; it is clear from the record that defendant was fully aware of the charge against him, he entered a plea of not guilty, and the trial court eliminated the possibility of prejudice by allowing additional time to file defendant's remaining pretrial motions. Assuming that the State violated N.C.G.S. § 15A-943(a) by publishing the calendar for defendant's arraignment on the same day the arraignment was held, there is no reversible error because defendant nonetheless had a full week's interval between arraignment and trial.

2. Jury § 256 (NCI4th)— first-degree murder—jury selection—*Batson* challenge

The trial court did not err during jury selection for a capital first-degree murder prosecution by allowing a peremptory challenge against an African-American prospective juror where defendant raised a *Batson* objection, the trial court said, "I understand," and confirmed the race reported on the juror's questionnaire; at that point, forty-seven venire members had been questioned and nine seated, including one black, four Native Americans, and four whites; five blacks had been excused for cause; this juror's excusal made the second peremptory challenge of a black prospective juror by the State; and the State had exercised peremptory challenges against two Native American prospective jurors. Although the trial court did not explicitly rule that defendant had failed to make a *prima facie* showing of discrimination, it is clear from the record that this was the trial court's decision and, defendant having made no other showing to support his *Batson* objection, there was no error.

3. Jury § 256 (NCI4th)— capital first-degree murder—jury selection—*Batson* challenge

The trial court did not err during jury selection for a capital first-degree murder prosecution by denying defendant's *Batson* claim as to three jurors where the reasons articulated by the prosecutor were supported by the record. Prospective juror Hester indicated that she had four relatives who were currently or had been in jail or prison; Ms. Locklear admitted to pleading guilty to possession of marijuana; Ms. Brooks expressed her opposition to the death penalty and the State exercised its peremptory challenge after the trial court had twice denied a challenge for cause; and defendant's only rebuttal was that the State had passed several white jurors despite drug and DWI convictions. The North Carolina Supreme Court has previously rejected an attempt to show discriminatory intent by finding a single factor among several articulated by the prosecutor and matching it to a passed juror who exhibited that same factor. Here, the prosecutor pointed to Ms. Locklear's demeanor as well as her prior drug conviction as the basis for the challenge.

4. Jury § 256 (NCI4th)— first-degree murder—jury selection—*Batson* challenge—no prima facie case

The trial court's finding in a capital prosecution for first-degree murder that defendant failed to make a *prima facie* showing of discrimination as to the State's peremptory challenges of two jurors was not clearly erroneous where the court noted that the two prospective jurors were not of the same race as defendant and defendant asserted that the two prospective jurors were members of a minority race who were asked the same questions and gave the same responses as white jurors who were passed by the State. Defendant's standing to assert a *Batson* claim is not impaired by the fact that he is of a different race than the challenged jurors, but the race of a defendant and the race of the victim and key witnesses are relevant circumstances that the trial court may consider when determining whether defendant had raised an inference of purposeful discrimination sufficient to make a *prima facie* case upon a *Batson* motion. Furthermore, disparate treatment of prospective jurors is not necessarily dispositive of discriminatory intent.

5. Jury § 256 (NCI4th)— first-degree murder—jury selection—*Batson* challenge—Native American and African-American prospective jurors considered separately

There was no violation of the Equal Protection Clause in jury selection for a capital first-degree murder prosecution where the trial court considered defendant's *Batson* motion separately as to challenged Natice American and African-American prospective jurors. Racial identity between defendant and some of the challenged jurors was a legitimate factor for the trial court to consider in ruling on defendant's *Batson* motion and the fact that defendant and the challenged black jurors were of different races was a relevant circumstance which the trial court was also entitled to weigh. The trial court may consider the acceptance rate of minority jurors by the State as evidence bearing on alleged discriminatory intent and defendant's contention that the trial court unduly emphasized this factor is rejected.

6. Jury § 93 (NCI4th)— first-degree murder—jury selection—objections to question sustained

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by sustaining objections to questions which defendant contended prevented

him from questioning prospective jurors concerning the credibility of law enforcement officers. The record reveals that defense counsel was allowed the opportunity to rephrase the questions and that the trial court gave defendant ample opportunity to inquire into jurors' potential bias in favor of law enforcement.

7. Jury § 149 (NCI4th)— first-degree murder—jury selection—inquiry into automatic vote for death penalty—no abuse of discretion

There was no abuse of discretion during jury selection for a capital first-degree murder prosecution where defendant contended that the court limited *voir dire* concerning whether jurors would automatically vote for the death penalty, but he was permitted to pursue this line of inquiry with direction from the court to rephrase certain questions.

8. Jury § 222 (NCI4th)— first-degree murder—jury selection—death qualification—no error

There was no error during jury selection for a capital first-degree murder prosecution where the prospective jurors excused for cause based on their responses to questions concerning capital punishment were not able to state clearly that they could set aside personal opposition to the death penalty and render a verdict in accordance with the law and the evidence in the case.

9. Jury § 183 (NCI4th)— first-degree murder—jury selection—challenge for cause

There was no error during jury selection for a capital first-degree murder prosecution where defendant contended that the court erred by not excusing a prospective juror for cause based on the juror's inability to be impartial in weighing the credibility of law enforcement officers but that venire member was in fact ultimately dismissed for cause.

10. Jury § 118 (NCI4th)— first-degree murder—jury selection—no expression of opinion by judge

The trial judge during jury selection for a capital first-degree murder prosecution did not improperly and prejudicially convey an opinion by his conduct and participation, by his examination of witnesses, by his nonverbal conduct, and by his comments. There was nothing in those portions of the record to which defendant pointed that suggested that the judge's comments or

questions improperly influenced jurors or disparaged defense counsel and, because prospective jurors were examined individually, no possible prejudicial impact could have occurred as a result of the judge's remarks to defense counsel during the questioning of persons ultimately excused.

11. Criminal Law § 376 (NCI4th Rev.)— first-degree murder—guilt phase—relevance of line of questioning—judge's remarks

There was no error and no prejudicial effect on the jury during the guilt phase of a capital first-degree murder prosecution where defendant contended that the court's questions and conduct were improper during an exchange with defense counsel, but the judge conducted a proper inquiry into the relevance of defendant's line of questioning so as to prevent inadmissible evidence from being presented to the jury and the exchange took place outside the presence of the jury.

12. Criminal Law § 376 (NCI4th Rev.)— capital first-degree murder—judge's comments—relevancy of evidence

The jury in a capital first-degree murder prosecution was not improperly influenced and defendant was not denied his right to a fair trial where the court remarked on the relevancy of certain evidence.

13. Criminal Law § 381 (NCI4th Rev.)— capital sentencing—judge's comments—no error

There was no error in a capital sentencing proceeding where defendant contended that the court improperly commented on the evidence, but the court in fact in one instance was acting upon defendant's objection to the State's attempt to offer a certified copy of defendant's criminal record rather than the judgment, and in another instance did no more than interpose a clarifying question. There was no objectionable intimation of opinion as to the witnesses' credibility, defendant's culpability, or any factual controversy to be decided by the jury.

14. Criminal Law § 381 (NCI4th Rev.)— first-degree murder—judge's comments—no error

There was no error in a capital first-degree murder prosecution where defendant contended that the trial court assisted and coaxed the prosecutor, made objections to questions by the defense, sustained its own objections, and belittled defense coun-

sel, but the inquiries to attorneys for both sides as to their desire to object to potentially inadmissible testimony did not constitute coaxing the prosecutor or making objections to questions by the defense and did not indicate that the court was rude to or belittled defense counsel.

15. Evidence and Witnesses § 1767 (NCI4th)— first-degree murder—test of murder weapon—admissible

The trial court did not err in a capital first-degree murder prosecution by admitting the testimony of an SBI expert in firearms where defendant contended that the witness's test with the murder weapon to determine muzzle to target distances based on shotgun-pellet patterns was not conducted under circumstances sufficiently similar to conditions at the time of the crime. The agent used the same .12-gauge shotgun that fired the fatal shots, used ammunition consistent with ammunition recovered at the scene, the purpose was to determine the distance at which the gun was fired, and the agent was well qualified by his knowledge, training and the experience to conduct these tests and render an expert opinion.

16. Evidence and Witnesses § 2273 (NCI4th)— first-degree murder—testimony of pathologist—shotgun wound pattern

The trial court did not err in a capital first-degree murder prosecution by admitting the testimony of an expert forensic pathologist that a shot pattern that corresponded with test firing a shotgun from the three-foot range most closely matched the wound in the victim's back as well as his expert opinion of the effect on a body of such a shot. The witness performed the autopsy on the victim, examined and measured the wounds, and reviewed and measured the shotgun-pellet test patterns. He was undoubtedly in a position to assist the jury in determining the distance from which the fatal shots were fired and his testimony illustrating the effect such a shot would have had was likewise appropriate to assist the jury in understanding the evidence.

17. Evidence and Witnesses § 2309 (NCI4th)— first-degree murder—victim's blood alcohol level—pathologist's opinion of alcohol intake—admissible

The trial court did not err in a capital first-degree murder prosecution by admitting the testimony of an expert forensic

pathologist that the victim's blood alcohol level would have been the result of the ingestion of approximately one-half of a beer. The witness personally drew the blood sample from the victim during the autopsy and incorporated the results into the autopsy report, the witness measured the victim's height and weight and noted an amount of partially digested food in the victim's stomach, and, based on his training, knowledge, and experience, gave his opinion to a reasonable medical certainty of the amount of alcohol that was absorbed into the victim's blood stream.

18. Evidence and Witnesses § 3164 (NCI4th)— first-degree murder—witness's prior statement to police—admissible

The trial court did not err during a capital first-degree murder prosecution by admitting the prior statement of a witness to officers on the night of the shooting where the prior statement was consistent with the witness's trial testimony, contained no significant additional facts, and the court gave proper instructions limiting the evidence to corroboration.

19. Evidence and Witnesses § 716 (NCI4th)— first-degree murder—hearsay testimony—not prejudicial

There was no prejudice in a capital first-degree murder prosecution from testimony by a witness as to how he had come to live in the victim's home, even assuming that the testimony consisted of inadmissible hearsay.

20. Evidence and Witnesses § 694 (NCI4th)— first-degree murder—evidence excluded—not preserved for review

A defendant in a capital first-degree murder prosecution who argued that evidentiary rulings by the trial court denied him the right to present a defense could not show prejudice because the record fails to show what the answers would have been had the witnesses been permitted to respond.

21. Criminal Law § 504 (NCI4th Rev.)— first-degree murder—jury deliberations—taking evidence into jury room

The trial court did not err in a capital prosecution for first-degree murder by refusing to allow the jury to review the testimony of a particular witness and instructing them to remember the testimony as it was given in the courtroom.

22. Criminal Law § 503 (NCI4th Rev.)— capital first-degree murder—jury deliberations—defendant's statement taken into jury room—no error

There was no prejudicial error in a capital first-degree murder prosecution where the trial court granted the jury's request to take defendant's statement into the jury room. Although defendant contends that he was not given the opportunity to object to the submission of the exhibit to the jury, the record reveals no action by the trial court which prevented defendant from making such an objection or otherwise indicating his lack of consent and there was no prejudice in that defendant's statement had previously been admitted into evidence, read to the jury in its entirety, and published individually to jurors.

23. Criminal Law § 467 (NCI4th Rev.)— capital murder—prosecutor's arguments—use of shotgun—basis in evidence

There was no error during the guilt phase of a capital first-degree murder prosecution where the prosecutor argued that the twelve-gauge shotgun used in the murder had to be loaded, closed, fired, and unloaded. The prosecutor argued that the very act of loading and firing the weapon showed premeditation and deliberation, a reasonable inference from the evidence. The shotgun had been introduced as evidence and the mechanics of loading and firing it were based directly upon the evidence.

24. Criminal Law § 436 (NCI4th Rev.)— capital first-degree murder—prosecutor's argument—defendant's choices

There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor argued that defendant was there because of the choices he had made and that the jury should not let the defense put that fault or blame on the jury.

25. Criminal Law § 475 (NCI4th Rev.)— capital first-degree murder— prosecutor's argument—heat of passion

There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor argued that there was no heat of passion involved in the case and that there would be no instruction on self-defense where the record showed that the trial court gave instructions only on first- and second-degree murder, not manslaughter, and not on self-defense, so that the prosecutor's assertions were correct. The prosecutor did not misstate the law, distort the evidence, or inflame or prejudice the jury.

26. Criminal Law § 448 (NCI4th Rev.)— capital first-degree murder—prosecutor's argument—jury as voice of the community

There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor argued to the jury that the jury was the voice of the community and represented the community.

27. Homicide § 706 (NCI4th)— first-degree murder—instruction on voluntary manslaughter refused

There was no prejudicial error in a capital prosecution for first-degree murder in not granting defendant's request for a jury instruction on voluntary manslaughter where, assuming that the evidence warranted the instruction, the jury's verdict of first-degree murder and its rejection of second-degree murder renders any error harmless.

28. Homicide § 609 (NCI4th)— first-degree murder—instruction on self-defense refused—no error

The trial court did not err in a capital first-degree murder prosecution by failing to instruct on self-defense where defendant in his own statement acknowledged that the victim was unarmed when defendant shot him in the back and defendant offered no evidence that, at the time of the shooting, he believed, reasonably or unreasonably, that it was necessary to kill the victim in order to protect himself from imminent death or great bodily harm.

29. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—prior record—certified copy of record

The trial court did not err in a capital sentencing proceeding by allowing the State to put before the jury defendant's criminal record before admitting the judgment of defendant's prior felony conviction as proof of the aggravating circumstance of a previous conviction of a felony involving violence. The State offered a certified copy of defendant's record, defendant objected, and the court allowed the prosecutor to withdraw the copy of defendant's criminal record and substitute the judgment, with the testimony of the deputy clerk laying the foundation for the admission of the judgment. While the prosecutor initially proffered a copy of defendant's criminal record, it was never admitted into evidence or "put before the jury," and the court ruled appropriately in

requiring the State to prove the sole aggravating circumstance by the preferred method, introduction of the judgment itself. Although defendant contends that the mere proffer of his criminal record insinuated to the jury that he had an extensive criminal history, defendant's bare assertion of prejudice is unsupported by the record.

30. Evidence and Witnesses § 2877 (NCI4th)— capital first-degree murder—defendant's expert witnesses—cross-examination

The trial court in a capital first-degree murder prosecution did not abuse its discretion in overruling defendant's objections to the cross-examination of defendant's expert witnesses where, without identifying how any specific question exceeded the permissible scope of cross-examination, defendant merely referred to portions of the transcript and generally labeled the cross-examination abusive and insulting. A careful inspection of the record reveals no prejudicial error and that the questions were within the scope of permissible cross-examination.

31. Evidence and Witnesses § 2877 (NCI4th)— first-degree murder—forensic psychologist—cross-examination

The cross-examination of defendant's forensic psychologist in a capital first-degree murder prosecution was not abusive, insulting, and degrading and was not intended to distort his testimony, as defendant contended. He was interrogated as to the amount and method of the computation of his fee, a legitimate subject of cross-examination, and, while defense objections were overruled to questions concerning how the witness arrived in that county for the trial, the number of capital trials at which he had previously testified, and what he did while administering a test to defendant, nothing suggests abusive or improper interrogation and there was no untoward or bad faith questioning.

32. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—prior conviction involving violence—testimony as to nature of conviction—admissible

The trial court did not abuse its discretion during a capital sentencing proceeding by admitting the testimony of a detective that the victim in defendant's prior assault conviction had been confined to a wheelchair at the time of the assault. The testimony simply conveyed the circumstances of defendant's prior conviction, which had already been introduced as evidence, and the

record reveals no prejudicial insinuations flowing from this testimony.

33. Criminal Law § 1335 (NCI4th Rev.)— capital sentencing—defendant's evidence excluded—no error

The trial court did not err during a capital sentencing proceeding by excluding evidence upon the prosecutor's objection which defendant contended was admissible mitigating evidence. One instance warrants discussion: defendant sought to attack the character of the victim of his prior assault conviction, but the State proved the existence of the prior felony aggravating circumstance by submitting the judgment and the testimony of the investigating officer and the prior victim did not appear at trial and was not a hearsay declarant subject to impeachment. Nothing in the criminal record of the prior victim sheds light on defendant's age, character, education, environment, habits, mentality, propensities, or criminal record or on the circumstances of the offense for which defendant was being sentenced.

34. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—mitigating circumstance—victim as voluntary participant—not submitted

The trial court did not err in a capital sentencing proceeding by refusing to submit the statutory mitigating circumstance that the victim was a voluntary participant in defendant's homicidal conduct where defendant contended that the victim provoked a fight with defendant, but defendant was getting the best of the victim in the fight and the victim had stopped before defendant reentered the mobile home to get his shotgun. Defendant presented no evidence that he knew the victim kept a weapon in the shed toward which the victim was moving or that the victim reinitiated the fight. It is undisputed that defendant's homicidal conduct consisted of retrieving a shotgun from inside that mobile home, shooting the victim in the back, and firing at the victim again as he was lying on the ground. N.C.G.S. § 15A-2000(f)(3).

35. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstance—not submitted as requested

The trial court did not err in a capital sentencing proceeding by not submitting a nonstatutory mitigating circumstance as originally proposed by defendant where the circumstance that was actually submitted, along with the catchall mitigating circum-

stance, allowed the jury to consider and give weight to all the evidence presented on this subject.

36. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstances—defendant's support by relatives

The trial court did not err in a capital sentencing proceeding by excluding the proposed nonstatutory mitigating circumstance that defendant continues to have family members who care for and support him; the feelings, actions, and conduct of third parties have no mitigating value as to defendant and are irrelevant.

37. Criminal Law § 685 (NCI4th Rev.)— capital sentencing—peremptory instructions—not requested

The trial court did not err in a capital prosecution for first-degree murder by refusing to give peremptory instructions on all the statutory and several nonstatutory mitigating circumstances where defendant did not request peremptory instructions during the charge conference and only raised the issue just prior to closing arguments in the penalty phase of the trial. Defendant did not make a specific request for peremptory instructions, nor did he make a showing that the evidence supporting any mitigating circumstance was uncontroverted and manifestly credible, but merely raised the issue of peremptory instructions before the trial court.

38. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstance—requested circumstance submitted

Although the defendant in a capital sentencing proceeding argued that the trial court erred by failing to submit and instruct the jury on a nonstatutory mitigating circumstance after agreeing to submit the circumstance, the record reveals that defendant initially requested two nearly identical nonstatutory circumstances and agreed to the submission of only one during the charge conference. That mitigating circumstance was in fact submitted and instructed upon.

39. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's arguments—not grossly improper

Certain of the prosecutor's arguments in a capital sentencing proceeding were not so grossly improper as to require the trial court to intervene *ex mero motu*. In addition to the wide latitude generally afforded trial counsel in jury arguments, the prosecutor of a capital case has a duty to zealously attempt to persuade the jury that the death penalty is appropriate upon the facts presented.

40. Criminal Law § 471 (NCI4th Rev.)— capital sentencing—prosecutor's argument—not supported by evidence—not prejudicial

Most of a first-degree murder defendant's contentions that the trial court erred by allowing certain arguments by the prosecutor in a capital sentencing hearing were without merit. While there was no evidence to support the prosecutor's assertion that the victim's son saw his father after the shooting, the evidence clearly established the son's proximity to the scene and the prosecutor's statement, though inappropriate, was not prejudicial.

41. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—deterence

There was no error in a capital sentencing proceeding where the court allowed the prosecutor to urge the jury to "save someone else's life"; to never "let him put his hands on another gun or another knife and face down another human being who has made him mad"; that prison would not do defendant any good; and that the death penalty would prevent defendant from taking another life. Arguments invoking specific deterrence are proper.

42. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—specific deterrence—not a comment on appellate process

There was no error in a capital sentencing proceeding where the trial court denied defendant's motion for a mistrial after the prosecutor argued "You've got to stop this now, ladies and gentlemen. And only you can do it. Don't pick up the paper somewhere down the road and read about a new trial of [defendant]." The trial court correctly interpreted the argument as an extension of the specific deterrence argument as to defendant rather than a comment on the appellate process.

43. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—passion, prejudice, or other arbitrary factor

The prosecutor's arguments in a capital sentencing proceeding did not result in a verdict of death returned under the influence of passion, prejudice, or other arbitrary factors where the defendant's assertions that certain arguments were grossly improper were meritless.

44. Appeal and Error § 341 (NCI4th)— capital first-degree murder—preservation issues—not properly raised

Certain of a capital first-degree murder defendant's preservation issues were in fact not proper preservation issues because they were not determined solely by principles of law upon which the court had previously ruled. Where counsel determines that an issue does not have merit, it should be omitted entirely from the argument on appeal, furthermore, some of the issues were not addressed by any argument or authority whatsoever and assignments of error in support of which no reasonable argument is stated will be taken as abandoned.

45. Criminal Law § 1402 (NCI4th Rev.)— death penalty—supported by record—not under the influence of passion, prejudice, or other arbitrary considerations

A sentence of death in a first-degree murder prosecution was not imposed under the influence of passion, prejudice, or any other arbitrary consideration and the record fully supports the sole aggravating circumstance found by the jury.

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

A death penalty for first-degree murder was not disproportionate where defendant shot his unarmed stepfather in the back and fired the gun twice more as the victim was lying on the ground. The evidence presented at trial as to the circumstances of defendant's previous conviction revealed a knife attack on a victim confined to a wheelchair and defendant in this case was convicted of first-degree murder under the theory of premeditation and deliberation.

Justice WYNN did not participate in the consideration or decision of this opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Britt (Joe Freeman), J., at the 29 April 1996 Criminal Session of Superior Court, Robeson County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 9 February 1998.

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

William L. Davis, III, for defendant-appellant.

FRYE, Justice.

Defendant was indicted by a Robeson County grand jury for the first-degree murder of James Charles Taylor. He was tried capitally, and the jury returned a verdict of guilty of first-degree murder. In a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury found as an aggravating circumstance that defendant had previously been convicted of a felony involving the use of violence to the person. No juror found any mitigating circumstance. The jury recommended and the trial court imposed a sentence of death. For the reasons discussed herein, we conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's conviction of first-degree murder and sentence of death.

The State's evidence presented at trial tended to show the following facts and circumstances. On 27 January 1994, defendant and the victim, James Charles "Jay" Taylor, were living in the same mobile home in Robeson County. Also living in the home were defendant's mother, Angelina Locklear Taylor, who was the victim's wife; defendant's stepbrother, James Reed "J.R." Taylor, who was the victim's son; and defendant's uncle, James B. Locklear, Jr. That evening, defendant and his stepbrother were inside the bedroom they shared in the home. According to defendant's statement, Jay Taylor came into the room and began "raising hell" with defendant. Taylor invited defendant outside, and a fight ensued. Defendant was "getting the best of him," and Taylor stopped. Taylor moved toward an outside storage shed, telling defendant, "I will be right back you son of a bitch."

Defendant reentered the mobile home, got a twelve-gauge shotgun and shells, and returned outside. Taylor was standing in front of

the storage shed, and defendant shot him in the back from a distance of approximately three to eight feet. Defendant reloaded the shotgun and shot Taylor in the neck as he was lying on the ground, then reloaded and fired a third time, missing the victim. Taylor died as a result of the two gunshot wounds inflicted by defendant.

Defendant had been drinking beer and liquor during the day of the shooting. An autopsy showed that the victim had a blood- alcohol level of .02, the equivalent of approximately half a beer.

After the shooting, defendant again entered the mobile home and told his uncle, "You better go check on your brother-in-law." Defendant told his uncle that he had shot Taylor because Taylor "said he was an S.O.B. and his mother was, too." Defendant then went across the street and told his aunt, Vera Lindsey, what he had done. Defendant ran down the road, where he was found by his cousin, James Belton Locklear, about a mile away. Locklear drove defendant back to the scene and summoned police. After being advised of his rights and waiving them, defendant voluntarily gave a statement to Detective Randal Patterson of the Robeson County Sheriff's Department in which he admitted shooting Taylor. Defendant's statement was published to the jury.

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

Defendant did not testify but did present evidence at trial. J.R. Taylor, the victim's son, testified that his father came into the bedroom he shared with defendant and asked him to go into another room. J.R. heard loud talking and a few minutes later he heard a shot, but did not think anything of it because target shooting was common in the neighborhood. Two of defendant's relatives testified that the victim kept one or more guns in the shed or outbuilding behind the mobile home. Mrs. Taylor, defendant's mother, testified that a week after her husband's death, she found a rifle while cleaning out the shed. She also testified that when she saw defendant at the jail on the night of the shooting he was upset and crying.

At defendant's capital sentencing proceeding, the State presented evidence of defendant's prior conviction for assault with a deadly weapon inflicting serious injury in support of the sole aggravating circumstance submitted to the jury, that defendant had been previously convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988) (amended 1994).

Defendant's evidence during the sentencing phase tended to show the following: Defendant's mother had abused alcohol before and during her pregnancy. There was evidence that defendant suffered from Fetal Alcohol Syndrome. Defendant was an illegitimate child who had no contact with his father. Defendant was cared for by his grandmother from an early age because his mother continued to drink heavily. He was close to his grandmother and cared for her during her final illness, until she died when defendant was approximately nine years old.

There was expert testimony that defendant had an IQ of 76, which placed him in the borderline range of intellectual functioning. Defendant had always been small for his age and was "slow" in school. He had been retained in school and, as a teenager, had dropped out. Defendant also began to abuse alcohol as a teenager. He suffered from impulsive behavior and feelings of insecurity, inadequacy, and dependency, in part because of the effects of his exposure to alcohol before birth. At the time of the shooting, defendant was intoxicated from alcohol, Valium, and marijuana.

The jury considered twenty-one mitigating circumstances based on this evidence and the catchall mitigating circumstance. No juror found any mitigating circumstance to exist. The jury unanimously recommended, and the trial court imposed, a sentence of death.

Defendant appeals to this Court as of right from the sentence of death and presents thirty issues based on seventy-three assignments of error.

[1] Defendant first contends that the trial court erred by arraigning him in violation of the procedures mandated by N.C.G.S. § 7A-49.3. Defendant was arraigned on 22 April 1996, at a Mixed Session of Superior Court, Robeson County, one week before he was scheduled for trial. On the day of the hearing, defendant objected on the grounds that his arraignment was not on a calendar published for that session. The trial court continued the proceeding until later in the day, and in the meantime, a calendar containing defendant's arraignment was published. Defendant contends that his constitutional right to due process was violated because the arraignment was scheduled pursuant to an *ex parte* communication between the trial court and the prosecutor, because he was not given proper notice of the arraignment, and because he was denied the full statutorily required time to file pretrial motions. We reject these contentions.

First, defendant's allegation of an *ex parte* communication between the trial court and the prosecutor implies that his constitutional right to presence was violated in some manner. At most, the record indicates that the prosecutor requested a hearing on an arraignment. While it is well settled that a defendant has an unwaivable right to be present at every stage of his capital trial, *see State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987), a defendant does not have a right to be present when the State makes a routine communication with the court, prior to trial, concerning a scheduling matter. Assuming the State requested a hearing on arraignment outside of defendant's presence, this communication occurred prior to trial and did not constitute a stage of his capital trial. *Cf. State v. Buckner*, 342 N.C. 198, 228, 464 S.E.2d 414, 431 (1995) (no error where conference between trial judge and counsel was held without defendant's presence prior to commencement of trial), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 47 (1996).

Second, defendant's right to due process was in no way impaired by a lack of notice, if any, that the arraignment was to be held on 22 April 1996. An arraignment is "a proceeding whereby a defendant is brought before a judge having jurisdiction to try the offense so that the defendant may be formally apprised of the charges pending against him and directed to plead to them." *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980); *see* N.C.G.S. § 15A-941 (1997). It is clear from the record that defendant was fully aware of the charge against him, and he entered a plea of not guilty to first-degree murder at the arraignment. Further, defendant was not prevented, by the holding of his arraignment on this date, from filing pretrial motions. The trial court eliminated any possibility of prejudice by allowing defendant additional time to file his remaining pretrial motions.

Finally, defendant's contention that the State violated N.C.G.S. § 15A-943, thereby prejudicing him, is also meritless. Defendant was arraigned on 22 April 1996, and his trial began on 29 April 1996. This Court has determined that a defendant's interest in N.C.G.S. § 15A-943 arises under subsection (b), which provides that a defendant may not be tried without his consent in the same week in which he is arraigned. *State v. Richardson*, 308 N.C. 470, 482, 302 S.E.2d 799, 806 (1983); *State v. Shook*, 293 N.C. 315, 319, 237 S.E.2d 843, 846 (1977). Thus, defendant's "only interest is in his vested right to a week's interval between his arraignment and trial." *Richardson*, 308 N.C. at 483, 302 S.E.2d at 807. Assuming, *arguendo*, that the State violated N.C.G.S. § 15A-943(a) by publishing the calendar for defend-

ant's arraignment on the same day the arraignment was held, there is no reversible error because defendant nonetheless had a full week's interval between arraignment and trial. *Id.* at 482-83, 302 S.E.2d at 806-07.

[2] We next examine defendant's assignments of error pertaining to the jury selection process. Defendant first argues that the trial court erred by allowing the prosecution to peremptorily excuse black and Native American prospective jurors on the basis of race. The use of peremptory challenges for racially discriminatory reasons violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The North Carolina Constitution, Article I, Section 26, also prohibits the exercise of peremptory strikes solely on the basis of race. *See State v. Ross*, 338 N.C. 280, 284, 449 S.E.2d 556, 560 (1994).

Upon making an objection under *Batson*, a defendant must first make out a *prima facie* case of racial discrimination, which he may do by showing: "(1) he is a member of a cognizable racial minority, (2) members of his racial group have been peremptorily excused, and (3) racial discrimination appears to have been the motivation for the challenges." *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990). Defendant is a Native American. We recognize that "[w]here defendant is an American Indian, people of this heritage are a racial group cognizable for *Batson* purposes." *Id.* at 499, 391 S.E.2d at 151. However, a defendant also has standing to complain that a prosecutor has used the State's peremptory challenges in a racially discriminatory manner even if there is not racial identity between the defendant and the challenged juror. *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991); *see also State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993). Thus, defendant, although Native American, is not prohibited from challenging the excusal of black prospective jurors on the basis of race.

If a defendant succeeds in making a *prima facie* showing of discrimination, the burden shifts to the State to come forward with a race-neutral reason for each challenged peremptory strike. *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991). The rebuttal must be clear, reasonably specific, and related to the particular case to be tried, but " 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Robinson*, 336 N.C. 78, 93, 443 S.E.2d 306, 312 (1994) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88),

cert. denied, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). A defendant is then entitled to present evidence to show that the prosecutor's explanations are a pretext. *State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, —— U.S. ——, 139 L. E. 2d. 177 (1997).

Where the trial court rules that a defendant has failed to make a *prima facie* showing, our review is limited to whether the trial court erred in finding that the defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges. *State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722-23 (1998); *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386-87 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 618 (1997). On the other hand, where the trial court rules that a defendant has made an initial *prima facie* showing of discrimination, it is the responsibility of the trial court to make appropriate findings as to whether the prosecution's stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext. Then the issue before this Court is whether the trial court properly determined whether or not the defendant had proven purposeful discrimination. "Because the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error." *State v. Cummings*, 346 N.C. 291, 309, 488 S.E.2d 550, 561 (1997), *cert. denied*, —— U.S.——, 139 L. Ed. 2d 873 (1998).

In this case, prospective jurors self-reported their race by so indicating in a space on the printed juror questionnaire. Defendant's first *Batson* objection came when the prosecutor peremptorily challenged prospective juror James Love, an African-American male. In support of this objection, defendant pointed out that Mr. Love had given the same answers to questions concerning the death penalty as white prospective jurors and that the State had already peremptorily challenged another minority prospective juror, Mary Brooks, a Native American female. The trial court noted that the first juror seated was a black juror and that there were no other peremptory challenges against black jurors. The trial court ruled that defendant had not yet made a *prima facie* case and allowed the State's challenge of Mr. Love.

Defendant next objected when prospective juror Diana Locklear was challenged by the prosecutor. Although defendant initially indicated that he did not care to be heard, after the trial court inquired, defendant stated that the prosecutor was using the peremptory challenges "on minorities," mentioning the earlier excusals of Ms. Brooks and Mr. Love, and argued again that white jurors who had answered

questions concerning the death penalty in a similar fashion had been passed. The trial court then ruled:

> [A]t this point . . . [t]here were only two Indian jurors removed peremptorily by the State. One, two, three, four—it appears out of nine jurors, the State has passed, let's see, one, two, three, four Indian jurors. Out of nine selected, four have been Indians.
>
> I do not see that you've made out a prima facie case yet. However, you may continue to renew your motion.

We note that while it appears from the transcript of this particular exchange that both the trial court and defense counsel presumed prospective juror Locklear to be Native American, her self-reported race, indicated on the juror questionnaire, was white.

Jury *voir dire* continued, and the prosecutor exercised another peremptory challenge against an African-American prospective juror, Jimmy Cummings. Defendant again raised a *Batson* objection. The trial court said, "I understand," and confirmed the race reported on the juror's questionnaire. To this point in the jury *voir dire*, forty-seven venire members had been questioned; nine had been seated, including one black, four Native Americans, and four whites. Five blacks had been excused for cause, and Mr. Cummings' excusal made the second peremptory challenge of a black prospective juror by the State. In addition, the State had exercised peremptory challenges against two Native American prospective jurors. While the trial court did not explicitly rule at this point that defendant had failed to make a *prima facie* showing of discrimination so as to require the State to come forward with reasons for the challenge, we believe it is clear from the record that this was the trial court's decision. Defendant having made no other showing to support his *Batson* objection, we cannot say that the trial court erred in allowing the challenge and continuing with jury *voir dire*.

[3] The State's next peremptory challenge was to Lisa Locklear, a Native American female. After defendant's objection, the trial court said, "I understand the objection. We'll deal with all of this later," and excused Ms. Locklear. Through the remainder of the jury selection, the State exercised four more peremptory challenges—against two white jurors, a Native American juror, and a black juror. Defendant did not raise *Batson* objections to any of these challenges. After a jury of twelve and two alternates was seated, with a racial makeup of seven Indian, two black, and five white jurors, the trial court revisited

the "ongoing *Batson* motion of the defendant."

The trial court first considered defendant's contention that Native American prospective jurors had been excused in a racially discriminatory manner. Noting that the State had "passed seven jurors of the Indian race and struck three," the trial court nonetheless found that defendant had made a *prima facie* case of discrimination as to the three challenged Native American jurors: Mary Brooks, Lisa Locklear, and Connie Hester. The State gave the following reasons why these prospective jurors were excused.

> [PROSECUTOR]: As to Hester, family history. As to Lisa Locklear, marijuana conviction and her attitude, smiling and laughing during the time we were asking the questions. As to—I'm not sure what Brooks' first name is. I can't read that. Indian female. She was undecided about the death penalty and wavered when I asked her the questions.

Defendant was given an opportunity to give a rebuttal and responded as follows.

> [DEFENSE COUNSEL]: Your Honor, in rebuttal to that I would point out to the Court that several white jurors indicated that they had been—prior convictions for drugs and for DWIs and other charges and the State passed them. Particularly, I remember Rodger Britt had DWI and marijuana charges. Some of the other jurors had DWI charges. James Lewis had several DWI charges. And the State passed them despite those prior convictions.

The trial court found that the State had tendered racially neutral explanations. We hold that this was not error.

After carefully reviewing the transcripts of jury *voir dire*, we find that the reasons articulated by the prosecutor are supported by the record. Prospective juror Hester indicated that she had four relatives who were currently or had been in jail or prison. Ms. Locklear admitted to pleading guilty to possession of marijuana. Ms. Brooks, after extensive questioning, expressed her opposition to the death penalty but also indicated that she might be able to set aside her beliefs. The State exercised its peremptory challenge of Ms. Brooks after the trial court had twice denied a challenge for cause. A juror's reservations "concerning his or her ability to impose the death penalty constitute a racially neutral basis for exercising a peremptory challenge." *Cummings*, 346 N.C. at 310, 488 S.E.2d at 561.

Defendant's only rebuttal was that the State had passed several white jurors despite drug and DWI convictions, in apparent response to the prosecutor's reasons for excusing Ms. Locklear. We have previously rejected a defendant's attempt to show discriminatory intent by "finding a single factor among the several articulated by the prosecutor . . . and matching it to a passed juror who exhibited that same factor." *Porter*, 326 N.C. at 501, 391 S.E.2d at 152; *see also State v. Kandies*, 342 N.C. 419, 435-36, 467 S.E.2d 67, 75-76, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996). In this case, the prosecutor pointed to Ms. Locklear's demeanor as well as her prior drug conviction as the basis for the challenge.

The ultimate burden of persuasion in a *Batson* claim is on the defendant. *Porter*, 326 N.C. at 497-98, 391 S.E.2d at 150. On review, deference is given to the trial court's findings as to the State's given reasons for the challenges. *Hernandez v. New York*, 500 U.S. 352, 365, 114 L. Ed. 2d 395, 409 (1991); *see also State v. Floyd*, 343 N.C. 101, 105, 468 S.E.2d 46, 48, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 170 (1996). Given the prosecutor's articulation of racially neutral reasons for challenging prospective jurors Hester, Locklear, and Brooks, which are supported by the record, and given defendant's inadequate rebuttal, we cannot conclude that the trial court erred in denying defendant's *Batson* claim as to these three jurors.

[4] The trial court then inquired into defendant's *Batson* challenge to the excusal of two black prospective jurors, Mr. Cummings and Mr. Love. The court noted that these prospective jurors were not of the same race as defendant. However, defendant asserted that they were members of a minority race who were asked the same questions, and gave the same responses, as white jurors who were passed by the State. The trial court found that defendant had not made a *prima facie* case as to the exclusion of these two jurors. We hold that this was not error.

As noted above, defendant's standing to assert a *Batson* claim is not impaired by the fact that he is of a different race than the challenged jurors. However, the race of a defendant, as well as the race of the victim and key witnesses, is a relevant circumstance that the trial court may consider when determining whether defendant has raised an inference of purposeful discrimination sufficient to make a *prima facie* case upon a *Batson* motion. *State v. Smith*, 328 N.C. 99, 120, 400 S.E.2d 712, 724 (1991). Furthermore, although the basis for defendant's *Batson* motion was that prospective minority jurors were chal-

lenged while white jurors who gave similar answers were passed, this Court has held that disparate treatment of prospective jurors is not necessarily dispositive of discriminatory intent. *Floyd*, 343 N.C. at 105-06, 468 S.E.2d at 48-49. We conclude that the trial court's finding that defendant failed to make a *prima facie* showing of discrimination as to the State's challenges of Mr. Cummings and Mr. Love was not clearly erroneous.

[5] In his brief to this Court, defendant also argues that it was a violation of the Equal Protection Clause for the trial court to consider his *Batson* motion separately as to challenged Native American and African-American prospective jurors and that the trial court erred by placing undue emphasis on the fact that some minority jurors were seated. We reject both contentions.

As previously stated, discriminatory use of peremptory challenges on the basis of race is forbidden regardless of the respective races of the defendant and of the challenged jurors. *See Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411; *cf. Georgia v. McCollum*, 505 U.S. 42, 120 L. Ed. 2d 33 (1992) (holding that racially discriminatory use of peremptory challenges by a criminal defendant is also prohibited). However, we note that "[r]acial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype," *Powers*, 499 U.S. at 416, 113 L. Ed. 2d at 429, and racial identity between defendant and some of the challenged jurors in this case was a legitimate factor for the trial court to consider in ruling on defendant's *Batson* motion. Likewise, the fact that defendant and the challenged black jurors were of different races was a relevant circumstance which the trial court was entitled to weigh. We therefore cannot conclude that the trial court erred in considering defendant's *Batson* challenges separately.

Finally, while the excusal of even a single juror for a racially discriminatory reason is impermissible, *see State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987), the trial court may consider the acceptance rate of minority jurors by the State as evidence bearing on alleged discriminatory intent, *Smith*, 328N.C. at 121, 400 S.E.2d at 724. We reject defendant's contention that the trial court unduly emphasized this factor. For the foregoing reasons, we conclude that there was no violation of defendant's right, under either the state or federal Constitution, to a jury selected in a racially nondiscriminatory manner.

[6] Defendant next contends that the trial court improperly limited *voir dire* of several prospective jurors in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 18 and 19 of the North Carolina Constitution. It is well established that while counsel are allowed wide latitude in examining jurors on *voir dire*, the extent and manner of the inquiry rests within the trial court's discretion. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). The trial court's decisions regarding the extent and manner of *voir dire* questioning will not be disturbed absent an abuse of discretion. *State v. Jaynes*, 342 N.C. 249, 266, 464 S.E.2d 448, 459 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

Defendant argues that he was prevented from questioning prospective jurors concerning the credibility of law enforcement officers and the weight jurors would give their testimony. However, the record reveals that the trial court gave defendant ample opportunity to inquire into jurors' potential bias in favor of law enforcement. The court sustained objections to hypothetical or confusing questions, but allowed defense counsel opportunity to rephrase the questions. We find no abuse of discretion on the part of the trial court.

[7] Defendant also argues that the trial court limited *voir dire* concerning whether jurors would automatically vote for the death penalty, in violation of *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). Again, a careful examination of the transcript does not bear out defendant's contention. Defendant was permitted to pursue this line of inquiry, albeit with direction from the trial court to rephrase certain questions. We find no abuse of the trial court's discretion on this point. Defendant also argues that the trial court committed error by limiting *voir dire* on prospective jurors' ability to consider mitigating evidence and to follow the court's instructions. These contentions are without merit. There is no indication that the trial court abused its discretion during jury *voir dire*, and defendant shows no prejudice from any alleged improper ruling.

[8] Finally, defendant argues that the trial court improperly allowed the prosecutor's for-cause challenges to excuse certain prospective jurors based on their responses to questions concerning capital punishment. Whether a prospective juror may be excused for cause because of his or her views on capital punishment depends upon whether those views will "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841,

851-52 (1985); *see also State v. Flippen*, 344 N.C. 689, 697, 477 S.E.2d 158, 163 (1996). Prospective jurors may also be properly excused for cause 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, 908 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)). We have consistently accorded deference to a trial court's judgment concerning a prospective juror's ability to impartially follow the law. *See, e.g., id.*

Defendant does not identify any specific contention of error as to a particular juror. However, of the thirty-one jurors listed by defendant as improperly excused for cause, two were in fact peremptorily challenged, and another was excused for cause with the approval of defendant. A careful examination of the record reveals that none of the remaining twenty-eight was able to state clearly that he or she could set aside personal opposition to the death penalty and render a verdict in accordance with the law and the evidence in the case. Accordingly, we reject this assignment of error.

[9] Defendant also contends that the trial court improperly overruled defendant's challenge for cause of a prospective juror based on the juror's inability to be impartial in weighing the credibility of law enforcement officers. The record reveals that the venire member in question was in fact ultimately dismissed for cause; thus, this contention is without merit.

[10] By his next four assignments of error, defendant alleges that the trial judge improperly and prejudicially conveyed an opinion by his conduct and participation in the *voir dire* of prospective jurors, by his examination of witnesses, by his nonverbal conduct, and by his comments on the evidence and witnesses. These allegations are not supported by the record.

It is indisputable that every person charged with a crime is "entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951). The relevant statute directs that a "judge may not express during any stage of the trial, any opinion *in the presence of the jury* on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1997) (emphasis added).

> The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not

> sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made.

Carter, 233 N.C. at 583, 65 S.E.2d at 10-11 (citations omitted).

Defendant contends that the judge cast aspersions on defense counsel during jury *voir dire* which diminished the effectiveness of the defense in the eyes of the jury. However, we find nothing in those portions of the record to which defendant points that suggests the trial judge's comments or questions improperly influenced jurors or disparaged defense counsel. Furthermore, because prospective jurors were examined individually, no possible prejudicial impact on the jury could have occurred as a result of the judge's remarks to defense counsel during the questioning of persons who were ultimately excused.

[11] Defendant also contends that the court's participation in the trial, by questioning and by conduct, was improper. Defendant points first to an exchange between the trial court and defense counsel concerning the relevance of a line of questioning being pursued by defendant. The trial court was unwilling to allow defendant to question a witness about the possible existence of guns in the shed located near the shooting when there was no record evidence that defendant in fact knew that the victim kept weapons in the shed and no proffered evidence of self-defense. The scope and manner of examination of witnesses are matters ordinarily governed by the trial judge, who may take appropriate measures to restrict improper questioning by counsel. *State v. Searles*, 304 N.C. 149, 157, 282 S.E.2d 430, 435 (1981). The trial judge in this instance conducted a proper inquiry into the relevance of defendant's line of questioning so as to prevent inadmissable evidence from being presented to the jury. Furthermore, the exchange took place outside the presence of the jury, the judge having sent the jurors from the courtroom prior to initiating the relevance inquiry. There was no error and no prejudicial effect on the jury.

[12] Next, defendant points to the following remarks, made during the examination of defendant's mother, Mrs. Taylor:

Q. BY [DEFENSE COUNSEL]: What, if anything, happened to the weapon that you found in the shed?

[PROSECUTOR]: Object.

THE COURT: Sustained, without a foundation. Is it relevant anyway what happened to it, if there was a weapon? If anything—I don't know whether anything happened to it at this point.

While a judge may never express an opinion upon the credibility of evidence or the merits of a case, *State v. Lynch*, 279 N.C. 1, 11, 181 S.E.2d 561, 567 (1971), in this situation, the trial court was merely remarking on the relevancy of the evidence. We cannot say that this query by the judge had the probable effect of improperly influencing the jury and thereby denying defendant his right to a fair trial.

[13] Defendant points to instances during the sentencing phase where the judge allegedly commented on evidence, conducted an examination of a witness, and attempted to present evidence of an aggravating circumstance. In the first instance, the record shows that the trial court, outside the presence of the jury, acted upon *defendant's* objection to the State's attempt to offer a certified copy of defendant's criminal record rather than the judgment of a prior conviction. Defendant does not explain, and we fail to see, how this constitutes an improper comment on the evidence.

As to the second instance, the prosecutor was examining the officer who investigated the assault for which defendant had previously been convicted. The following testimony was elicited:

Q. Did you have an occasion to investigate an assault on a Donnie Wilkins?

A. Yes, sir, I did.

. . . .

Q. Is Donnie Wilkins an individual that's confined to a wheelchair?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. Go ahead.

THE WITNESS: Yes, sir, he was.

THE COURT: Do you mean at the time of the assault or some later time, Solicitor?

[PROSECUTOR]: No, sir. At the time of the assault, Your Honor.

THE COURT: All right.

We have held that a trial judge "may question a witness for the purpose of clarifying his testimony and promoting a better understanding of it." *State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986); *see also State v. Jackson*, 306 N.C. 642, 651, 295 S.E.2d 383, 388 (1982). In this case, the judge did no more than interpose a clarifying question. We find no objectionable intimation of opinion as to the witness' credibility, defendant's culpability, or any factual controversy to be decided by the jury. *See State v. Ramey*, 318 N.C. 457, 465, 349 S.E.2d 566, 571 (1986). Therefore, we reject this contention.

[14] Finally, defendant contends that the trial court "assisted and coaxed the prosecutor in presenting evidence, making objections to questions by the defense, and sustaining its own objections," and belittled defense counsel. Defendant points to an instance during the examination of defendant's uncle, R.D. Locklear, when the trial court inquired, "Well, now—is there an objection to all that?" When the prosecutor answered affirmatively, the trial court sustained the objection. Later, during cross-examination of this witness, the trial court asked whether defendant wished to continue his objection to a line of questioning. When defense counsel answered, "Your Honor, you overruled it," the judge answered, "Yeah, but we're getting into something else now. Do you object now?" Defendant did not object. These inquiries, made to attorneys for both sides as to their desire to object to potentially inadmissible testimony, do not constitute "coaxing the prosecutor in presenting evidence" or "making objections to questions by the defense." Neither do they indicate that the court was rude to or belittled defense counsel.

In sum, defendant has failed to show that any impermissible expression of opinion was made by the trial judge in the presence of the jury or that any conduct or statement by the judge improperly influenced the jury or prejudiced defendant in any manner. Accordingly, these assignments of error are rejected.

Based on six assignments of error, defendant's next argument concerns evidentiary rulings made by the trial court. Defendant asserts that the court committed reversible error by admitting, over his objection, evidence that was inadmissible, thereby violating his state and federal constitutional rights to due process of law, to a trial by an impartial jury, and to be free from cruel and unusual punishment.

[15] Defendant first contends that the trial court erred by allowing into evidence certain opinion testimony of Dr. Marvin Thompson, a medical expert in the field of forensic pathology, and SBI Agent Al Langley, an expert in firearms. Defendant stipulated to the qualification of both witnesses as experts. Langley conducted tests with the murder weapon to determine muzzle-to-target distances based on shotgun-pellet patterns. He testified in detail, without objection, about how these tests were conducted. The exhibits of the test results and his written report were then received into evidence, over defendant's objections. Defendant contends that the tests were inadmissible and prejudicial because the experiments were not conducted under circumstances sufficiently similar to the conditions at the time of the crime.

Experimental evidence is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence. *State v. Jones*, 287 N.C. 84, 97, 214 S.E.2d 24, 33 (1975); *State v. Carter*, 282 N.C. 297, 300, 192 S.E.2d 279, 281 (1972). The absence of exact similarity of conditions does not require exclusion of the evidence, but rather goes to its weight with the jury. *Id.* The trial court is generally afforded broad discretion in determining whether sufficient similarity of conditions has been shown. *State v. Bondurant*, 309 N.C. 674, 686, 309 S.E.2d 170, 178 (1983).

Agent Langley used the same twelve-gauge shotgun that fired the fatal shots and used ammunition consistent with that recovered at the scene of the shooting to re-create conditions similar to those that existed at the time of the murder. The purpose of the tests was to determine, based on the diameter of the shotgun-pellet pattern, the distance at which the gun was fired. Agent Langley was well qualified by his knowledge, training, and experience to conduct these tests and render an expert opinion as to the results. The trial court did not err in admitting this evidence.

[16] Likewise, we find no error in the admission of Dr. Thompson's opinions. "It is undisputed that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984); *see* N.C.G.S. § 8C-1, Rule 702(a) (Supp. 1997). Dr. Thompson testified that the shot pattern that corresponded with firing the shotgun from the three-foot range most closely matched the wound in the victim's back. He also

rendered his expert medical opinion as to the effect on the body such a shot would have produced. Dr. Thompson performed the autopsy on the victim, examined and measured the wounds, and reviewed and measured the shotgun-pellet test patterns, allowing him to form an opinion as to which shot pattern most closely matched the gunshot wound in the victim's back. By giving his opinion based on his experience as a pathologist and his personal observation of the gunshot wounds, Dr. Thompson was undoubtedly in a position to assist the jury in determining the distance from which the fatal shots were fired. Dr. Thompson's testimony illustrating the effect such a shot would have had on the human body was likewise appropriate to assist the jury in understanding the evidence. The trial court did not err in overruling defendant's objection to this testimony.

[17] Defendant also objected to Dr. Thompson's testifying that the victim's blood-alcohol level, the equivalent of .02 on a Breathalyzer test, would have been the result of the ingestion of approximately one-half of a beer. Dr. Thompson personally drew the blood sample from the victim during the autopsy and incorporated the results of the blood-alcohol test into the autopsy report. Dr. Thompson measured the victim's height and weight and noted that there was "a small amount of partially digested food" in the victim's stomach. Based on his training, knowledge, and experience as a pathologist, Dr. Thompson gave his opinion, to a reasonable medical certainty, of the amount of alcohol that was absorbed into the victim's bloodstream. Defendant points to no basis for his assertion that Dr. Thompson, as a medical expert, was unqualified to draw this conclusion. The assignment of error based on Dr. Thompson's testimony is rejected.

[18] Defendant next contends that the trial court committed reversible error by admitting the prior statement of defendant's uncle, James B. Locklear, Jr., given to police on the night of the shooting. At trial, the sole basis of defendant's objection to the prior statement's admission into evidence was that Locklear had not been impeached. On appeal, defendant now contends that the prior statement was inadmissible as corroborative evidence because it was inconsistent with Locklear's testimony at trial. We find no error.

After carefully examining both the testimony and the prior statement of James B. Locklear, Jr., we conclude that the prior statement was properly admitted as corroborative evidence. Locklear's prior statement was consistent with his testimony at trial and contained no significant additional facts. *See Ramey*, 318 N.C. at 469, 349 S.E.2d at

573; *State v. Riddle*, 316 N.C. 152, 156, 340 S.E.2d 75, 77 (1986). Furthermore, we note that the trial court gave proper limiting instructions, directing the jury to consider the evidence only for the purpose of corroboration.

[19] Defendant also objected to an allegedly hearsay statement made by James B. Locklear, Jr., concerning the circumstances under which Locklear had come to live in the victim's home. During direct examination of the witness by the State, the following occurred:

Q. How is it you came to live there?

A. Me and my wife were separated, so I moved in with them.

Q. Did Mr. Taylor give his blessings to that?

[DEFENSE COUNSEL]: Objection.

THE WITNESS: Yes, sir.

It does not appear from the transcript that the trial court ruled on defendant's objection; nonetheless, the challenged testimony came in.

It is well settled that " '[t]he erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial.' " *State v. Abraham*, 338 N.C. 315, 356, 451 S.E.2d 131, 153 (1994) (quoting *Ramey*, 318 N.C. at 470, 349 S.E.2d at 574). Defendant has the burden of showing error and that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred. N.C.G.S. § 15A-1443(a) (1997); *see also State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984).

Assuming, *arguendo*, that James Locklear's answer constituted inadmissible hearsay, we are not convinced that there is a reasonable possibility that a different result would have been reached at trial had this statement not been admitted. Thus, we find no prejudicial error.

[20] Defendant next argues, by three assignments of error, that numerous evidentiary rulings of the trial court denied him the right to present a defense. "The right of a defendant charged with a criminal offense to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution and by Article I, Sections 19 and 23 of the North Carolina Constitution." *State v. Miller*, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996). However, in this

case, the record demonstrates no error in any ruling of the trial court cited by defendant.

Initially, we note no instance where the trial court erred or abused its discretion by excluding relevant, admissible evidence. With respect to instances of alleged erroneous exclusion of evidence, the record fails to show what the answer would have been had the witnesses been permitted to respond.

> "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record."

State v. Johnson, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)) (citations omitted); *see* N.C.G.S. § 8C-1, Rule 103 (1992). By failing to preserve evidence for review, defendant deprives the Court of the necessary record from which to ascertain if the alleged error is prejudicial. *State v. Miller*, 321 N.C. 445, 452, 364 S.E.2d 387, 391 (1988). Thus, in no instance where defendant alleges error based on the improper exclusion of evidence can he show that the ruling was prejudicial.

[21] By his next assignment of error, defendant argues that the trial court committed reversible error by permitting the jury to take evidence into the jury room without defendant's consent and without allowing defendant the opportunity to object. The controlling statute is N.C.G.S. § 15A-1233, which provides that, upon a request by the jury to review evidence, the trial court must conduct all jurors into the courtroom and must exercise its discretion in determining whether to permit the requested evidence to be read to or examined by the jury. N.C.G.S. § 15A-1233(a) (1997); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985). Additionally, "[u]pon request by the jury and with consent of all parties," the trial court may, in its discretion, "permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C.G.S. § 15A-1233(b).

During its deliberations in the guilt phase of the trial, the jury sent a note to the trial judge requesting to review two items: the tes-

timony of defendant's uncle, James B. Locklear, Jr., and defendant's statement to police. The trial court, in accordance with the statutory requirement, summoned the jurors into the courtroom. As to the request to "review the testimony of James B. Locklear," the trial court ruled: "In my discretion, that is denied. It is the duty of the jurors to remember the testimony as it was given here in the courtroom." The trial court properly exercised its discretion on this point in conformance with the statute and applicable case law.

[22] Next, the trial court granted the jury's request to take defendant's statement, State's Exhibit 28, into the jury room. While defendant claims as error that he was not given the opportunity to object to the submission of the exhibit to the jury, the record reveals no action by the trial court which prevented defendant from making such an objection or otherwise indicating his lack of consent. However, N.C.G.S. § 15A-1233(b) requires the consent of all parties, and while defendant did not object, neither did he give his consent. Assuming that this was error, however, we conclude it was harmless in this instance. *See State v. Cunningham*, 344 N.C. 341, 364, 474 S.E.2d 772, 783 (1996); *see also State v. Wagner*, 343 N.C. 250, 257-58, 470 S.E.2d 33, 37-38 (1996) (no prejudicial error where excerpt of defendant's statement was submitted for jury examination over defendant's objection); *State v. Cannon*, 341 N.C. 79, 83-86, 459 S.E.2d 238, 241-43 (1995) (no prejudicial error where crime-scene and autopsy photographs, defendant's confession, a witness' statement, and a diagram were taken into jury room over defendant's objection). Defendant makes no persuasive assertion of prejudice. His statement had previously been admitted into evidence; read to the jury in its entirety during the testimony of Detective Randal Patterson; and published, individually, to jurors as the State's rebuttal evidence. Under these circumstances, and in light of the totality of the evidence against defendant, we conclude that allowing the jury to take this exhibit into the jury room could not have affected the outcome of the trial. Thus, there was no prejudicial error.

[23] By his next eight assignments of error, defendant argues that the prosecutor was allowed to make improper, inflammatory, and prejudicial arguments during closing arguments of the guilt phase of the trial. This Court has firmly established that:

> Trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court. Further, for an inappropriate prosecutorial com-

> ment to justify a new trial, it "must be sufficiently grave that it is prejudicial error."

State v. Soyars, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992) (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)) (citations omitted). Applying these principles to the instant case, we find no error.

In the instant case, the prosecutor argued to the jury that the twelve-gauge shotgun had "to be loaded, breech closed, fired, unloaded." Defendant objected on the basis that there was no evidence to support this argument. The trial court ruled that the prosecutor was holding the weapon and "may argue from the weapon." The shotgun had been introduced as evidence, and the mechanics of loading and firing it were based directly upon evidence in the case. The prosecutor also argued that the very act of loading and firing the weapon showed premeditation and deliberation. As this was a reasonable inference to be drawn from the evidence, this ruling was not improper.

[24] Defendant also objected to the prosecutor's assertion that "defendant is here because of choices that he made" and his exhortation to the jury not to "let [the defense] put that fault or blame on you as jurors." These remarks fall well within the wide latitude allowed for forceful persuasion and are not improper or inflammatory. Therefore, we find no error in the trial court's ruling allowing these arguments.

[25] Next, defendant challenged the following arguments:

> And heat of passion? There was no heat of passion involved in this. You won't hear any instruction from the [c]ourt on heat of passion.
>
> . . . .
>
> You won't hear any instruction from the [c]ourt on self-defense, because there is no evidence to support it, ladies and gentlemen. Simply does not exist.

Defendant contends that these remarks, in addition to being improper and prejudicial, were misstatements of the law.

The record shows that the trial court gave instructions on first-degree and second-degree murder only, not manslaughter or "heat of passion." The prosecutor's assertion that the jury would not hear

instructions on heat of passion was correct, not a misstatement of the law. Likewise, there was no instruction on self-defense. The prosecutor's attempt to convince the jury that there was no evidentiary support for heat of passion or self-defense was permissible within the "wide latitude [granted to counsel] in the argument of hotly contested cases." *State v. Fullwood*, 343 N.C. 725, 740, 472 S.E.2d 883, 891 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997). The prosecutor did not misstate the law, distort the evidence, or inflame or prejudice the jury; thus, the trial court did not err in allowing these arguments.

[26] The prosecutor also told the jury: "You're the voice of this community. You're here representing the community in which we all live." Defendant objected and was overruled. We have previously upheld virtually identical jury arguments. *See, e.g., State v. Bishop*, 346 N.C. 365, 396, 488 S.E.2d 769, 786 (1997). This assignment of error is rejected.

As to the final line of argument to which defendant points as improper, the trial court in fact sustained defendant's objections at trial and gave the jury a curative instruction. Upon an examination of the record, we do not find that the trial court acted improperly or that defendant was prejudiced. For all of the foregoing reasons, we hold that there was no error in the trial court's rulings made during the prosecutor's closing arguments in the guilt phase of the trial.

[27] Defendant next assigns as error the trial court's failure to grant defendant's request for a jury instruction on voluntary manslaughter when the evidence supported such an instruction. Before the trial court, defendant argued that the evidence supported an instruction on voluntary manslaughter based upon the victim's provocation arousing the "heat of passion" in defendant. The State contended that nothing in the evidence suggested defendant was temporarily incapable of reflection or otherwise supported the proposed instruction. After hearing both sides, the trial court determined that the jury charge would be limited to first-degree murder, second-degree murder, and not guilty.

Defendant contends that the court's refusal to instruct the jury on voluntary manslaughter violated his rights under the state and federal Constitutions. We disagree. This Court has consistently held that "when a jury is properly instructed on both first-degree and second-degree murder and returns a verdict of guilty of first-degree murder, the failure to instruct on voluntary manslaughter is harmless error."

State v. East, 345 N.C. 535, 553, 481 S.E.2d 652, 664, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 236 (1997); *see also State v. Exxum*, 338 N.C. 297, 300, 449 S.E.2d 554, 556 (1994); *State v. Wiggins*, 334 N.C. 18, 37, 431 S.E.2d 755, 766 (1993). Assuming, *arguendo*, that the evidence warranted an instruction on voluntary manslaughter, the jury's verdict of first-degree murder and its rejection of second-degree murder, upon proper instructions, renders any error harmless.

[28] By another assignment of error, defendant argues that the trial court committed reversible error by refusing to give an instruction on self-defense. Defendant contends the evidence showed the following: that the victim was the aggressor; that defendant and the victim fought; that defendant bested the victim in the fight; that the victim then told defendant to wait, he would be right back; and that the victim then moved toward the shed, where he kept weapons. Defendant asserts this was sufficient evidence for the jury to infer that defendant was in reasonable apprehension of death or great bodily harm.

We summarized the applicable law in *State v. Ross*, 338 N.C. 280, 449 S.E.2d 556:

> There are two types of self-defense: perfect and imperfect. Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter. For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. In addition, defendant's belief must be "reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness."

Id. at 283, 449 S.E.2d at 559-60 (citations omitted) (quoting *State v. McKoy*, 332 N.C. 639, 644, 422 S.E.2d 713, 716 (1992)). Applying these principles to this case, we conclude that the trial court did not err in refusing to give a jury instruction on self-defense.

In *Ross*, which occurred under similar circumstances, we held that the evidence was insufficient to merit an instruction on either perfect or imperfect self-defense, and we reach the same conclusion here. In both cases, the defendant's own statement acknowledged that the victim was unarmed when the defendant shot him in the back. *Id.*; *see also Exxum*, 338 N.C. 297, 449 S.E.2d 554 (holding that defendant was not entitled to an instruction on imperfect self-defense

where undisputed evidence showed that defendant shot victim in the back as victim was walking away from defendant). Likewise, in *Ross*, as here, the "[d]efendant failed to present evidence to support a finding that he in fact formed a belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm." *Ross*, 338 N.C. at 283, 449 S.E.2d at 560. Defendant offered no evidence that at the time of the shooting he believed, reasonably or unreasonably, that it was necessary to kill the victim in order to protect himself from imminent death or great bodily harm. Accordingly, the trial judge did not err by failing to instruct on self-defense.

[29] By three assignments of error, defendant next argues that the trial court committed reversible error at the beginning of the capital sentencing proceeding by allowing the prosecutor to put before the jury a certified copy of his criminal record and then substitute for that exhibit another exhibit without retaining the original exhibit as part of the trial record. We find no merit in this argument.

The State offered "a certified copy of defendant's record" as the method of proof of the sole aggravating circumstance that defendant had previously been convicted of a felony involving the use of violence to the person. Defendant objected, and the trial court excused the jury from the courtroom. After hearing arguments, the judge determined that use of defendant's criminal record, which included both charges and convictions, was not provided for by case law, and he required proof of the prior felony conviction by introduction of the judgment itself. The trial court allowed the prosecutor to withdraw the copy of defendant's criminal record and substitute the judgment as State's Exhibit S-1. The testimony of the deputy clerk of superior court laid the foundation for admission of the judgment into evidence.

Although a different form of proof may be accepted, so long as it is sufficiently reliable, this Court has recognized that the preferred method of proving a prior conviction is introduction of the judgment itself into evidence. *See State v. Bishop*, 343 N.C. 518, 551, 472 S.E.2d 842, 859-60 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 723 (1997); *State v. Thomas*, 331 N.C. 671, 679, 417 S.E.2d 473, 479 (1992); *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). While the prosecutor initially proffered a copy of defendant's criminal record, it was never admitted into evidence or "put before the jury." The trial court in this case ruled appropriately in requiring the State to prove the sole aggravating circum-

stance by the preferred method, introduction of the judgment itself. Defendant contends that the mere proffer of his criminal record insinuated to the jury that defendant had an extensive criminal history. However, defendant's bare assertion of prejudice is unsupported by the record. The trial court did not err in admitting the judgment of defendant's prior felony conviction of assault with a deadly weapon inflicting serious injury as proof of the aggravating circumstance.

[30] By his next assignment of error, defendant contends that the trial court erred in overruling defendant's objections to improper cross-examination of defendant's expert witnesses. Defendant argues that the prosecutor asked improper questions, not in good faith, that were intended to prejudice the jury. Without identifying how any specific question exceeded the permissible scope of cross-examination, defendant merely refers to several portions of the transcript and generally labels the prosecutor's cross-examination as abusive and insulting to defendant's expert witnesses.

The trial court exercises broad discretion over the scope of cross-examination and, in a sentencing proceeding, is not limited by the Rules of Evidence. *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998). Generally, the scope of permissible cross-examination is limited only by the discretion of the trial court and the requirement of good faith. *See State v. Scott*, 343 N.C. 313, 339-40, 471 S.E.2d 605, 621 (1996).

During the sentencing proceeding, defendant objected to several questions placed to Dr. Brent Dennis, a professional social worker who testified for defendant. Defendant now asserts broadly that these questions were not asked in good faith and were intended to unduly prejudice the jury. A careful inspection of the record, however, reveals no prejudicial error during the cross-examination of Dr. Dennis. First, the trial court sustained defendant's objection to a question about whether defendant's past would be a predictor of his future actions. The witness did not answer, and defendant suffered no prejudice. Next, three questions concerning the circumstances of defendant's prior assault conviction, which defendant now attempts to challenge on appeal, were not objected to at trial. Applying the plain error rule, we conclude that the trial court did not err by failing to intervene *ex mero motu* to limit this questioning. *See id.* at 339, 471 S.E.2d at 621. Finally, the prosecutor's remaining inquiries concerned whether defendant's background would change, how long defendant had been in prison for his prior conviction, and how much the wit-

ness was compensated for his services. These questions were within the scope of permissible cross-examination. The trial court did not abuse its discretion in overruling defendant's objections.

[31] Defendant also argues that the cross-examination of Dr. John Warren, a forensic psychologist called by defendant to testify as an expert, was abusive, insulting, and degrading, and was intended to distort his testimony. We disagree. Dr. Warren was interrogated as to the amount and method of computation of his fee. We have held that the compensation of an expert witness is a legitimate subject of cross-examination to test the partiality of the witness. *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 598-99 (1994). Defendant also points to portions of the transcript where the trial court overruled his objections to questions concerning how Dr. Warren arrived in Robeson County for the trial, the number of capital trials at which Dr. Warren had previously testified, and what Dr. Warren did while administering the MMPI-2 (The Minnesota Multiphasic Personality Inventory-2) to defendant. Nothing in the record suggests abusive or improper interrogation by the prosecutor. Because we find no untoward or bad-faith questioning of Dr. Warren or Dr. Dennis, and no abuse of discretion by the trial court, we reject this assignment of error.

[32] Defendant next argues that the trial court allowed the admission of irrelevant, improper, and prejudicial evidence during the testimony of Detective Ken Sealey in violation of his rights under the state and federal Constitutions. During direct examination of this witness, the prosecutor elicited the following information, to which defendant objected: (1) that the victim of defendant's prior assault conviction had been confined to a wheelchair at the time of the assault, and (2) that the original charge against defendant had been assault with a deadly weapon with intent to kill inflicting serious injury. We have previously held that "evidence of the circumstances of prior crimes is admissible to aid the sentencer" and that "the State is entitled to present witnesses in the penalty phase of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record of conviction." *State v. Roper*, 328 N.C. 337, 364-65, 402 S.E.2d 600, 616, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). The testimony of Detective Sealey simply conveyed the circumstances of defendant's prior conviction, which had already been introduced as evidence. The record reveals no prejudicial insinuations flowing from this testimony as defendant contends. Accordingly, we hold that the trial court properly exercised its

discretion by allowing this evidence during the penalty phase of the trial and that defendant's constitutional rights were in no way infringed thereby.

[33] Defendant next argues that the trial court, during the sentencing phase, excluded relevant mitigating evidence from consideration by the jury. Defendant contends that the trial court's rulings prevented the jury from making an appropriate individualized decision on sentencing, resulting in a violation of defendant's rights under the state and federal Constitutions.

The United States Supreme Court, in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), held that under the Eighth and Fourteenth Amendments to the United States Constitution, the sentencer in capital cases may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990. Consistent with this constitutional mandate, our capital punishment statute provides that, during the sentencing phase, evidence may be presented "as to any matter that the court deems relevant to sentence," including matters relating to mitigating circumstances. N.C.G.S. § 15A-2000(a)(3) (1997). The admissibility of mitigating evidence during the penalty phase is not constrained by the Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992); *Green v. Georgia*, 442 U.S. 95, 60 L. Ed. 2d 738 (1979). However, the trial judge must determine the admissibility of such evidence subject to general rules excluding evidence that is repetitive, unreliable, or lacking an adequate foundation. *See State v. Simpson*, 341 N.C. 316, 350, 462 S.E.2d 191, 211 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996).

During the sentencing proceeding, defendant presented significant evidence in mitigation by way of seven witnesses. On numerous occasions, however, the trial court excluded evidence upon the prosecutor's objection, and defendant points to over forty instances where the trial court allegedly excluded admissible mitigating evidence. After conducting an exhaustive examination of each allegedly erroneous ruling, we conclude that the trial court did not commit prejudicial error or abuse its discretion by excluding mitigating evidence proffered by defendant.

However, one of defendant's arguments warrants further discussion. Defendant sought to attack the character of the victim of his

prior assault conviction, Donnie Wilkins, by attempting to introduce Wilkins' criminal record and elicit testimony as to his reputation for violence. Defendant claims that this evidence was relevant to minimize or rebut the State's use of defendant's prior felony conviction as an aggravating circumstance. *See Bishop*, 343 N.C. at 551, 472 S.E.2d at 860. We disagree. The State proved the existence of the aggravating circumstance by submitting the judgment, on the foundation of testimony from the clerk of court, and by the testimony of the investigating officer. Wilkins did not appear at defendant's trial, nor was he a hearsay declarant subject to impeachment as defendant contends. The evidence defendant sought to submit did not serve to illustrate the circumstances of defendant's prior felony conviction, nor did it serve to leave with the jury "a more favorable impression of defendant's character." *State v. Green*, 321 N.C. 594, 611, 365 S.E.2d 587, 597, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). Nothing in the criminal record of Donnie Wilkins sheds light on defendant's age, character, education, environment, habits, mentality, propensities, or criminal record, or on the circumstances of the offense for which defendant was being sentenced. Accordingly, the evidence was not relevant to mitigation, and the trial court did not err in excluding it.

Defendant's next five arguments concern the trial court's alleged failure to submit and properly instruct on several statutory and nonstatutory mitigating circumstances. For the following reasons, we find these arguments to be without merit.

[34] Defendant first asserts that the trial court committed reversible error by refusing to submit, upon defendant's written request, the statutory mitigating circumstance that the victim was a voluntary participant in defendant's homicidal conduct, pursuant to N.C.G.S. § 15A-2000(f)(3). Defendant argues that this mitigating circumstance was appropriate because the victim provoked a fight with defendant and, therefore, was a voluntary participant in the homicidal conduct that followed. We do not agree.

This Court recently examined this mitigating circumstance for the first time in *State v. Larry*, 345 N.C. 497, 481 S.E.2d 907, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 234 (1997). In that case, we concluded that the evidence did not support submission of the mitigating circumstance where the victim attempted to apprehend the defendant as he fled after committing armed robbery. In this case, by defendant's own admission, defendant was "getting the best of [Jay Taylor]" in the fight, and Taylor had "stopped" before defendant reen-

tered the mobile home to get his shotgun. Defendant presented no evidence that he knew the victim kept a weapon in the shed or that the victim reinitiated the fight. Nonetheless, defendant asserts that the victim's words, "I will be right back, you son of a bitch," coupled with the prior altercation, constituted the victim's voluntary participation in defendant's homicidal conduct. It is undisputed that defendant's homicidal conduct consisted of retrieving his shotgun from inside the mobile home, shooting the victim in the back, and firing at the victim again as he was lying on the ground. The victim was not a voluntary participant in defendant's homicidal conduct within the meaning of the (f)(3) mitigating circumstance.

Next, defendant argues that the trial court committed reversible error by refusing to submit, upon written request, two nonstatutory mitigating circumstances.

[35] The trial court submitted the nonstatutory mitigating circumstance that "defendant and James Charles Taylor never established a stepfather/stepson relationship." During the charge conference, defendant agreed that this was "sufficient." Defendant now contends that the trial court erred by not giving the circumstance as originally proposed, that "there was an extenuating relationship between the defendant and James Charles Taylor." We have repeatedly held that "[i]f 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." *State v. Richmond*, 347 N.C. 412, 438, 495 S.E.2d 677, 691 (1998); *see also State v. Strickland*, 346 N.C. 443, 466, 488 S.E.2d 194, 207 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 757 (1998); *State v. Bates*, 343 N.C. 564, 583, 473 S.E.2d 269, 279 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 873 (1997). The circumstance that was actually submitted, along with the statutory (f)(9) catchall mitigating circumstance, which was also submitted, allowed the jury to consider and give weight to all evidence presented regarding the nature of defendant's relationship with the victim. Accordingly, the trial judge did not err in failing to submit the additional nonstatutory mitigating circumstance as originally proposed by defendant.

[36] Defendant also contends that the trial court erred by failing to submit as a nonstatutory mitigating circumstance that "defendant continues to have family members, such as his mother, brother, aunts and uncles, who care for and support him." This circumstance, as worded, relates to persons other than defendant. Matters which reflect upon " '*defendant*'s character, record or the nature of his par-

ticipation in the offense' " are properly considered in mitigation by the jury. *State v. McLaughlin*, 341 N.C. 426, 441, 462 S.E.2d 1, 9 (1995) (quoting *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981)) (emphasis added), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996); *see also State v. Cherry*, 298 N.C. 86, 98, 257 S.E.2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). The feelings, actions, and conduct of third parties have no mitigating value as to defendant and, therefore, are irrelevant to a capital sentencing proceeding. The trial court did not err in excluding this proposed nonstatutory mitigating circumstance.

[37] By two more assignments of error, defendant argues that the trial court committed reversible error by refusing to give peremptory instructions on the existence of all the statutory and several nonstatutory mitigating circumstances. If a mitigating circumstance is supported by uncontroverted and manifestly credible evidence, defendant is entitled, upon request, to a peremptory instruction on that circumstance. *State v. Gregory*, 340 N.C. 365, 415, 459 S.E.2d 638, 667 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). However, a defendant must timely request such an instruction, as the trial court is "not required to sift through all the evidence and determine which of defendant's proposed mitigating circumstances entitle him to a peremptory instruction." *Id.* at 416, 459 S.E.2d at 667. Further, a defendant must specify a proper peremptory instruction for statutory and nonstatutory mitigating circumstances. *Id.*; *see also Buckner*, 342 N.C. at 235-37, 464 S.E.2d at 436. A general request for a peremptory instruction on all mitigating circumstances is insufficient. *Gregory*, 340 N.C. at 416-17, 459 S.E.2d at 667.

In this case, defendant did not request peremptory instructions during the charge conference and only raised the issue just prior to closing arguments in the penalty phase of the trial. Defendant did not make a specific request for peremptory instructions for statutory and nonstatutory mitigating circumstances, nor did he make a showing that the evidence supporting any mitigating circumstance was uncontroverted and manifestly credible. Defendant merely raised the issue of peremptory instructions before the trial court and did little more than recite several mitigating circumstances. Even in arguing to this Court, defendant does not point to any specific mitigating circumstance, statutory or nonstatutory, on which the trial court erroneously denied a peremptory instruction after a proper request and a showing of sufficient evidence. We conclude that the trial court did not err in ruling on this issue.

[38] By his next assignment of error, defendant argues that the trial court committed reversible error by failing to submit and instruct the jury on a nonstatutory mitigating circumstance, defendant's emotional immaturity at the time of the offense, after agreeing to submit such circumstance for consideration by the jury. The record reveals that defendant initially requested two nearly identical nonstatutory mitigating circumstances: number 7, "The Defendant, though 21 at the time of the offense, is emotionally immature," and number 24, "Defendant's emotional immaturity at the time of the offense reduced his culpability." During the charge conference, defendant agreed to the submission of number 7 only. This mitigating circumstance relating to defendant's emotional immaturity was in fact submitted and instructed on. Therefore, defendant's assignment of error is without merit.

[39] Defendant next argues, based on ten assignments of error, that during the capital sentencing proceeding the trial court allowed the prosecutor to make arguments that were improper, inflammatory, prejudicial, and unsupported by the evidence. In reviewing defendant's contentions regarding the guilt phase of his trial, we examined the law applicable to prosecutors' arguments. We note here that "[t]hese principles apply not only to ordinary jury arguments, but also to arguments made at the close of the sentencing phase in capital cases." *Fullwood*, 343 N.C. at 740, 472 S.E.2d at 891. Further, in addition to the wide latitude generally afforded trial counsel in jury arguments, we also recognize that "the prosecutor of a capital case has a duty to zealously attempt to persuade the jury that, upon the facts presented, the death penalty is appropriate." *Strickland*, 346 N.C. at 467, 488 S.E.2d at 208. Applying these principles to the instant case, we find no prejudicial error.

We first note that defendant includes in his assignments of error several pages of arguments directed toward defendant's mitigating evidence, to which defendant did not object at trial. The prosecutor urged the jury, *inter alia*, that defendant's evidence did not establish that he was under the influence of a mental or emotional disturbance, that defendant's capacity to comply with the law was not impaired, and that defendant's size in comparison to the victim's was not a mitigating factor in this case. Upon close scrutiny of the arguments, we conclude that none were so grossly improper as to require the trial court to intervene *ex mero motu*.

[40] Defendant also excepts to numerous instances in which his objections to the prosecutor's arguments were overruled.

Specifically, defendant contends that the trial court committed reversible error by allowing the prosecutor to: (1) inject his personal opinion of the significance of the evidence, (2) stress the character of the deceased and the impact of his death on his family, (3) assert the possibility of a new trial for defendant, (4) make improper and inflammatory arguments, (5) stress the societal impact of crime, (6) negate the jury's duty to consider the mitigating circumstances, (7) argue the deterrent effect of the death penalty, and (8) misrepresent the testimony of defendant's mental health experts. After an exhaustive examination of the transcript, we conclude that defendant's contentions are without merit.

However, three of defendant's contentions require further discussion. First, the prosecutor argued to the jury that J.R. Taylor, defendant's stepbrother and the victim's son, walked outside and saw "his father laying there on the ground . . . his life's blood puddled." Defendant objected on the basis that there was no evidence to support the statement. The trial court overruled the objection, stating that "[t]he jury will recall the evidence." We have carefully reviewed the entire record and agree with defendant that there was no evidence to support the prosecutor's assertion that J.R. Taylor saw his father after the shooting. The trial court should have disallowed this statement, as "[i]t is well settled that the trial court is required to censor remarks not warranted either by the law or by the facts." *State v. McCollum*, 334 N.C. 208, 225, 433 S.E.2d 144, 153 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

However, even though the prosecutor's argument was improper, defendant is entitled to a new sentencing hearing only if the comment " 'so infected the trial with unfairness' " as to deny defendant due process of law. *Id.* at 223-24, 433 S.E.2d at 152 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)). This remark by the prosecutor did not have such an effect. The victim's son testified that he heard a gunshot, and there was substantial evidence that the boy was inside the trailer when his father was killed outside, only several feet away. The evidence clearly established J.R. Taylor's proximity to the scene of his father's murder. We conclude that the prosecutor's statement that J.R. saw the body, while inappropriate, was not prejudicial. The trial court's error in failing to sustain defendant's objection was harmless beyond a reasonable doubt.

[41] Next, defendant repeatedly objected to the prosecutor's argument for the death penalty as an appropriate punishment. Defendant

contends that speculation about defendant's future dangerousness was inflammatory and that the trial court erred by allowing it. The record shows that the prosecutor urged the jury to "save someone else's life" and to never "let him put his hands on another gun or another knife and face down another human being who has made him mad." The prosecutor argued that prison would not do defendant any good and that the death penalty would prevent defendant from taking another life. During this argument, the trial court instructed the prosecutor to make it clear that his deterrence argument applied only to this defendant. We have previously held that arguments invoking specific deterrence are proper. *See State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). This argument is rejected.

[42] Finally, defendant contends that the following argument improperly commented on a possible appeal: "You've got to stop this now, ladies and gentlemen. And only you can do it. Don't pick up the paper somewhere down the road and read about a new trial of [defendant]." Defendant objected. Out of the presence of the jury, defendant argued to the court that this implied to the jury that defendant could get a retrial. Defendant requested a mistrial. The trial court stated that it did not interpret the argument that way. The court denied the motion for a mistrial and overruled defendant's objection. We conclude that the trial court correctly interpreted the prosecutor's argument as an extension of his specific-deterrence argument as to defendant, rather than a comment on the appellate process. We decline to hold that the trial court erred in this ruling.

[43] By another assignment of error, defendant contends that his state and federal constitutional rights were violated by the jury's recommendation of a death sentence because it was returned under the influence of passion, prejudice, and other arbitrary factors. Defendant argues that grossly improper arguments by the prosecutor, specifically arguments that implied defendant would get a new trial, get out of jail, and kill again, substantially influenced the jury's recommendation of death. We have already addressed these assertions and found them to be meritless. We have also carefully scrutinized the entire record for any indication of the influence of passion, prejudice, or other arbitrary factors in the jury's recommendation, and having found none, we reject this assignment of error.

Defendant raises six additional issues which he has denominated as preservation issues. As to the first of these, defendant simply reit-

erates the arguments he made concerning allegedly improper and prejudicial comments by the prosecutor concerning the possibility of a new trial. Defendant contends that the trial court erred by denying his motion for mistrial. For the reasons we have already stated, we reject this argument.

[44] Of the remaining five issues raised by defendant, we initially note that at least four

> are not proper preservation issues because they are not determined solely by principles of law upon which this Court has previously ruled. Rather, these assignments of error are fact specific requiring review of the transcript and record to determine if the assignment has merit. Where counsel determines that an issue of this nature does not have merit, counsel should "omit it entirely from his or her argument on appeal."

Gregory, 340 N.C. at 429, 459 S.E.2d at 675 (quoting *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 303 (1994)). Furthermore, none of these five issues is addressed by any argument or authority whatsoever. "Assignments of error . . . in support of which no reason or argument is stated or authority cited[] will be taken as abandoned." N.C. R. App. P. 28(b)(5).

[45] Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we turn now to duties reserved exclusively for this Court in capital cases. It is our duty under N.C.G.S. § 15A-2000(d)(2) to ascertain: (1) whether the record supports the jury's finding of the aggravating circumstance on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In this case, the sole aggravating circumstance submitted to and found by the jury was that defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3). None of the jurors found the existence of any submitted statutory mitigating circumstance: that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); 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); or the age of defendant at the time of the crime, N.C.G.S. § 15A-2000(f)(7). The trial court also submitted seventeen nonstatutory mitigating circumstances and the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9), none of which was found by any juror.

The existence of the (e)(3) aggravating circumstance was established at trial through the introduction of the judgment of defendant's prior conviction of assault with a deadly weapon inflicting serious injury, as well as the testimony of the detective who investigated the assault. After thoroughly examining the record, transcripts, and briefs in this case, we conclude that the record fully supports the sole aggravating circumstance submitted to and found by the jury. Further, as stated above, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

[46] We begin our proportionality review by comparing the present case with other cases in which this Court has concluded that the death penalty was disproportionate. 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, *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; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). No case in which this Court has determined the death penalty to be disproportionate has included the aggravating circumstance that defendant had previously been convicted of a felony involving the use of violence to the person. *State v. Burke*, 343 N.C. 129, 162, 469 S.E.2d 901, 918, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 409 (1996); *State v. Rose*, 335 N.C. 301, 351, 439 S.E.2d 518, 546, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). Additionally, although the jury considered twenty-two mitigating circumstances, it found none. We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

It is also proper to compare this case to those where the death sentence was found proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. However, it is unnecessary to cite every case used for

comparison. *Id.*; *Syriani*, 333 N.C. at 400, 428 S.E.2d at 146. We do note that this Court has previously upheld a sentence of death in cases in which the sole aggravating circumstance found by the jury was the conviction of a prior felony involving the use of violence to the person. *See Strickland*, 346 N.C. at 469-70, 488 S.E.2d at 209-10.

In the instant case, there was sufficient evidence introduced to support this aggravating circumstance. Evidence presented at trial as to the circumstances of defendant's previous conviction of a prior violent felony revealed it was a knife attack on a victim confined to a wheelchair. Additionally, defendant was convicted in this case of first-degree murder under the theory of premeditation and deliberation. Defendant shot his unarmed stepfather in the back and fired the gun twice more as the victim was lying on the ground.

After comparing this case to other roughly similar cases as to the crime and the defendant, we conclude that this case has the characteristics of first-degree murders for which we have previously upheld the death penalty as proportionate. We hold that defendant received a fair trial and capital sentencing proceeding free of prejudicial error and that the death sentence in this case is not excessive or disproportionate.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this opinion.

STATE OF NORTH CAROLINA v. JOHNATHON GREGORY HOFFMAN

No. 313A97

(Filed 9 October 1998)

1. Jury § 227 (NCI4th)— jury selection—death penalty views—conflicting responses—excusal for cause

The trial court did not abuse its discretion in excusing a prospective juror for cause in a capital sentencing proceeding based upon her death penalty views where she gave conflicting responses to *voir dire* questions in that she stated on numerous occasions that she did not believe in the death penalty, that she

could not consider the death penalty as an appropriate punishment, and that her views would substantially impair the performance of her duties as a juror, but she also stated that she could set aside her views and consider death as a possible punishment.

2. Jury § 187 (NCI4th)— challenge for cause—different grounds on appeal—question not presented

Defendant did not properly preserve for appellate review the question of the trial court's refusal to excuse a prospective juror for cause where defendant is arguing on appeal completely different grounds in support of his challenge for cause than he argued in the trial court. N.C. R. App. P. 10(b)(1).

3. Jury § 194 (NCI4th)— prospective juror—conversation with police officer—denial of challenge for cause

The trial court did not abuse its discretion in the denial of defendant's challenge for cause of a prospective juror in this capital sentencing proceeding after defense counsel reported that a prospective juror was seen conversing with a police officer during a recess where the court conducted an inquiry into the matter; the officer explained that he was telling a story about a time when his father was called for jury duty and he had a case in court and that he did not discuss defendant's case with the prospective juror; the juror stated that she had not discussed defendant's case with the officer and had not been influenced with regard to defendant's case during the conversation; and the trial court was satisfied that the prospective juror could be fair and impartial.

4. Evidence and Witnesses § 2956 (NCI4th); Constitutional Law § 349 (NCI4th)— corroborating witness—pending criminal charges—denial of cross-examination—harmless error

Although the trial court erred by not allowing defendant to cross-examine a State's witness regarding pending charges against him for breaking and entering, defendant was not denied the right of effective cross-examination, and the error was harmless, where the witness was not a principal witness for the State but was only a corroborating witness; the witness was thoroughly impeached by cross-examination about his prior crimes and convictions and about several prior inconsistent statements; and the State presented substantial evidence of defendant's guilt aside from the witness's testimony. U.S. Const. amend. VI.

5. Evidence and Witnesses § 221 (NCI4th)— car defendant driving on crime date—ticket two days later—relevancy—exclusion as harmless error

In a prosecution for armed robbery and first-degree murder in which the State presented evidence that defendant was seen sitting in his white car outside the victim's jewelry store on the day of the murder, and defendant attempted to prove that he was driving his sister's red car and she was driving his car on the date of the murder, any error in the trial court's exclusion of testimony by defendant's sister that defendant got a ticket while driving her car two days after the murder was not prejudicial since the State presented substantial evidence tending to show defendant's guilt; the excluded testimony would not necessarily negate evidence that defendant was driving his own car two days earlier when the murder was committed; and the value of the testimony of defendant's sister was diminished substantially when she admitted on cross-examination that she had never told a law officer that she had defendant's car on the day of the murder, and she was unsure of the basic features of the car, such as whether it had an automatic or manual transmission, although she stated that she drove it for several weeks.

6. Evidence and Witnesses § 310 (NCI4th)— robbery-murder—other robberies by defendant—identity of perpetrator

Testimony by a witness that defendant had participated in two bank robberies with him during the two months preceding a robbery-murder at a jewelry store was admissible to show defendant's identity as the perpetrator of the jewelry store crimes where defendant drove his white Nissan in the bank robberies, while a white Nissan was seen outside the jewelry store on the day of the murder; defendant's sawed-off shotgun and ski mask were used in the bank robberies, and the perpetrator of the jewelry store crimes wore a ski mask and carried a sawed-off shotgun; the banks and the jewelry store were all located in small towns surrounding Charlotte; and all of the establishments were robbed during the daytime when they were open for business.

7. Criminal Law § 472 (NCI4th Rev.)— prosecutor's closing argument—burden of proving malice—harmless error

Assuming *arguendo* that it was error for the prosecutor to state during his argument on malice that "there is no just cause,

there is no excuse, there is no justification in this case. Make them tell you where it is," defendant was not prejudiced where the prosecutor told the jury that the State had to prove malice, and the trial court properly instructed that the prosecutor had the burden of proof as to malice.

8. Criminal Law § 475 (NCI4th Rev.)— prosecutor's closing argument—silence

The prosecutor's use of two minutes of silence to emphasize to the jury in a capital trial how long the victim spent bleeding on the floor before he died was not so grossly improper as to require *ex mero motu* intervention by the trial court.

9. Criminal Law § 475 (NCI4th Rev.)— prosecutor's closing argument—victim not on trial—no gross impropriety

The prosecutor's closing argument in a capital trial which merely reminded the jury that it was defendant, not the victim, who was on trial was not grossly improper as to merit *ex mero motu* intervention by the trial court.

10. Criminal Law § 471 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—misstatement of evidence—not prejudicial error

The prosecutor's single reference in his closing argument in a robbery-murder case to "hundreds of rings" that were recovered without any indication of how this evidence supported defendant's guilt, if a misstatement of the evidence, could not have affected the verdict and was not prejudicial error.

11. Criminal Law § 1374 (NCI4th Rev.)— capital sentencing—prior robberies—course of conduct aggravating circumstance

Evidence of defendant's participation in two bank robberies in the two months preceding the robbery-murder at issue was sufficient to support the trial court's submission of the course of conduct aggravating circumstance to the jury since the span of time was not so great as to prevent the crimes from being considered part of the same course of conduct, and there was a similar *modus operandi* employed in the crimes. N.C.G.S. § 15A-2000(e)(11).

12. Criminal Law § 475 (NCI4th Rev.)— capital sentencing— prosecutor's closing argument—taking victim's life without trial

The prosecutor's closing argument in a capital sentencing proceeding commenting on the fact that defendant took the victim's life without the benefit of a trial was not an attack on defendant's exercise of his constitutional rights and was not improper.

13. Criminal Law § 460 (NCI4th Rev.)— capital sentencing— prosecutor's closing argument—punishment chosen by defendant—absence of prejudice

Defendant was not prejudiced by the prosecutor's closing argument in a capital sentencing proceeding that, when defendant made the decision to rob and shoot the victim, "he chose the punishment he's going to get for this crime" where the trial court properly instructed the jury following this argument, as well as during its jury instructions, that it was the jury's duty, not defendant's, to determine the punishment.

14. Criminal Law § 458 (NCI4th Rev.)— capital sentencing— prosecutor's closing argument—mitigating circumstances

The prosecutor's closing argument in a capital sentencing proceeding that "[t]hey can drag up anything they think has mitigating value. But just because they say it doesn't make it so" did not improperly inform the jury that defendant could submit any matter as a mitigating circumstance; rather, the prosecutor was merely arguing that the jury had to decide for itself whether the matters submitted by defendant were mitigating. Assuming, *arguendo* that the argument was improper, defendant was not prejudiced thereby.

15. Criminal Law § 460 (NCI4th Rev.)— capital sentencing— prosecutor's closing argument—not perversion of concept of mitigation

The prosecutor's closing argument in a capital sentencing proceeding that if the jury feels "that you should be merciful and not follow the law and just make a choice like [defendant] made when he pulled that trigger, then it's your conscience you have to live with. But if you do what you have all sworn to do, that is, follow the law, you will return a verdict recommending this man be sentenced to death" did not improperly equate mercy with lawlessness and pervert the concept of mitigation; rather, the argu-

ment attempts to reinforce the responsibility of the jury to reach its decision based on the evidence and the law.

16. Criminal Law § 448 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—jury's role in law enforcement system

The prosecutor's closing argument in a capital sentencing proceeding that the thin blue line (police officers) is what keeps persons like defendant out of your home, business, and community, that the jury is the anchor for the thin blue line, that there is no law or order without the jury, and that the jury should "follow the law" did not impermissibly urge the jurors to imagine they were potential crime victims and ask the jury to remedy societal problems via general deterrence. Taken in context, the argument sought to illustrate the importance of the jury's role within the system of law enforcement and was not improper.

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

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where this case involved a robbery during which defendant shot and killed the victim; defendant was convicted of armed robbery and of first-degree murder on the basis of premeditation and deliberation and the felony murder rule; the jury found as aggravating circumstances that defendant had been previously convicted of a violent felony, that the murder was committed for pecuniary gain, and that the murder was part of a course of conduct including other violent crimes; and the jury found no mitigating circumstances.

Justice WYNN did not participate in the consideration or decision of this case.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Helms (William H.), J., on 14 November 1996 in Superior Court, Union County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment was allowed 5 December 1997. Heard in the Supreme Court 26 May 1998.

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

Center for Death Penalty Litigation, by Staples Hughes, Staff Attorney, for defendant-appellant.

WHICHARD, Justice.

On 22 January 1996 defendant was indicted for robbery with a dangerous weapon and the first-degree murder of Danny Cook, both occurring on 27 November 1995. Defendant was tried capitally, and the jury returned verdicts finding him guilty of robbery with a firearm and first-degree murder based on premeditation and deliberation as well as 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, and further sentenced him to 101 to 131 months' imprisonment for the robbery with a dangerous weapon conviction. Defendant appealed the first-degree murder conviction to this Court, and we allowed defendant's motion to bypass the Court of Appeals on the robbery with a dangerous weapon conviction.

In an opinion filed 9 July 1998, this Court remanded the case to the Superior Court, Union County, for a hearing as to whether defendant's jury had been selected contrary to the equal protection principles set forth in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). *State v. Hoffman*, 348 N.C. 548, 500 S.E.2d 718 (1998). A hearing was held, and an order was entered on 24 August 1998. The trial court concluded that the State had offered valid, race-neutral explanations for its peremptory challenges of prospective jurors James Rorie and Lori Brace and that defendant had failed to meet his ultimate burden of proof of showing purposeful racial discrimination in the challenging of these prospective jurors. The transcript contains evidence that supports the trial court's findings, and the findings in turn support its conclusions. This assignment of error is therefore overruled, and the case is before this Court for review of defendant's remaining assignments of error.

The evidence presented at trial tended to show that between 3:30 and 4:00 p.m. on 27 November 1995, defendant entered a jewelry store in Marshville, North Carolina, wearing a ski mask and carrying a sawed-off shotgun. Danny Cook, the victim, was behind the store's display counter when he saw defendant enter. Defendant shot the victim in the chest from a distance of about three feet. Defendant then broke three glass display cases and took various items of jewelry, including some gold rings and necklaces. Defendant also stole two pistols.

[1] In defendant's first assignment of error, he contends that prospective juror Josephine McLemire was improperly excused for

cause. Defendant argues that while McLemire may have shown some opposition to the death penalty, she did not demonstrate sufficient opposition to warrant a for-cause removal.

The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the 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)). When McLemire was first asked about her ability to return a guilty verdict knowing that death was a possible sentence, she said she did not know whether she could return such a verdict. After time to think about the question, McLemire said she could "fairly consider death as a possible sentence in this case." Before defendant finished questioning the prospective jurors in McLemire's panel, the court excused the prospective jurors and adjourned for the day. Defendant continued his questioning of these jurors the next day. When defendant asked McLemire how long she had held her belief in the death penalty, she replied, "Well, I really don't believe in it. I slept on it last night and I'm still undecided." Upon further questioning by the trial court, McLemire stated that she could not consider the death penalty as an appropriate punishment. She further stated that she would find herself to be substantially impaired in her ability to perform her duties as a juror. In response to questioning by the State, she again stated that if her duty as a juror required her to sentence defendant to death, she would be substantially impaired in performing her duty.

At that point the State challenged McLemire for cause. The trial court allowed defendant's request to question her further. Defendant asked her whether she believed in the death penalty. She said she did not. McLemire then told defendant she could apply the law to the case without her personal beliefs substantially impairing her ability to follow the law. The trial court then asked, "But you still couldn't come back and consider a death penalty as one of the appropriate punishments in the case?" McLemire replied that she could not. The trial court continued its questioning. She told the trial court that her views on the death penalty would not substantially impair her ability to perform her duties as a juror. She also told the trial court that her views on the death penalty would not interfere with her ability to consider both possible punishments and that, in spite of her views, she could return a sentence of death against defendant. At this point the

trial court allowed the State's for-cause challenge, agreeing that her answers were "obviously equivocal."

Defendant argues that McLemire should not have been excused for cause because while her answers revealed that she had reservations about the death penalty, she also stated that these views would not impair her ability to consider that penalty in this case. In support of his argument, defendant cites the following:

> [T]he Constitution [does not] permit the exclusion of jurors from the penalty phase of a . . . murder trial if they aver that they will honestly find the facts and answer the [capital sentencing] questions in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, *yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt.*

Adams v. Texas, 448 U.S. at 50, 65 L. Ed. 2d at 593 (emphasis added). Defendant argues that McLemire falls into the above class of prospective jurors and that she therefore was improperly excused for cause.

Five years after *Adams*, the United States Supreme Court decided *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841, in which it made it clear that a prospective juror's bias does not have to be proven with "unmistakable clarity" in order to justify a for-cause removal. *Id.* at 424, 83 L. Ed. 2d at 852.

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-26, 83 L. Ed. 2d at 852-53 (footnote omitted). This Court has likewise held that 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).

McLemire stated on numerous occasions that she did not believe in the death penalty and that her views would substantially impair the performance of her duties as a juror. The trial court had to decide whether a number of contradictory responses by this prospective juror were sufficient to defeat the State's for-cause challenge. After watching and listening to this prospective juror, the trial court concluded that McLemire's answers during *voir dire* provided a sufficient basis to allow the State's for-cause challenge. We cannot conclude that the trial court abused its discretion.

Defendant also argues that he should have been allowed to question McLemire again before she was excused for cause. We have stated that "[i]t is not an abuse of discretion for the trial court to deny defendant an attempt to rehabilitate a juror unless defendant can show that further questions would have produced different answers by the juror." *State v. Cummings*, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 873 (1998). The trial court had already allowed defendant one attempt to rehabilitate this prospective juror. Defendant has not shown that additional questioning of McLemire would likely have produced different results. This assignment of error is overruled.

[2] Defendant next contends that juror Howard Setzer, a Charlotte police officer, should have been excused for cause. Setzer stated that he had heard about defendant's case briefly in the course of his employment but had not formed an opinion about it. Upon questioning by defendant, Setzer stated that he would tend to find "an officer to be a more credible witness simply based on the fact that he's an officer, as opposed to any other witness." Defendant argues that Setzer's response shows that he could not be an impartial juror and thus should have been excused for cause. However, defendant did not make a for-cause challenge of Setzer at this point in the *voir dire*. Further, at no point during jury selection did defendant assert this argument as a basis for his for-cause challenge. Instead, defendant continued questioning Setzer about his experience as a police officer. Finally, defendant asked him, "Mr. Setzer, honestly, wouldn't it be a problem for you to sit in a case like this? . . . A problem in being totally—totally fair, totally impartial, totally unbiased against a

defendant in a case?" Setzer responded, "I could follow the law in this case and I could do my duty as a juror."

It was not until after a recess that defendant made his for-cause challenge of Setzer. During this recess Setzer was seen talking to a deputy sheriff who was operating a metal detector. Two other members of the panel, Ann Keziah and Tracy Johnson, were also seen conversing with two police officers. It was at this point, and in light of these observations, that defendant challenged all three prospective jurors, Setzer, Keziah, and Johnson, for cause. After an inquiry into the matter, the trial court determined that Setzer had been talking with the deputy sheriff about a new security device and that defendant had not shown sufficient reason to excuse him for cause.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure provides: "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." On appeal to this Court, defendant is arguing completely different grounds in support of his for-cause challenge of Setzer than he argued to the trial court. The trial court had no opportunity to consider defendant's for-cause challenge in the terms in which he now presents it. Defendant thus did not properly preserve this assignment of error for appellate review, and it is overruled.

[3] Defendant next contends that the trial court erred when it failed to excuse prospective juror Ann Keziah for cause. During the recess mentioned above, prospective jurors Ann Keziah and Tracy Johnson were seen conversing with two police officers in a break room. Defense counsel overhead one of the officers say, "I said, 'That's awesome, Pops. A [sic] least we have one juror that will vote to convict.' " When defense counsel informed the trial court of this incident, the court ordered the officers summoned to the courtroom and conducted an inquiry into the matter.

Officer Rigoli explained that he was telling a story about a time when his father was called for jury duty and he had a case in court. Officer Rigoli told the court:

> I was telling her about telling my dad, he got called up, and I had a case coming up and he couldn't get off the jury duty. And so he ended up getting put on jury duty. And I said, "Well, Pop", I said, "If I come up and you got one of my cases, you know, I may end

> up looking like an idiot, because I'm just a dumb poor boy from the country, and, heck fire, if my own dad won't vote for me, then I need to drop back in something and be a meter reader or something.

Officer Rigoli said that he had not discussed defendant's case with prospective juror Keziah.

The trial court then questioned Keziah. She said that she had not discussed defendant's case with the officers and that she had not been influenced in any way with regard to defendant's case during the conversation. The trial court next questioned prospective juror Johnson. She said that she had not been a part of the conversation in the break room and that she had heard nothing which would have influenced her with regard to defendant's case. After talking with these individuals, the trial court was satisfied that Keziah and Johnson could be fair and impartial. It therefore denied defendant's for-cause challenges.

Defendant argues that this was error with regard to Keziah. Defendant notes inconsistencies between the accounts of what happened given by Officer Rigoli and prospective jurors Keziah and Johnson. Officer Rigoli testified that he had not known that Keziah was on the jury when he related the story about his father, while both Keziah and Johnson stated that they believed Officer Rigoli knew Keziah was on the jury at the time. Also, Keziah said that she did not remember laughter, while both Officer Rigoli and prospective juror Johnson reported that there had been laughter in response to what was said. Defendant argues that the trial court ended its inquiry into the matter too quickly and that

> it is entirely possible that the officers talked to a potential juror about the defendant's case knowing that she was a juror and intending to encourage her, subtly or otherwise, to vote to convict a defendant on trial for the murder of a citizen of the county in which they worked.

We have stated that "[w]hen there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991). That is precisely what the trial court did. It is also well settled that rulings on challenges for cause are matters in the discretion of the trial court

and will not be overturned on appeal absent a showing of an abuse of discretion. *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991). We give deference to the ruling of the trial court because it "has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial." *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997).

The trial court in this case was in the best position to observe the demeanor of these witnesses as they gave their sworn testimony. It did not abuse its discretion. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred by sustaining one of the State's objections during defendant's cross-examination of Donald Pearson. Pearson provided several pieces of corroborating testimony for the State. He testified that he had seen defendant's sawed-off shotgun in his father's bedroom days before the shooting. This corroborated the testimony of Pearson's father, Willie Pearson, that defendant had stored the gun at his house and had retrieved it from his bedroom on the morning of the crime. Donald Pearson also testified that he saw defendant at his father's house on the afternoon of the murder, that defendant was placing jewelry in a green bag, and that his father told him defendant had robbed a jewelry store. This also corroborated Willie Pearson's testimony.

During defendant's cross-examination of Donald Pearson, defendant asked, "[W]hat other offenses—what other record do you have?" Pearson answered, "Basically that's it except I'm being accused for a B and E." After questioning Pearson about another offense, defendant asked, "The, uh—you have a pending breaking and entering, is that right?" At this point the State objected. The trial court sustained the objection. Defendant argues this was a violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. We agree.

In *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974), the United States Supreme Court addressed a similar situation in which the principal witness against the defendant was on probation. The defendant was not allowed to cross-examine the witness about his probationary status. *Id.* at 310-11, 39 L. Ed. 2d at 350-51. The Court held that this limitation on cross-examination was a violation of the defendant's Sixth Amendment right "to be confronted with the witnesses against him." *Id.* at 315, 39 L. Ed. 2d at 353. The Court reasoned that "[t]he claim of bias which the defense sought to develop

was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer as well as of Green's possible concern that he might be a suspect in the investigation." *Id.* at 317-18, 39 L. Ed. 2d at 354 (citation omitted). The Court concluded that the defendant was thus denied the right of effective cross-examination and that this was constitutional error that no showing of want of prejudice could cure. *Id.* at 318, 39 L. Ed. 2d at 355.

This Court has applied *Davis* in a situation similar to the case at bar. In *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997), we held that the trial court erred when it did not allow the defendant to cross-examine the State's principal witness regarding nine pending charges of forgery and uttering forged checks. *Id.* at 163-64, 484 S.E.2d at 378. Likewise, we hold that the trial court here erred by not allowing defendant to cross-examine Pearson regarding his pending charges for breaking and entering. We conclude, however, that this error was harmless beyond a reasonable doubt.

As stated by the Supreme Court in *Davis*, the denial of the "right of *effective* cross-examination" cannot be cured by a showing of lack of prejudice. *Davis*, 415 U.S. at 318, 39 L. Ed. 2d at 355 (emphasis added). This rule has its roots in *Brookhart v. Janis*, a case in which the defendant was completely denied the opportunity to cross-examine the State's witnesses. *Brookhart v. Janis*, 384 U.S. 1, 2-3, 16 L. Ed. 2d 314, 316-17 (1966). *Davis*, however, dealt not with a total denial of cross-examination, but rather with a significant limitation on the defendant's cross-examination of the State's principal witness. The defendant in *Davis* was prevented from showing possible bias by inquiring into the probationary status of "a crucial witness for the prosecution." *Davis*, 415 U.S. at 310, 39 L. Ed. 2d at 350. The Court thus concluded that the defendant had been denied the right of "effective" cross-examination which could not be cured with a showing of lack of prejudice. *Id.* at 318, 39 L. Ed. 2d at 355.

Defendant here was not denied the right of effective cross-examination. The witness, Donald Pearson, was not a principal witness for the State but was a corroborating witness. His minimal importance is evidenced by the fact that the prosecutor scarcely mentioned him in his closing argument. Further, even without inquiry into any pending charges, Pearson was thoroughly impeached on cross-examination. Pearson testified that prior to moving to North Carolina, he lived in New Jersey and made a living robbing drug deal-

ers. He said he had not yet lived in North Carolina long enough to do the same here. He testified that he had been convicted of possession with intent to sell cocaine in New Jersey and North Carolina, that he had been convicted of driving while his license was revoked approximately thirty times, and that he had been convicted of giving fictitious information to an officer. He also testified that he had fired a sawed-off shotgun at a woman who insulted him and had stolen a ring from his father. Finally, Pearson was also cross-examined about several prior inconsistent statements.

In addition, the State presented substantial evidence of defendant's guilt aside from Pearson's testimony. Two witnesses testified that they saw defendant parked outside the victim's jewelry store just before the murder. Defendant's cousin and former partner in crime, Johnell Porter, testified that defendant had tried to get him to rob the store with him. Both Porter and Willie Pearson testified that defendant admitted the murder to them. Willie Pearson also testified that the property the officers recovered from various individuals—the jewelry, the victim's handgun, and the sawed-off shotgun—was all given to him by defendant. The robbery was also consistent with prior bank robberies which Porter testified defendant had committed with him. Finally, physical evidence from the crime scene, such as pieces of wood from the shotgun and green fabric from a gym bag, was also consistent with what Willie Pearson told the officers defendant had told him.

In light of the above, we conclude that although the trial court erred by not allowing defendant to cross-examine Pearson regarding his pending charges, this error was harmless beyond a reasonable doubt. This assignment of error is overruled.

[5] Defendant next contends that the trial court erred by sustaining one of the State's objections during defendant's direct examination of defendant's sister, Wandra Hoffman. The State presented evidence tending to show that defendant had been sitting in his white Nissan outside the victim's jewelry store on the day of the murder. Defendant attempted to prove that he had not been driving his white Nissan that day but had been driving his sister's car, a red Toyota. During defendant's direct examination of Wandra Hoffman, the following exchange took place:

> Q Tell the jury whether or not your brother was using that car [his white Nissan] on November the 29th of 1995, Wednesday.

A No. I don't recall him having that car then.

Q You had the car at that time?

A I believe I did. I'm not approximately for sure, but I believe I did.

Q Well, tell the jury whether or not your brother got a ticket driving your car on November the 29th, 1995.

A Yes, he did.

MR. HONEYCUTT: Your Honor, we object on the grounds of relevancy.

THE COURT: Sustained.

Defendant argues this evidence was relevant because it tended to prove that the period during which defendant's sister had his car extended beyond the date of the shooting.

Assuming *arguendo* that this evidence should have been admitted, defendant has failed to show prejudice. To show prejudice, a defendant must establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1997). As described in the preceding issue, the State presented substantial evidence tending to show defendant's guilt. Further, testimony that defendant had his sister's car on 29 November would not necessarily negate the fact that he was driving his own car two days earlier when the murder was committed. It is equally plausible that if defendant had his sister's car on 29 November, he borrowed it after 27 November so he would not be seen driving the car he had used to commit his crimes on 27 November. Finally, the value of Wandra Hoffman's testimony was diminished substantially on cross-examination. She admitted that she had never told a law enforcement officer that she had defendant's white car on the day of the murder. She was also unsure of basic features of the car, such as whether it had an automatic or manual transmission, although she said she drove it for several weeks. For these reasons, there is no reasonable possibility that a different result would have been reached had the State's objection not been sustained. This assignment of error is overruled.

[6] Defendant next contends the trial court erred by allowing the State to present evidence of defendant's prior crimes. Defendant's

cousin, Johnell Porter, testified that defendant had participated in two bank robberies with him during the two months preceding the crimes at issue. Defendant argues this evidence should have been excluded pursuant to Rule 404(b) because it was probative only of defendant's propensity to commit robberies.

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1997). This Court has stated:

> Rule 404(b) state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

The trial court conducted a *voir dire* on the State's proffered evidence of defendant's past crimes. It concluded that the evidence was admissible for the purpose of establishing identity and that its probative value was not substantially outweighed by the danger of unfair prejudice. The trial court instructed the jury, both at the time the evidence was admitted and in its charge, that the evidence was relevant only to the question of identity.

We have stated as to the use of other-crimes evidence to prove identity:

> The other crime may be offered on the issue of defendant's identity as the perpetrator when the *modus operandi* of that crime and the crime for which defendant is being tried are similar enough to make it likely that the same person committed both crimes. *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983). This theory of admissibility requires "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *Id.* at 106, 305 S.E.2d at 545.

State v. Carter, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Porter testified that in both of the prior robberies, defendant drove his white Nissan and provided Porter with a sawed-off shotgun and a dark-blue ski mask. Defendant waited in the car while Porter and another man robbed the banks, and then defendant drove his two companions from the banks.

There are obvious similarities between these bank robberies and the crimes at issue here. Defendant drove his white Nissan in the bank robberies, while here a white Nissan was seen outside the jewelry store on the day of the murder. Defendant's sawed-off shotgun and ski mask were used in the bank robberies, and the perpetrator here wore a ski mask and carried a sawed-off shotgun. The banks and the jewelry store were all located in small towns surrounding Charlotte. Finally, all of the establishments were robbed during the daytime when they were open for business. The trial court properly concluded that Rule 404(b) did not preclude admission of this evidence for the purpose of proving the identity of the perpetrator of these crimes.

Defendant argues further that this evidence should have been excluded pursuant to Rule 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992). "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citations omitted). The trial court did not abuse its discretion by admitting this evidence and limiting the jury's consideration of it to the question of identity. This assignment of error is overruled.

[7] Defendant next contends that the trial court erred by allowing the prosecutor to make several improper and prejudicial statements to the jury during his closing argument in the guilt-innocence phase. First, defendant complains that the State improperly argued that defendant should have to bear the burden of persuading the jury that the evidence did not establish malice. The prosecutor argued:

> The judge is going to instruct you about malice. He's going to tell you that malice is that condition of the mind in part—that condition of the mind that prompts a person to take the life of

> another intentionally without just cause, excuse or justification. Members of the jury, "it was him or me", what this defendant said, "Him or me." There is no just cause, there is no excuse, or there is no justification in this case. Make them tell you where it is.

The trial court overruled defendant's objection to this argument. Defendant contends this was erroneous because the argument sought to remove from the State the burden of proving malice.

Assuming *arguendo* that this was error, there was no prejudice to defendant. The prosecutor told the jury that the State had to prove malice. Further, the trial court properly instructed that the prosecutor had the burden of proof as to malice. This Court presumes that the jury follows the trial court's instructions. *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 500 (1997). Therefore, defendant suffered no prejudice.

[8] Defendant next complains of the prosecutor's use of two minutes of silence to emphasize to the jury how long the victim spent bleeding on the floor before he died. Defendant contends this tactic is permissible only in sentencing-phase arguments. Defendant, however, failed to object to this portion of the prosecutor's argument. "In cases where the defendant failed to object at trial, 'the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Holden*, 346 N.C. 404, 430, 488 S.E.2d 514, 528 (1997) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 132 (1998). The prosecutor's use of two minutes of silence was not so grossly improper as to merit *ex mero motu* intervention by the trial court. *See State v. Jones*, 346 N.C. 704, 713-14, 487 S.E.2d 714, 720-21 (1997) (holding that the prosecutor's use of five minutes of silence during its guilt-innocence closing argument was not so grossly improper as to require *ex mero motu* intervention).

[9] Defendant next contends that the prosecutor improperly argued for guilt on the basis of victim impact. The prosecutor argued:

> The greed by Hoffman's hands took Danny Cook's property. It took Danny's life. It took Danny Cook's gun. It took Danny Cook's grandfather's gun, which was never recovered. He took Danny Cook's life for a few handfuls of rings and jewelry.

Danny Cook, ladies and gentlemen, lies out there in the cold ground.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: He's gone forever. But forever to be remembered in the tender mercies of his mother's heart. Forever to be remembered for the loving memories of his sister.

That's something he's to be remembered for. He's to be remembered here by me. That's my job. He's to be remembered here by you. It is your duty to remember, ladies and gentlemen, who's on trial in this case. Who's on trial in this case. That this person sitting right here, Greg Hoffman, this is the defendant. This is the man who took Danny Cook's life and took his property. That's who's on trial.

Defendant contends that the prosecutor's argument was inflammatory and that the trial court should have sustained his objection.

Defendant objected when the prosecutor argued that the victim was in the "cold ground." This argument was based on the undisputed evidence that the victim was dead. Defendant failed to object to the remainder of the prosecutor's argument of which he now complains. This argument, taken in context, merely reminded the jury that it was defendant, not the victim, who was on trial. There was nothing so grossly improper in this argument as to merit *ex mero motu* intervention by the trial court.

[10] Finally, defendant contends that the prosecutor argued outside the evidence. The prosecutor argued:

He would have you believe that the Pearson Gang conspired to plant that piece of wood under Danny Cook's body. That the Pearson Gang conspired to give that ring, that one ring out of those hundreds that we recovered, that one ring with a price tag—

[DEFENSE COUNSEL]: Objection, improper statement of evidence.

THE COURT: Overruled.

[PROSECUTOR]: That one ring with Danny Cook's handwriting on it.

Defendant argues that the prosecutor implied that the State had recovered hundreds of rings, which was inaccurate. Defendant contends that, as a result, the jury would naturally have inferred that the State had more evidence of defendant's guilt which it had not introduced.

Assuming *arguendo* that the prosecutor misstated the evidence as described by defendant, there is not a reasonable possibility that a different result would have been reached had the trial court sustained defendant's objection. The State presented substantial evidence of defendant's guilt. A single reference to "hundreds of rings" that were recovered without any indication of how this evidence supported defendant's guilt could not have affected the verdict. This assignment of error is overruled.

[11] Defendant next contends that the trial court erroneously submitted the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance during the penalty phase. This circumstance provides: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (1997). Defendant argues that the evidence did not support this circumstance. He further argues that any evidence that could have supported this circumstance was used to support other aggravating circumstances which were submitted. Therefore, argues defendant, this evidence could not be used to support the (e)(11) circumstance without being impermissibly duplicative.

Three aggravating circumstances were submitted to the jury: (1) N.C.G.S. § 15A-2000(e)(3), defendant was previously convicted of a violent felony; (2) N.C.G.S. § 15A-2000(e)(6), the murder was committed for pecuniary gain; and (3) N.C.G.S. § 15A-2000(e)(11), the murder was part of a course of conduct involving other violent crimes. The jury found all three aggravating circumstances to exist. In its penalty-phase argument, the prosecutor argued that the (e)(3) circumstance was supported by defendant's convictions for two armed robberies, one occurring in Mecklenburg County in 1976 and the other occurring in South Carolina in 1983. The prosecutor argued that the (e)(6) circumstance was supported by the armed robbery of the jewelry store occurring at the time of the murder. Finally, the prosecutor argued that the (e)(11) circumstance was supported by defendant's participation in two bank robberies in the two months preceding the crimes charged in this case.

Defendant argues that the bank robberies were not sufficiently connected to the crimes charged in this case to support the (e)(11) course-of-conduct aggravating circumstance. Defendant argues further that there was no other evidence which could have been used to support this circumstance. We disagree.

We have explained the law regarding submission of the (e)(11) circumstance as follows:

> In determining whether there is sufficient evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving all contradictions in favor of the State. . . . In determining whether the evidence tends to show that another crime and the crime for which defendant is being sentenced were part of a course of conduct, the trial court must consider a number of factors, including the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons.

Cummings, 346 N.C. at 328-29, 488 S.E.2d at 572 (citations omitted). The robbery and murder in this case occurred on 27 November 1995. The two bank robberies in which defendant participated occurred on 20 October 1995 and 18 September 1995. This span of time was not so great as to prevent the crimes from being considered part of the same course of conduct. There was also a similar *modus operandi* employed in the crimes. All occurred in small towns around Charlotte, North Carolina. All occurred in daylight hours while the businesses were open. The same sawed-off shotgun, green bag, ski mask, and white Nissan were used in all the crimes. Finally, all the crimes shared the same motive, pecuniary gain.

The evidence of defendant's participation in the two prior bank robberies was sufficient to support the course-of-conduct aggravating circumstance. We thus need not consider whether it would have been impermissibly duplicative for the jury to consider other evidence in support of this circumstance. This assignment of error is overruled.

[12] Defendant next contends that several portions of the State's penalty-phase argument were improper. First, defendant argues that the prosecutor improperly commented on the fact that defendant

took the victim's life without the benefit of a trial. The prosecutor argued:

> No doubt you're going to hear arguments, pleading for the life and for the liberty of this defendant, but, members of the jury, don't forget how this defendant deprived Danny Cook of his life and liberty, and he deprived him of that life and liberty without the benefit of lawyers, without the benefit of a trial,—
>
> [DEFENSE COUNSEL]: Objection[.]
>
> [PROSECUTOR]: —without the benefit of the judge, and without the benefit of you citizens. He did it on his own. That's what this defendant did. He took that life on his own and you shouldn't forget it as you go through this.

Defendant contends that this argument was inflammatory and punished him for exercising his right to counsel.

We considered a similar penalty-phase argument in *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Here, as in *Walls*, "[w]e do not read into the prosecutor's argument that it was an attack on defendant's exercise of his constitutional rights. The prosecutor merely argued to the jury that defendant, as judge, jury and executioner, single-handedly decided [the victim's] fate." *Id.* at 64, 463 S.E.2d at 772. The trial court did not err by allowing this argument.

[13] Defendant next complains that the prosecutor argued that the only punishment for first-degree murder was the death penalty. The prosecutor argued:

> They may argue to you that don't give him the sentence of death because it may be a mistake. The only mistake made in this case was when Johnathon Gregory Hoffman took this shotgun, rushed into Cook's Jewelry, hit Danny Cook over the head and blew a hole in his chest from three feet away. That's the mistake that's been made and that defendant made it. Nobody else did it, that defendant did. He chose to make this decision consciously and wilfully. You've already convicted him of it. When he chose to make that decision, he chose the punishment he's going to get for this crime.
>
> [DEFENSE COUNSEL]: Objection.
>
> . . . .

THE COURT: Overruled. It's for you to determine what punishment and not the defendant. Go ahead.

Defendant contends that this argument amounts to instructing the jury that death is the sole punishment for first-degree murder.

The trial court properly instructed the jury following this argument, as well as during its jury instructions, that it was the jury's duty to determine the punishment, not the defendant's. We presume the jury follows the trial court's instructions. *Norwood*, 344 N.C. at 537, 476 S.E.2d at 361. Defendant's argument on this issue is without merit.

[14] Defendant next contends the prosecutor improperly informed the jury that there was no limit to the mitigating circumstances defendant could submit to the jury. The prosecutor argued:

> Now, there are only eleven aggravating circumstances listed in the law and we have to prove one of those aggravating circumstances. They have no limitation. They can drag up anything that they—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: —think has mitigating value. But just because they say it doesn't make it so.

Defendant contends this argument improperly informed the jury that defendant could submit any matter as a mitigating circumstance. Defendant argues this is not true because a defendant is only entitled to submit matters as mitigating circumstances which "the court deems relevant to sentence." N.C.G.S. § 15A-2000(a)(3).

After the trial court overruled defendant's objection, the prosecutor clarified that there was some limitation to what defendant could submit as a mitigating circumstance; it had to be something he believed had mitigating value. The prosecutor was merely arguing that the jury had to decide for itself whether these matters were mitigating. Even assuming *arguendo* that the jury would have interpreted the prosecutor's argument as described by defendant, defendant has nevertheless failed to show how he was prejudiced by it. To show prejudice, a defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the

appeal arises." N.C.G.S. § 15A-1443(a). Defendant has failed to make this necessary showing.

[15] Defendant next argues that the prosecutor improperly equated mercy with violent lawlessness. The prosecutor argued:

> If you feel sorry or pity on Greg Hoffman, that's all right. If you feel that you should be merciful and not follow the law and just make a choice like Greg Hoffman made when he pulled that trigger, than [sic] it's your conscience you have to live with.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: But if you do what you have all sworn to do, that is, follow the law, you will return a verdict recommending this man be sentenced to death.

Defendant contends that by equating mercy with lawlessness, the prosecutor perverted the concept of mitigation.

This Court considered a similar argument in *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48, *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994), where the prosecutor argued during the penalty phase:

> You are to perform your duty as a juror in reaching this decision fairly and objectively and without bias or prejudice, passion or any other arbitrary factor. Mercy, pity, sympathy, these are emotions. You promised us you would make your decision on the facts according to the law and we believed you.

Id. at 257, 443 S.E.2d at 62. The Court reasoned:

> Hearing the argument of the prosecution coupled with the court's instruction we do not believe a reasonable juror could understand the argument to call for the jury to disregard mitigating evidence simply because it appeals to a person's sympathies. The argument attempts to and serves to reinforce the responsibility of the jury to reach its decision based on the evidence and the law.

Id. at 258-59, 443 S.E.2d at 63. The same reasoning applies here. The trial court did not err by allowing this argument.

[16] Finally, defendant argues that a portion of the prosecutor's argument impermissibly urged jurors to imagine that they were potential crime victims and asked the jury to remedy larger societal problems via general deterrence. The prosecutor argued:

> Ladies and gentlemen, there is no law—there is no law and order in our community unless twelve people like you are willing to do your duty. And it is a noble but weighted [sic] thing you must do. You all heard of the reference in literature to the thin blue line, referring to police officers, the thin blue line. Well, ladies and gentlemen, the thin blue line is what separates the Greg Hoffmans, that keeps them out of your home and out of your business, from you,—
>
> [DEFENSE COUNSEL]: Object.
>
> [PROSECUTOR]: —and your community. It's the thin—
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: It's the thin blue line, ladies and gentlemen, that protects, serves and defends, but that line, that line, ladies and gentleman, as thin as it is, must be tied to something. It must be anchored. What is the anchor for the thin blue line? You. You are the anchor. There is no law, there is no order without you. You swore to uphold the law.
>
> We say that if you listen to the instructions of the Court, you will answer these questions, you will respond to your oath to follow the law no matter how personally distasteful it might be, you will be the anchor for this thin blue line.

Counsel are allowed wide latitude in the argument of hotly contested cases. *State v. Alford*, 339 N.C. 562, 572, 453 S.E.2d 512, 517 (1995). We do not believe the prosecutor's argument exceeded these generous parameters. Taken in context, the prosecutor sought to illustrate the importance of the jury's role within the system of law enforcement. Having done this, the prosecutor urged the jury to "follow the law." The trial court did not err by allowing this argument.

In conclusion, all of defendant's complaints regarding the prosecutor's penalty-phase argument are without merit. This assignment of error is overruled.

Defendant next raises several issues which he concedes this Court has decided against his position, including: (1) that the trial court's refusal to grant defendant the right of allocution violated his constitutional rights, (2) that the trial court's instructions regarding the weighing of aggravating and mitigating circumstances violated his constitutional rights, (3) that the trial court's definition of "mitigating

circumstance" violated his constitutional rights, and (4) that the trial court's instructions regarding the burden of proof applicable to 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 of error are overruled.

Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, it is our duty to ascertain: (1) whether the evidence supports the aggravating circumstances found by the jury; (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).

[17] The jury found all three aggravating circumstances which were submitted for its consideration. First, the jury found 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). Second, the jury found that defendant committed the offense for pecuniary gain. N.C.G.S. § 15A-2000(e)(6). Finally, the jury found that the murder was part of a course of conduct which included other acts of violence against other persons. N.C.G.S. § 15A-2000(e)(11). 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 consideration. 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). 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 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).

The instant case is distinguishable from each of these cases. In three of these cases, *Benson*, *Stokes*, and *Jackson*, the defendant either pled guilty or was convicted by the jury solely on the basis of the felony murder rule. Here, the defendant was convicted of first-degree murder on the basis of premeditation and deliberation and the felony murder rule. We have consistently stated that "[a] conviction based on the theory of premeditation and deliberation indicates a more calculated and cold-blooded crime." *State v. Davis*, 340 N.C. 1, 31, 455 S.E.2d 627, 643, *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83 (1995). Further, 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) aggravating 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). In particular, the jury's finding of the (e)(3) aggravating circumstance, prior conviction of a violent felony, is significant because none of the cases in which this Court has held the death sentence to be disproportionate have included this aggravating circumstance. *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995).

To determine whether the sentence of death is disproportionate, we also compare the instant case to 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). The present case is roughly similar to *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550. In *Cummings* the defendant robbed the victim's store. During the course of the robbery, the defendant killed the victim by shooting him in the head and then fired at the victim's wife when she came to investigate the gunfire. *Id.* at 300-03, 488 S.E.2d at 555-57. The jury convicted the defendant of first-degree murder based on premeditation and deliberation and the felony murder rule, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill. *Id.* at 300, 488 S.E.2d

at 555. At defendant's capital sentencing hearing, the jury found as aggravating circumstances that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and that the murder was part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11). *Cummings*, 346 N.C. at 333, 488 S.E.2d at 575. Further, the jury found twenty-eight of the thirty-two mitigating circumstances submitted. *Id.* at 334, 488 S.E.2d at 576. The jury recommended the death sentence, and this Court upheld that sentence as proportionate. *Id.* at 335, 488 S.E.2d at 576.

The instant case also involved a robbery during which defendant shot and killed the victim. Defendant was convicted of robbery with a firearm and first-degree murder on the basis of premeditation and deliberation and the felony murder rule. During the capital sentencing phase, the jury found three statutory aggravating circumstances: that defendant was previously convicted of a violent felony, N.C.G.S. § 15A-2000(e)(3); that the crime was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and that the crime was part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11). The jury found no mitigating circumstances.

In summary, defendant here and the defendant in *Cummings* committed similar crimes, and the juries in both cases found the (e)(6) and (e)(11) aggravating circumstances. The jury here further found the (e)(3) circumstance. In addition, the jury in *Cummings* found twenty-eight mitigating circumstances, while the jury here found none. We held the sentence of death to be proportionate in *Cummings*. The sentence of death in this case is likewise proportionate.

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

ESTATE OF JACQUELINE MELISSA MULLIS, BY KATHY DIXON, ADMINISTRATOR v. MONROE OIL COMPANY, INCORPORATED, CITY OF MONROE ALCOHOLIC BEVERAGE CONTROL, LISTON S. DARBY, ADMINISTRATOR OF THE ESTATE OF DWAINE LYDELL DARBY, AND THE ESTATE OF OTIS STEPHEN BLOUNT

No. 426PA97

(Filed 9 October 1998)

1. **Intoxicating Liquor § 48 (NCI4th)— sale of alcohol to underaged persons—no claim for negligence per se**

The Court of Appeals correctly determined that a plaintiff may not maintain a negligence *per se* action based on a violation of N.C.G.S. § 18B-302. The purpose of N.C.G.S. § 18B-302 is to restrict minors' consumption of alcohol; it is not therefore a public safety statute and cannot be the basis for a negligence *per se* claim.

2. **Intoxicating Liquor § 69 (NCI4th)— sale of alcohol to underaged person—common law negligence action—not excluded by Dram Shop Act**

A common law negligence suit may be maintained against a commercial vendor based on a sale of alcohol to an underaged person, provided that the plaintiff in such a case presents sufficient evidence to satisfy all elements of a common law negligence suit, that is, duty, breach of duty, proximate cause, and damages. The Dram Shop cause of action was not intended to be the exclusive remedy available to a third party who wishes to assert a negligence suit against a seller based on the sale of alcohol to an underaged person. N.C.G.S. §§ 18B-120 to 129.

3. **Intoxicating Liquor § 64 (NCI4th)— sale of alcohol to underaged person—common law negligence claim—evidence insufficient**

The trial court correctly granted summary judgment for defendants on a common law negligence claim based on the sale of alcohol to a twenty-year-old who was subsequently involved in an automobile accident where the evidence offered by plaintiff indicated merely that defendant sold alcohol to an individual who was later discovered to be underage. Evidence of this alone, without an offer of some additional factor or factors which would put the vendor on notice that harm was foreseeable, is insufficient to establish the duty element and thus maintain a common law negligence suit.

Justice WYNN did not participate in the consideration or decision of this case.

Justice FRYE concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 127 N.C. App. 277, 488 S.E.2d 830 (1997), affirming the trial court's grant of summary judgment for defendants Monroe Oil Company and City of Monroe Alcoholic Beverage Control by Martin (Jerry Cash), J., on 10 May 1996 in Superior Court, Union County. Heard in the Supreme Court 11 February 1998.

Clark, Griffin & McCollum, by Joe P. McCollum, Jr., and William L. McGuirt, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Timothy G. Barber and Steven D. Gardner, for defendant-appellee Monroe Oil Company.

R. Gregory Lewis, Anna L. Baird, and Joseph E. Wall for defendant-appellee Monroe ABC.

ORR, Justice.

This case arises out of a drunk-driving accident in which four young people were tragically killed. On 30 April 1993, the four persons involved, Otis Blount, twenty; Dwaine Darby, nineteen; Melissa Mullis, fifteen; and Patricia Teel, eighteen, decided to meet several other individuals at a local teen nightclub in Monroe between 7:00 and 8:00 p.m. Before meeting at the Monroe club, Blount bought some liquor for himself and two other individuals from a store operated by defendant City of Monroe Board of Alcoholic Beverage Control ("Monroe ABC"). Blount returned to the same Monroe ABC store later that evening and bought some more liquor for himself and the other individuals. Later, Blount left the club again and this time bought beer from a convenience store owned by defendant Monroe Oil Company, Inc. ("Monroe Oil").

At about 11:00 p.m., Blount, Darby, Mullis, and Teel decided to go to a party at a friend's house. The four got into Darby's Volkswagen Jetta: Darby in the driver's seat; Blount in the front passenger seat; and the two girls, Mullis and Teel, in the back passenger seat. Prior to leaving the club, Blount was given money which had been collected at the club to buy beer for the party, and on the way to the party,

Darby stopped at the convenience store owned by Monroe Oil so that Blount could buy the beer. Two other carloads of teenagers in the group also stopped at the store.

After Blount bought the beer, he returned to Darby's car and got behind the wheel to drive. Darby sat in the front passenger seat, and the two girls remained in the backseat. After consuming alcohol in the parking lot, Blount drove the car out of the parking lot and headed towards the location of the party. Moments later, at approximately midnight, Blount drove the car off the road into a tree. The car caught fire, killing all four occupants. An officer responding to the scene concluded that Blount's alcohol use contributed to the accident. Blount's autopsy report also revealed that his blood-alcohol content was 0.13 at the time of the accident, an amount exceeding the then-legal limit of 0.10 alcohol content under our impaired-driving statute, N.C.G.S. § 20-138.1 (1989) (amendment for offenses committed on or after 1 October 1993 substituted "0.08" for "0.10").

Based on the above, the administrator of the estate of Melissa Mullis, one of the passengers, filed suit alleging that defendants Monroe ABC and Monroe Oil were negligent for selling alcohol to an underage person under the Dram Shop Act, N.C.G.S. §§ 18B-120 to -129 (1995). Plaintiff brought the action under N.C.G.S. §§ 28A-18-1 to -18-8, dealing with the survival of actions and wrongful-death provisions. Defendants answered the complaint and moved to dismiss it for failure to state a claim upon which relief could be granted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. In their 12(b)(6) motions, defendants contended that the Dram Shop action should be dismissed because plaintiff had failed to file the complaint within the statute of limitations period under the Act. Plaintiff then filed a motion to amend the complaint, which was granted on 11 April 1995. In the amended complaint, plaintiff withdrew the Dram Shop action and asserted a negligence *per se* claim alleging that defendants' acts were in violation of N.C.G.S. § 18B-102, which prohibits the illegal sale of alcohol, and, more specifically, were in violation of N.C.G.S. § 18B-302, which prohibits the sale of alcohol to underage persons. In addition to the negligence *per se* claim, plaintiff also alleged that defendants were liable for the negligent sale of alcohol to an underage person under common law negligence.

Defendants renewed the 12(b)(6) motions to dismiss the complaint, and both motions were denied. Defendants subsequently

moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, arguing that there was no genuine issue as to any material fact as shown by the pleadings, depositions, and responses, and that defendants were entitled to judgment as a matter of law. The trial court granted the summary judgment motions for defendants on 10 May 1996, and plaintiff appealed.

The Court of Appeals affirmed the trial court's decision and held that plaintiff's sole and exclusive remedy was under the Dram Shop Act. The Court of Appeals explained that to maintain a wrongful-death suit, plaintiff/estate had to show that the deceased, Melissa Mullis, could have maintained a negligence action against defendants if she had lived. N.C.G.S. § 28A-18-2 (1984) (amended 1995); *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 647, 423 S.E.2d 72, 73 (1992); *Carver v. Carver*, 310 N.C. 669, 673, 314 S.E.2d 739, 742 (1984). The Court of Appeals concluded that, here, a negligence *per se* or common law negligence claim could not be so maintained based on this Court's decision in *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992). The Court of Appeals stated that a negligence *per se* action could not be maintained because this Court held in *Hart* that a violation of N.C.G.S. § 18B-302 is not negligence *per se*. *Estate of Mullis v. Monroe Oil Co.*, 127 N.C. App. 277, 279, 488 S.E.2d 830, 832 (1997). Plaintiff, therefore, could not establish that defendants' violation of N.C.G.S. § 18B-302 in this case was negligence *per se*. *Id.*

The Court of Appeals also held that plaintiff could not maintain a common law negligence claim against defendants for selling alcohol to an underage person. The Court of Appeals explained that in *Hart*, this Court held that a common law negligence suit could be maintained against a social host for furnishing alcohol to an underage guest if it was shown that the social host served alcohol to the guest when the host knew or should have known that the guest was intoxicated and was going to drive a car. *Id.* at 280, 488 S.E.2d at 832. The Court of Appeals noted that, here, plaintiff did not allege that defendants knew or should have known that Otis Blount was intoxicated when defendants sold him the alcohol on 30 April 1993. *Id.* Emphasizing plaintiff's failure to allege knowledge of intoxication, the Court of Appeals concluded that a common law negligence action could not be maintained and that the Dram Shop Act provided the sole cause of action available to plaintiff. The Court of Appeals stated that since plaintiff failed to timely file an action under the Dram Shop Act, the trial court's grant of summary judg-

ment was proper. For reasons set forth below, we affirm the Court of Appeals' decision affirming the trial court's orders of summary judgment for defendants.

[1] The issues in this case are whether plaintiff may maintain negligence claims against defendant commercial vendors for selling alcohol to an underage person on two grounds: (1) negligence *per se*, based on a violation of N.C.G.S. § 18B-302; and (2) common law negligence. First, the Court of Appeals correctly determined that plaintiff may not maintain a negligence *per se* action based on a violation of N.C.G.S. § 18B-302. In *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174, this Court reversed the Court of Appeals and held that a violation of N.C.G.S. § 18B-302 is not negligence *per se*. Under N.C.G.S. § 18B-302, it is a misdemeanor to give or sell alcoholic beverages to anyone less than twenty-one years old. *Id.* at 306, 420 S.E.2d at 178. In a divided opinion, this Court held that a violation of N.C.G.S. § 18B-302 was not negligence *per se* because the statute was not a public safety statute which imposed a duty for the protection of the public. *Id.* at 303-04, 420 S.E.2d at 177. The majority in *Hart* concluded that the purpose of N.C.G.S. § 18B-302 was to restrict minors' consumption of alcohol, that it was therefore not a public-safety statute, and that it could not be the basis for a negligence *per se* claim. In light of the majority decision in *Hart*, we are bound in this case to conclude that plaintiff may not maintain a negligence *per se* action based on a violation of N.C.G.S. § 18B-302.

[2] The next issue we must address is whether plaintiff may maintain a common law negligence action against defendant commercial vendors arising out of the sale of alcohol to an underage person. Presently, commercial vendors are subject to liability for the negligent sale of alcohol to an underage person under the North Carolina Dram Shop Act. N.C.G.S. §§ 18B-120 to -129. Any effect that the Dram Shop Act may have on the existence of a common law negligence suit must be addressed first since the Act was specifically created to impose liability for the conduct upon which plaintiff's suit is based.

Under the Dram Shop Act, an aggrieved party has a claim against a "permittee or local Alcoholic Beverage Control Board" if the party shows that the seller "negligently sold or furnished an alcoholic beverage to an underage person," that consumption of the beverage caused or contributed to the underage driver's impairment, and that the injury which resulted was "proximately caused by the underage

driver's negligent operation of a vehicle while so impaired." N.C.G.S. § 18B-121. The legislature has also provided that "[t]he creation of any claim for relief by this Article may not be interpreted to abrogate or abridge any claims for relief under the common law." N.C.G.S. § 18B-128. Under this section, the legislature has made clear that previously existing common law rights are preserved. We may conclude, therefore, that the Dram Shop cause of action was not intended to be the exclusive remedy available to a third party who wishes to assert a negligence suit against a seller based on the sale of alcohol to an underage person.

In addition to the Dram Shop Act's not excluding common law remedies, this Court held in *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174, that a common law negligence claim could exist for the negligent provision of alcohol by a social host. There, we held that a common law negligence claim could be maintained where the plaintiff alleged that the social host provided alcohol to an underage guest when the host knew or should have known that the guest was intoxicated and was going to drive a car shortly after consuming the alcohol. In acknowledging this common law claim in *Hart*, we stated that we were not creating a new cause of action but were instead merely allowing "established negligence principles" to be applied to the facts alleged. *Id.* at 306, 420 S.E.2d at 178. We stated that, under established common law negligence principles, a plaintiff must offer evidence of four essential elements in order to prevail: duty, breach of duty, proximate cause, and damages. *Id.* at 305, 420 S.E.2d at 177-78; *see Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990). In *Hart*, we further explained that

> [a]ctionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care.

Hart, 332 N.C. at 305, 420 S.E.2d at 177-78.

Applying these long-standing negligence rules to the plaintiff's allegations in *Hart*, we concluded that the plaintiff's factual averments were sufficient to satisfy all common law negligence elements. First, the defendants had a "duty to the people who travel on the public highways not to serve alcohol to an intoxicated individual who was known to be driving." *Id.* at 305, 420 S.E.2d at 178. Furnishing alcohol to a noticeably intoxicated person who is going to drive

would constitute a breach of that duty, and a jury could determine that this breach proximately caused harm.

The Court next addressed social-host liability in *Camalier v. Jeffries*, 340 N.C. 699, 460 S.E.2d 133 (1995). In *Camalier*, Charles Jeffries attended a party at the home of defendant Frank Daniels and consumed several gin and tonics over a three-hour period. Jeffries then left the party in his car and collided into a car driven by Caleb Camalier. Camalier died from injuries received in the accident, and his estate asserted a common law negligence claim against the social hosts of the party. The trial court later granted summary judgment for the defendants, and the Court of Appeals affirmed. *See Camalier v. Jeffries*, 113 N.C. App. 303, 438 S.E.2d 427 (1994). We subsequently affirmed the Court of Appeals' decision, finding that summary judgment for the defendants was proper. We determined that evidence presented by the plaintiffs established that the hosts had served Jeffries alcohol and that the hosts knew that Jeffries was going to drive a car shortly after consuming the alcohol. The plaintiffs' evidence failed, however, to show whether the social hosts *knew or should have known* that Jeffries was intoxicated when they served him the alcohol. While the plaintiffs' evidence did show that Jeffries had a blood-alcohol concentration of 0.191 and that he was visibly intoxicated after the accident, it failed to show that he was visibly intoxicated while at the party or that anyone at the party should have known that he was intoxicated. No one at the party said that Jeffries appeared intoxicated, and fifty-three people who were present at the party expressly stated that he *did not* appear intoxicated. Thus, we held that the plaintiffs in *Camalier* failed to produce sufficient evidence to establish a common law negligence claim against the social host.

Applying the foregoing principles developed in *Hart* and *Camalier* to the present case, we conclude that a common law negligence suit may be maintained against a commercial vendor, based on a sale of alcohol to an underage person, provided that the plaintiff in such a case presents sufficient evidence to satisfy all elements of a common law negligence suit, that is, duty, breach of duty, proximate cause, and damages. As was the case in *Hart*, we do not recognize a new cause of action but merely allow "established negligence principles" to be applied to the facts of plaintiff's case.

[3] Having determined that a common law cause of action may be maintained for the negligent sale of alcohol to an underage person if

all common law negligence elements are satisfied, we must now determine whether plaintiff's forecast of evidence was sufficient to establish a *prima facie* case of common law negligence. Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, dealing with summary judgment motions, "[t]he motion shall be allowed and judgment entered when such evidence reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). The party moving for summary judgment meets its burden "by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988), *quoted in Camalier*, 340 N.C. at 710-11, 460 S.E.2d at 138. To survive a motion for summary judgment, the nonmoving party must therefore " 'forecast sufficient evidence of all essential elements of [his] claim[]' to make a *prima facie* case at trial." *Camalier*, 340 N.C. at 711, 460 S.E.2d at 138 (quoting *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992)).

Plaintiff's forecast of evidence showed the following: On the night of 30 April 1993, Otis Blount, who was twenty years old and under the legal age to buy alcohol, purchased alcohol twice from defendant Monroe ABC and twice from defendant Monroe Oil. Melissa Baucom stated in her deposition that she drove Blount to the Monroe ABC store twice that evening to buy liquor for himself and two other individuals; she also stated that she later drove Blount to an Amoco station convenience store owned by Monroe Oil, where he bought beer. Several other teenagers stated that shortly after 11:00 p.m., Blount went back to the Amoco station owned by Monroe Oil with Darby in Darby's car and purchased more beer. Witnesses present stated that Melissa Mullis and Patty Teel were with Blount in Darby's car when Darby and Blount drove to the Amoco station to buy the beer. Aaron Tedder and Christopher Mullis, two teenagers present that night, stated that they saw Blount walk out of the Amoco station with beer and drink a portion of it in the parking lot. Blount then drove Darby's Volkswagen from the Amoco station; a short time later, he drove the car off the road and into a tree, killing himself and the other car occupants, Melissa Mullis, Patty Teel, and Dwaine Darby.

Other evidence tended to show that, although Blount was intoxicated, he did not readily appear so. Blount's autopsy report revealed

that he had a blood-alcohol content of at least 0.13 and was therefore driving while impaired; an officer who responded to the scene also concluded that Blount's alcohol use caused the accident. Melissa Baucom, however, stated that she did not notice anything unusual about Blount's eyes or speech to indicate that he had been drinking, adding that it was usually difficult to tell if Blount had been drinking alcohol. Several other teenagers stated that Blount's speech was normal that evening, that he was walking straight and had control over his body motions, and that he did not smell of alcohol. Tommy Quick, another teenager present that night, stated that he had not seen Blount drink that evening, but that the only way to tell if Blount was intoxicated was "if you knew him." Quick stated that "Otis [Blount] usually when he drinks, he gets in a cheery mood . . . . If you didn't know him, he would be sober to you." Several other witnesses also stated that Blount was not noticeably intoxicated and that it would be difficult to know when he was because he did not typically show outward signs of intoxication.

While plaintiff's evidence tends to show that defendants Monroe Oil and Monroe ABC illegally sold alcohol to Blount on 30 April 1993 and that Blount shortly thereafter drove a car while impaired and caused irrevocable harm, it fails to forecast sufficient evidence to make a *prima facie* case for common law negligence. Plaintiff has not established that defendants owed a duty based on a forecast of evidence showing only that defendants sold alcohol to an individual who was later found to be an underage person. As we have explained, a duty is " 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' " *Peal v. Smith*, 115 N.C. App. 225, 230, 444 S.E.2d 673, 677 (1994) (quoting W. Page Keeton et al., *The Law of Torts* § 53 (5th ed. 1984)), *aff'd per curiam*, 340 N.C. 352, 457 S.E.2d 599 (1995). A legal duty is owed " 'whenever one person is by circumstances placed in such a position [towards] another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other.' " *Dail v. Taylor*, 151 N.C. 285, 287, 66 S.E. 135, 136 (1909) (quoting *Heaven v. Pender*, XI Q.B.D. 503, 509 (1883)). " 'Every man is in general bound to use care and skill in his conduct wherever the reasonably prudent person in his shoes would recognize unreasonable risk to others from failure to use such care.' " *Firemen's Mutual Ins. Co. v. High Point Sprinkler Co.*, 266 N.C. 134, 140-41, 146 S.E.2d 53, 60 (1966) (quoting 2 Fowler V. Harper & Fleming James, Jr., *The*

Law of Torts § 28.1, at 1535 (1956). Risk-creation behavior thus triggers duty where the risk is both unreasonable and foreseeable. Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 16.30, at 135 (1991); David A. Logan & Wayne A. Logan, *North Carolina Torts* § 1.10, at 7 (1996). As explained by Justice Cardozo in his classic analysis of duty in *Palsgraf*:

> We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because *the eye of vigilance perceives the risk of damage. . . . The risk reasonably to be perceived defines the duty to be obeyed*, and risk imports relation; it is risk to another or to others within the range of apprehension.

Palsgraf v. Long Island R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (emphasis added). "[T]he orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty." *Id.* at 343, 162 N.E. at 100.

In this case, there is no evidence showing that the defendant commercial vendors should have recognized that Mullis, or anyone similarly situated might be injured by their conduct, and thus there was no duty. Plaintiff's evidence tends to show that defendants sold alcohol to Blount on 30 April 1993 and that Blount consumed some of the alcohol prior to driving Darby's car. Although the evidence tends to show that a sale was made, plaintiff's evidence fails to show that defendants should have perceived that the sale of alcohol to Blount was going to create an unreasonable risk of harm to third persons. The evidence in fact fails to indicate that the sellers should have been aware that anything but an ordinary transaction was occurring when selling the alcohol to Blount. Blount did not appear inebriated that evening according to observers, and there is no evidence in the record showing that Blount was noticeably intoxicated when buying the alcohol from defendants. Plaintiff's evidence tends to show the contrary: that although Blount may have been intoxicated, he appeared sober throughout the evening when buying liquor from Monroe ABC and when buying beer from the Amoco station owned by Monroe Oil.

There was also no evidence tending to show that the defendant commercial vendors should have known that Blount was going to

drive a car even if he had appeared inebriated. The evidence tended to show instead that, as previously stated, Blount did not appear intoxicated and that every time he purchased alcohol from defendants, he was driven to the store by other persons and was not driving a car. Thus, from the perspective of the vendors, this was an ordinary transaction for the sale of alcohol to a person who was driven to the store by another. Thus, there was no indication that foreseeable harm would occur from the sale of alcohol to Blount.

Such a scenario is quite different from that which occurred in *Hart* where the facts alleged were sufficient to establish foreseeability and the duty element. The plaintiff's allegations in *Hart* that the host served alcohol to an underage person who the host knew or should have known was intoxicated and was going to shortly drive a car were sufficient to show that the host should have perceived a risk of harm. There, we stated that a jury could find that "a man of ordinary prudence would have known that such or some similar injurious result was reasonably foreseeable from this negligent conduct." *Hart*, 332 N.C. at 305, 420 S.E.2d at 178. Furnishing alcohol to an intoxicated driver was conduct creating an unreasonable risk of harm to others. In such a situation, the host could also perceive the risk: Serving alcohol to an inebriated individual who is going to drive is a foreseeable risk "clear to the ordinarily prudent eye." *Munsey v. Webb*, 231 U.S. 150, 156, 58 L. Ed. 162, 166 (1913).

Such is not the case here. No evidence tended to show that defendants should have been aware that selling alcohol to Blount could produce foreseeable harm and subject other drivers or passengers to an unreasonable risk of harm. Evidence offered by plaintiff indicated merely that defendants sold alcohol to an individual who was later discovered to be underage. Evidence of this alone, without an offer of some additional factor or factors which would put the vendor on notice that harm was foreseeable, is insufficient to establish the duty element and thus maintain a common law negligence suit. It was necessary, in other words, for plaintiff's forecast of evidence to point to some additional factor or factors that would alert the defendant commercial vendors that the act of selling the alcohol would likely produce some foreseeable injury. Whether harm is foreseeable simply depends on the circumstances of each case and is not determined according to any predetermined set of factors. However, since plaintiff's forecast of evidence failed to have such an additional factor or factors which would have enabled the vendors to foresee that

harm was, in all likelihood, going to occur, the duty element is not satisfied, and plaintiff's *prima facie* case must fail.

Thus, based on the foregoing, plaintiff has not produced a sufficient forecast of evidence to maintain a common law negligence claim against defendants based on the sale of alcohol to Otis Blount. Accordingly, we affirm the Court of Appeals' decision affirming the trial court's grant of summary judgment for defendants.

AFFIRMED.

Justice WYNN did not participate in the consideration or decision of this case.

Justice FRYE concurring.

I agree with the majority that plaintiff has not produced a sufficient forecast of evidence to maintain a common law negligence claim against defendants based on the sale of alcohol to Otis Blount. However, the crucial question here is not whether there was a duty, but whether the evidence forecast a *breach* of duty.

"Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). Under this Court's decisions in *Hart* and *Camalier v. Jeffries*, 340 N.C. 699, 460 S.E.2d 133 (1995), "an individual may be held liable on a theory of common-law negligence if he (1) served alcohol to a person (2) when he knew or should have known the person was intoxicated and (3) when he knew the person would be driving afterwards." *Id.* at 711, 460 S.E.2d at 138. Here, as in *Camalier*, the forecast of evidence was insufficient to show that defendants knew or should have known that Blount was intoxicated at the time they sold alcohol to him. Thus, plaintiffs failed to forecast evidence of a breach of duty, and summary judgment for defendants was proper. Accordingly, I agree that the decision of the Court of Appeals should be affirmed.

HAYWOOD C. DAVIS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF SOCIAL SERVICES, CHILD SUPPORT ENFORCEMENT SECTION, RESPONDENT

No. 314A97

(Filed 9 October 1998)

1. Taxation § 216 (NCI4th)— child support—federal income tax refund

The Court of Appeals correctly held that respondent improperly intercepted petitioner's 1993 federal income tax refund when petitioner made child support payments in accordance with a court order but had not fully repaid the public assistance debt that he had incurred prior to the paternity adjudication. Under the federal law, a state agency may intercept an individual's federal income tax refund when the parent owes past due child support, with "past due support" defined as a delinquency. "Delinquency" is not defined in the United States Code but the interpretation and application of the term in other jurisdictions, including *In re Biddle*, 31 B.R. 449, is that delinquency arises when the debtor falls behind in court-ordered payments. The petitioner here was not delinquent since he was current in his court-ordered repayment plan, even though he had not completely extinguished his entire child support debt.

2. Taxation § 216 (NCI4th)— child support—interception of state income tax refund

The Court of Appeals erred by approving respondent's interception of petitioner's state income tax refund where petitioner had paid child support according to a court order but had not fully repaid a public assistance debt incurred prior to a paternity adjudication. Under N.C.G.S. § 105A-3(b), when an alternative collection means is in progress or available, a claimant agency has an affirmative duty to seek and obtain the Attorney General's advice or opinion before undertaking a state income tax refund interception. This statutory procedure was not followed in this case.

Justice WYNN did not participate in the consideration or decision of this case.

Appeal by respondent 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. 383,

485 S.E.2d 342 (1997), affirming in part, reversing in part, and remanding an order entered by Smith (W. Osmond, III), J., on 19 March 1996, in Superior Court, Cumberland County. On 4 September 1997, this Court allowed petitioner's petition for writ of certiorari as to an additional issue. Heard in the Supreme Court 15 December 1997.

Reid, Lewis, Deese, Nance & Person, by Renny W. Deese, for petitioner-appellant and -appellee.

Michael F. Easley, Attorney General, by Gerald K. Robbins, Assistant Attorney General, for respondent-appellant and -appellee.

LAKE, Justice.

This case presents for determination the issue of whether a parent who has paid child support according to a court order, but still owes arrears, may have his federal and state income-tax refunds intercepted by a state agency. The Court of Appeals held that the petitioner's federal income-tax refund should not have been intercepted but approved respondent's interception of petitioner's state-income tax refund. For the reasons stated below, we affirm the Court of Appeals' conclusion that petitioner's federal income-tax refund should not have been intercepted, but we reverse the Court of Appeals with regard to respondent's interception of petitioner's North Carolina state income-tax refund.

The facts in this case are not in dispute. On 29 January 1987, petitioner Haywood C. Davis was adjudged to be the father of LaToyah Renee Davis, born 14 June 1984. Petitioner was ordered by the trial court to pay $100.00 per month in ongoing child support plus $10.00 per month towards the repayment of $1,391.00 in past support for the child which had been paid by respondent. Petitioner complied with this order at least through the commencement of the administrative process in May 1994. On 7 October 1993, respondent sent petitioner a "Notice of Intent to Intercept Tax Refund and Statement of Account," stating that petitioner owed respondent $507.00 in child support as of 1 July 1993. At the time petitioner received this notice of intercept, he was current in his child-support obligation as directed by the trial court, but he continued to owe past paid public assistance and non-AFDC arrearages in excess of $150.00 and $50.00 respectively. The notice further stated that petitioner's state and federal income-tax refunds would be intercepted to pay these arrearages.

On 22 May 1994 and 23 August 1994, petitioner filed petitions for a contested case hearing with the Office of Administrative Hearings, contesting the interception of his 1993 federal and state income-tax refunds because he was not delinquent in the repayment of his child-support arrearages. On 23 September 1994, the chief administrative law judge (ALJ) consolidated the petitions for a single hearing. Respondent subsequently moved for summary judgment. On 17 January 1995, the ALJ entered a recommended decision for entry of summary judgment in favor of petitioner. However, respondent, in its 28 April 1995 final decision, reversed the ALJ and granted summary judgment for respondent. Petitioner appealed to Superior Court, Cumberland County, which, in an order entered 19 March 1996, affirmed the agency's ruling authorizing the interception of petitioner's state and federal income-tax refunds. The Court of Appeals unanimously affirmed the trial court's ruling approving respondent's interception of petitioner's state income-tax refund, holding that summary judgment was proper for respondent on that issue, but in a split decision, it reversed the trial court's conclusion that petitioner's federal income-tax refund could also be intercepted and remanded for entry of summary judgment for petitioner on that issue.

[1] We first address whether the Court of Appeals correctly held that respondent improperly intercepted petitioner's 1993 federal income-tax refund when petitioner made child-support payments in accordance with a court order but had not fully repaid the past public-assistance debt that he had incurred prior to the paternity adjudication. Under United States law, a state agency may intercept an individual's federal income-tax refund when the parent owes "past-due [child] support." 42 U.S.C. § 664 (1990). The United States Code defines "past-due support" to mean, "the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living." 42 U.S.C. § 664(c)(1). Respondent argues that "delinquency" means any amount of child support which has been established by a court order and which has not been fully paid or reimbursed. We disagree.

Although the word "delinquency" is not defined in the applicable section of the United States Code, 42 U.S.C. § 664(c), or other related sections, a federal bankruptcy court has held that "[t]he delinquency arises when the debtor falls behind in [the] court ordered payments." *In re Biddle*, 31 B.R. 449, 452 (Bankr. N.D. Iowa 1983). The *Biddle*

court's interpretation of the word "delinquency" under the United States Code is consistent with the interpretation and application of this term in other jurisdictions. For instance, a Pennsylvania court has held that the federal interception program did not apply where the supporting parent was current with his court-ordered support payments even though the parent still owed an arrearage. *Laub v. Zaslavsky*, 369 Pa. Super. 84, 534 A.2d 1090 (1987), *aff'd per curiam*, 523 Pa. 102, 565 A.2d 158 (1989). Similarly, the Ohio Court of Appeals has held that the state agency could not intercept the obligor-father's federal income-tax refund when he was not in default of his court-ordered obligation, although he had not yet extinguished his entire debt. *Gladysz v. King*, 103 Ohio App. 3d 1, 658 N.E.2d 309, *disc. rev. denied*, 73 Ohio St. 3d 1428, 652 N.E.2d 801 (1995). According to the Ohio Court of Appeals, "a delinquency is created by a default in performance, not merely by the existence of an outstanding debt." *Id.* at 6, 658 N.E.2d at 312.

Black's Law Dictionary further supports petitioner's interpretation of "delinquency" and defines the word as the "failure, omission, violation of law or duty. Failure to make payment on debts when due. State or condition of one who has failed to perform his duty or obligation." *Black's Law Dictionary* 428 (6th ed. 1990). Applying this definition and these judicial interpretations, we conclude that petitioner was not "delinquent" under 42 U.S.C. § 664, since he was current in his court-ordered repayment plan at the time his 1993 federal income-tax refund was intercepted, even though he had not completely extinguished his entire child-support debt. Accordingly, we hold that a North Carolina agency, administering a plan approved under 42 U.S.C. § 664, cannot intercept a supporting parent's federal income-tax refund until the parent fails to pay currently due court-ordered support or reimbursement payments, and we affirm the Court of Appeals on this issue.

[2] We now turn to the interception of petitioner's state income-tax refund. The propriety of this means of debt collection requires our determination of whether respondent was required to obtain an opinion, or advice, from the Attorney General that the child-support repayment plan established by the district court was an inadequate means of collecting petitioner's child-support arrearage so that the interception of petitioner's state income-tax refund would be justified under chapter 105A of the General Statutes, the Setoff Debt Collection Act, and specifically subsection 105A-3(b) thereof. For the reasons stated below, we hold that N.C.G.S. § 105A-3(b) imposed an

affirmative duty on respondent to seek the advice of the Attorney General with respect to the adequacy of the existing means of collection established by the district court.

The controlling statute for interception and setoff relating to state income-tax refunds provides in pertinent part:

> (b) All claimant agencies shall submit, for collection under the procedure established by this Article, all debts which they are owed, except debts that they are advised by the Attorney General not to submit because the validity of the debt is legitimately in dispute, because an alternative means of collection is pending and believed to be adequate, or because such a collection attempt would result in a loss of federal funds.

N.C.G.S. § 105A-3(b) (1997). The meaning and intent of this statutory provision is clear. "When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *State ex rel. Util. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). This statutory provision simply states that claimant agencies "*shall* submit" all debts owed "*except* debts" involved with legal questions or matters where input from the Attorney General is needed or would be helpful in three clearly defined areas: (1) where the validity of the debt is in dispute, (2) where another means of collection is pending or available which may be adequate, or (3) where federal funding may be lost. By this language, the legislature could have intended only that in any one of these three categories, each carrying legal implications if debt setoff is used, a claimant agency is required to seek and obtain the advice or opinion of its lawyer, the Attorney General, before it proceeds with interception and setoff debt collection. The situation in the case *sub judice* clearly falls within the second of these three categories.

We therefore hold that where, as here, alternative collection means are in progress, or available, a claimant agency has an affirmative duty to seek and obtain the Attorney General's advice or opinion before undertaking state income-tax refund interceptions. Since this statutory procedure was not followed in the case *sub judice*, the decision of the Court of Appeals must be reversed in this respect.

AFFIRMED IN PART; REVERSED IN PART.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. TERRY ANTHONY RUFF

No. 550PA97

(Filed 9 October 1998)

Criminal Law § 1096 (NCI4th Rev.)— second-degree kidnapping and rape—use of firearm—kidnapping sentence enhanced

The trial court did not err by enhancing defendant's second-degree kidnapping conviction for the use of a firearm pursuant to N.C.G.S. § 15A-1340.16A where the jury found defendant guilty of first-degree rape and first-degree kidnapping, but the trial court arrested judgment on the first-degree kidnapping conviction and entered judgment sentencing defendant for second-degree kidnapping. The use or display of a firearm is not an essential element of second-degree kidnapping and the trial court was not precluded from relying on evidence of defendant's use of the firearm and enhancing his term of imprisonment pursuant to the firearm enhancement section. It is irrelevant whether the use of a firearm was the gravamen of the first-degree rape; so long as the use of a firearm is not an essential element of the underlying felony, defendant's term of imprisonment must be enhanced by sixty months. The cases upon which the Court of Appeals relied in vacating the enhanced sentence were decided under the former Fair Sentencing Act.

Justice WYNN did not participate in the consideration or decision of this case.

On petition for discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 127 N.C. App. 575, 492 S.E.2d 374 (1997), vacating in part and remanding a judgment entered by Huffman, J., on 20 February 1996 in Superior Court, Cleveland County. Heard in the Supreme Court 11 March 1998.

Michael F. Easley, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State-appellant.

Brenda S. McLain for defendant-appellee.

MITCHELL, Chief Justice.

Defendant was indicted on 24 July 1995 for first-degree kidnapping and first-degree rape. He was tried at the 12 February 1996 Criminal Session of Superior Court, Cleveland County. The jury found defendant guilty of both charges. On 20 February 1996, the trial court arrested judgment on the first-degree kidnapping conviction and entered judgment sentencing defendant for second-degree kidnapping. Defendant received a minimum sentence of thirty-two months' imprisonment for the class E felony, which was then enhanced by sixty months pursuant to N.C.G.S. § 15A-1340.16A, resulting in a minimum sentence of 92 months' and a maximum sentence of 120 months' imprisonment. In a separate judgment, defendant was also sentenced to a consecutive term of from 320 months' to 393 months' imprisonment for the class B1 felony of first-degree rape. Defendant gave notice of appeal to the North Carolina Court of Appeals on 20 February 1996.

On appeal, the Court of Appeals vacated the part of the judgment for kidnapping that imposed an enhanced sentence of sixty months' imprisonment for use of a firearm during the commission of second-degree kidnapping. *State v. Ruff*, 127 N.C. App. 575, 585, 492 S.E.2d 374, 379-80 (1997). For the reasons discussed herein, we conclude that the Court of Appeals erroneously vacated defendant's enhanced sentence. Accordingly, we reverse the Court of Appeals and reinstate defendant's enhanced sentence.

The State's evidence tended to show that the victim was a female employed by the Lutz Oil Company in Shelby, North Carolina. On 13 June 1995, Mr. Lutz, president of Lutz Oil Company, asked the victim to drive to the Kings Mountain store in order to cover for another employee while that employee went to lunch. The victim left her Shelby office at 12:15 p.m. and arrived at the Kings Mountain store at approximately 12:30 p.m. Shortly after the victim arrived at the Kings Mountain store, she began to clean the bathroom. While cleaning, she heard a side door open. The victim left the water in the bathroom running in order to attend to what she believed to be a customer. The customer, later identified as defendant, asked her for some cigarettes. As the victim turned around after reaching for the cigarettes,

she saw a gun pointing at her face. While holding the gun, defendant told the victim to be quiet and to cooperate.

Defendant then held his gun to the victim's side and escorted her outside to his pickup truck. She testified that she did not scream or try to escape because she believed defendant would kill her if she did so. Defendant and the victim then traveled down Stoney Point Road. Defendant stopped the truck and led the victim to a field while holding the gun to her back. At one point, defendant stopped and took off the victim's pantyhose, but then continued to lead her further into the field so they could not be seen from the road. Once they stopped again, he removed her shirt and told her to remove her skirt and bra. Defendant also removed his own clothes and removed the victim's underpants himself. Defendant ordered the victim to lie down, then proceeded to commit sexual acts against her and to rape her. Afterwards, defendant got dressed and unloaded his gun. He then said, "If I'd known it was this easy, I would never have brought my gun."

As the victim and defendant traveled back towards the store, the victim convinced defendant to let her out of the truck before arriving at the store. After defendant let the victim out, she ran to the store and saw a co-employee and a police officer. After describing defendant to the officer, she was taken to Cleveland Memorial Hospital for examination. The police apprehended defendant shortly thereafter.

The State contends that the Court of Appeals incorrectly vacated the part of defendant's sentence that was enhanced by reason of his use of a firearm. The State argues that in reaching its decision, the Court of Appeals erroneously relied upon *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985), and *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984). We agree.

In the decision below, the Court of Appeals noted that under *State v. Westmoreland*, a trial court "could not aggravate [a] sentence with acts of the defendant 'which form[ed] the gravamen of contemporaneous convictions of joined offenses.' " *State v. Ruff*, 127 N.C. App. 575, 583, 492 S.E.2d 374, 379 (1997) (quoting *Westmoreland*, 314 N.C. at 449, 334 S.E.2d at 227-28) (second alteration in original). The Court of Appeals then found that the use of a firearm was the "gravamen" of defendant's first-degree rape conviction, and therefore the trial court could not use it to aggravate defendant's second-degree

kidnapping conviction. *Id.* at 585, 492 S.E.2d at 379-80. *Westmoreland* and *Lattimore*, the cases upon which the Court of Appeals relied in reaching its decision in the present case, were decided under the former Fair Sentencing Act, N.C.G.S. ch. 15A, art. 81A (1988). However, our legislature has since repealed the Fair Sentencing Act. Act of July 24, 1993, ch. 538, sec. 14, 1993 N.C. Sess. Laws 2298, 2318. Since defendant was found guilty and sentenced for crimes occurring after 1 October 1994, the Structured Sentencing Act, N.C.G.S. ch. 15A, art. 81B (1997), provides the controlling law. N.C.G.S. § 15A-1340.10 (1997).

The firearm enhancement section of the Structured Sentencing Act provides:

> If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months. The court shall not suspend the 60-month minimum term of imprisonment imposed as an enhanced sentence under this section and shall not place any person sentenced under this section on probation for the enhanced sentence.

N.C.G.S. § 15A-1340.16A(a). This provision does not apply, however, where "[t]he evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying . . . felony." N.C.G.S. § 15A-1340.16A(b)(2).

We conclude the trial court correctly applied the firearm enhancement section in this case. Even though the jury found defendant guilty of first-degree rape and first-degree kidnapping, the trial court arrested judgment on the first-degree kidnapping conviction and entered judgment sentencing defendant for second-degree kidnapping instead. Defendant's conviction and sentence for the first-degree rape remained intact. N.C.G.S. § 15A-1340.16A requires the trial court to increase defendant's term of imprisonment for a felony when the trial court finds that defendant "used, displayed, or threatened to use or display a firearm at the time of the felony." Here, defendant displayed a firearm when he kidnapped and raped the victim. The "underlying felony" which was enhanced by sixty months' imprisonment under the firearm enhancement section is second-degree kidnapping. Because the use or display of a firearm is not an essential element of second-degree kidnapping, the trial court was

not precluded from relying on evidence of defendant's use of the firearm and enhancing defendant's term of imprisonment pursuant to the firearm enhancement section. *See* N.C.G.S. § 15A-1340.16A(b)(2).

In determining whether defendant's sentence for second-degree kidnapping could properly be enhanced under the firearm enhancement section, it is irrelevant whether the use of a firearm was the gravamen of the first-degree rape. So long as the use of a firearm is not an essential element of the underlying felony for which defendant is sentenced—here, second-degree kidnapping—defendant's term of imprisonment for that particular felony must be enhanced by sixty months.

For the foregoing reasons, we conclude that the Court of Appeals erred in vacating that part of defendant's sentence which was enhanced by the firearm enhancement section. 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, Cleveland County, for reinstatement of the judgment for second-degree kidnapping, including the enhanced sentence for use of a firearm.

REVERSED AND REMANDED.

Justice WYNN did not participate in the consideration or decision of this case.

IN RE: PERRY HARRINGTON, EMPLOYEE v. ADAMS-ROBINSON ENTERPRISES, EMPLOYER, WAUSAU INSURANCE COMPANY, CARRIER

No. 75A98

(Filed 9 October 1998)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 128 N.C. App. 496, 495 S.E.2d 377 (1998), reversing an opinion and award entered by the North Carolina Industrial Commission on 29 October 1996. Heard in the Supreme Court on 28 September 1998.

Brenton D. Adams for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens and Gregory M. Willis, for defendant-appellants.

Delaney and Sellars, P.A., by Mark T. Sumwalt; and Law Offices of Robin E. Hudson, by Robin E. Hudson and Anna Harris Stein, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge Walker in the Court of Appeals, the decision of the Court of Appeals is reversed.

REVERSED.

Justice WYNN did not participate in the consideration or decision of this case.

STATE v. TAYLOR

[349 N.C. 219 (1998)]

STATE OF NORTH CAROLINA v. WILLIAM JUAN TAYLOR

No. 71PA98

(Filed 9 October 1998)

On review of substantial constitutional questions, pursuant to N.C.G.S. § 7A-30(1), of a unanimous decision of the Court of Appeals, 128 N.C. App. 394, 496 S.E.2d 811 (1998), finding no error in a judgment entered by Gardner, J., on 19 April 1996, in Superior Court, Mecklenburg County. Heard in the Supreme Court 1 October 1998.

Michael F. Easley, Attorney General, by T. Brooks Skinner, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine Crawley Fodor, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed as to both constitutional questions raised, the issue of the juvenile transfer statute, N.C.G.S. § 7A-610(a), being based on the authority of *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998).

AFFIRMED.

Justice WYNN did not participate in the consideration or decision of this case.

WILLIAM Z. DEASON v. J. KING HARRISON CO., INC. D/B/A J. KING HARRISON TRANSPORTATION CO., INC. AND AMERICAN NATIONAL FIRE INSURANCE COMPANY

No. 591A97

(Filed 9 October 1998)

Appeal 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. 514, 491 S.E.2d 666 (1997), affirming a judgment entered 26 September 1996 by Morgan (Melzer A., Jr.), J., in Superior Court, Mecklenburg County. On 7 May 1998, the Supreme Court granted discretionary review of an additional issue. Heard in the Supreme Court 28 September 1998.

Waggoner, Hamrick, Hasty, Monteith and Kratt, P.L.L.C., by S. Dean Hamrick, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Richard T. Rice and Lawrence B. Somers, for defendant-appellee American National Fire Insurance Company.

PER CURIAM.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice WYNN did not participate in the consideration or decision of this case.

MARSHALL v. SIZEMORE

[349 N.C. 221 (1998)]

MICHAEL S. MARSHALL v. LISA D. SIZEMORE

No. 570A97

(Filed 9 October 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. 751, 493 S.E.2d 89 (1997), affirming orders dated 30 December 1994, 9 January 1996, and 13 June 1996, by Evans, J., in District Court, Mecklenburg County. Heard in the Supreme Court 29 September 1998.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Richard F. Kronk, for plaintiff-appellee.

Richard F. Harris, III, for defendant-appellant.

PER CURIAM.

AFFIRMED.

Justice WYNN did not participate in the consideration or decision of this case.

RONALD E. SHACKELFORD, ET AL., PETITIONERS v. CITY OF WILMINGTON, RESPONDENT

No. 561PA97

(Filed 9 October 1998)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the decision of the Court of Appeals, 127 N.C. App. 449, 490 S.E.2d 578 (1997), affirming an order and judgment entered 10 April 1996 by Cashwell, J., in Superior Court, New Hanover County. Heard in the Supreme Court 28 September 1998.

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, II, for petitioner-appellants.

Thomas C. Pollard, City Attorney, for respondent-appellee.

Adams Hendon Carson Crow & Saenger, P.A., by Martin K. Reidinger, on behalf of the Good Neighbors Association of North Carolina, amicus curiae.

North Carolina League of Municipalities, by John M. Phelps, II, Assistant General Counsel, amicus curiae.

PER CURIAM.

Justice Webb took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

AFFIRMED.

SPEARS v. CENTURA BANK

[349 N.C. 223 (1998)]

CARL SPEARS, D/B/A PIEDMONT REALTY v. CENTURA BANK

No. 541PA97

(Filed 9 October 1998)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the unpublished decision of the Court of Appeals, 127 N.C. App. 397, 490 S.E.2d 256 (1997), and to review a judgment entered 17 May 1996 by Barnette, J., in Superior Court, Wake County. Heard in the Supreme Court 28 September 1998.

Donald B. Hunt for plaintiff-appellant.

Poyner & Spruill, L.L.P., by David Dreifus and Eric P. Stevens, for defendant-appellee.

PER CURIAM.

CERTIORARI IMPROVIDENTLY ALLOWED.

Justice WYNN did not participate in the consideration or decision of this case.

MARY HOWARD, EMPLOYEE v. SQUARE-D COMPANY, EMPLOYER, AND SELF-INSURED (JAMES C. GREEN AND COMPANY, SERVICING AGENT)

No. 46PA98

(Filed 9 October 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 to review a unanimous decision of the Court of Appeals, 128 N.C. App. 303, 494 S.E.2d 606 (1998), reversing an opinion and award of the Industrial Commission entered 21 January 1997. Heard in the Supreme Court 1 October 1998.

Young Moore and Henderson, P.A., by John A. Michaels and Dawn M. Dillon, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, by Dayle A. Flammia and Tamara R. Nance, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice WYNN did not participate in the consideration or decision of this case.

WILLIAMS v. HOLSCLAW

[349 N.C. 225 (1998)]

MICHAEL ANTHONY WILLIAMS AND KATHERINE WILLIAMS v. RONALD FLOYD HOLSCLAW AND CITY OF RALEIGH

No. 28PA98

(Filed 9 October 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 from the decision of the Court of Appeals, 128 N.C. App. 205, 495 S.E.2d 166 (1998), affirming in part and reversing in part orders entered 4 October 1996 and 24 October 1996, by Barnette, J., in Superior Court, Wake County. Heard in the Supreme Court 30 September 1998.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for unnamed defendant-appellant Integon Indemnity Corporation.

Fuller, Becton, Slifkin & Bell, by James C. Fuller and Asa L. Bell, Jr., for plaintiff-appellees.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin and Thomas H. Moore, on behalf of State Farm Mutual Automobile Insurance Company, amicus curiae.

PER CURIAM.

AFFIRMED.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JOSEPH EUGENE HOOVER

No. 128PA98

(Filed 9 October 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 128 N.C. App. 749, 496 S.E.2d 851 (1998), finding no error in judgments entered 18 October 1996 by Stephens (Ronald L.), J., in Superior Court, Randolph County, upon jury verdicts of guilty of possession with intent to manufacture, sell, or deliver cocaine and knowingly maintaining a dwelling for the use, keeping, or selling of a controlled substance. Heard in the Supreme Court 29 September 1998.

Michael F. Easley, Attorney General, by Robert T. Hargett, Special Deputy Attorney General, and William B. Crumpler, Assistant Attorney General, for the State.

Robert T. Newman, Sr., for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice WYNN did not participate in the consideration or decision of this case.

AAA SIGNS OF BURLINGTON v. CITY OF BURLINGTON BD. OF ADJUST.

No. 301P98

Case below: 130 N.C.App. 149

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

AUSTIN v. LARGE ANIMAL MED. & SURGERY

No. 262P98

Case below: 129 N.C.App. 646

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 September 1998.

BALDRIDGE v. HUDSON

No. 342P98

Case below: 129 N.C.App. 643

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 October 1998.

BARBER v. CONSTIEN

No. 373P98

Case below: 130 N.C.App. 380

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

BOYD v. DRUM

No. 261A98

Case below: 129 N.C.App. 586

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 October 1998.

BRYANT v. WEYERHAEUSER CO.

No. 314P98

Case below: 130 N.C.App. 135

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

BURLESON v. CASE FARMS OF N.C., INC.

No. 371P98

Case below: 130 N.C.App. 340

Motion by defendant for discretionary review and related filings allowed 8 October 1998.

CARRIKER v. CARRIKER

No. 312PA98

Case below: 130 N.C.App. 149

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998.

CHARNS v. BROWN

No. 267P98

Case below: 129 N.C.App. 635

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

COSTELLO v. HOUSE OF RAEFORD

No. 265P98

Case below: 129 N.C.App. 646

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

DUNKLEY v. SHOEMATE

No. 178PA98

Case below: 129 N.C.App. 255

Petition by defendant (Shoemate) for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998.

FERRELL v. YARBROUGH

No. 185P98

Case below: 129 N.C.App. 262

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

FLETCHER v. NATIONWIDE INS.

No. 294P98

Case below: 129 N.C.App. 646

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed 8 October 1998.

GARNER v. RENTENBACH CONSTRUCTORS INC.

No. 255PA98

Case below: 129 N.C.App. 624

Petition by defendant (Rentenbach) for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998. Petition by third party defendant (Allied Clinical) for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998.

HIGH v. BOLAND

No. 264P98

Case below: 129 N.C.App. 647

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Justice Wynn recused.

HMS GEN. CONTR'RS v. SNIPES & ASSOC., INC.

No. 268P98

Case below: 129 N.C.App. 647

Petition by defendants (Snipes and Pope) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 31 July 1998.

HUBBARD v. STATE CONSTRUCTION OFFICE

No. 352P98

Case below: 130 N.C.App. 254

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

HUGHES v. WELCH

No. 282P98

Case below: 129 N.C.App. 843

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

IN RE BAILEY

No. 317P98

Case below: 130 N.C.App. 340

Petition by petitioner for writ of supersedeas denied 12 August 1998. 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 allowed 8 October 1998.

IN RE WILL OF TAYLOR

No. 306P98

Case below: 129 N.C.App. 843

Petition by propounder (Kenneth Davis) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 October 1998.

KIRKLAND v. ELLIS

No. 351PA98

Case below: 130 N.C.App. 341

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998.

KOONTZ v. DAVIDSON COUNTY BD. OF ADJUST.

No. 401P98

Case below: 130 N.C.App. 479

Motion by respondent (Davidson County Board of Adjustment) for temporary stay allowed 17 September 1998.

MARK IV BEVERAGE, INC. v. MOLSON BREWERIES USA, INC.

No. 243P98

Case below: 129 N.C.App. 476

Petition by defendants (Molson, Miller, and Martlet) for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

PATTERSON v. CHINA GROVE TEXTILES

No. 370P98

Case below: 130 N.C.App. 341

Motion by defendants (China Grove and Travelers) for temporary stay denied 16 September 1998. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 16 September 1998.

R. E. CARROLL CONSTR. CO. v. ROBERTS

No. 280P98

Case below: 129 N.C.App. 844

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

RAINTREE HOMEOWNERS ASSOC'N v. RAINTREE COUNTRY CLUB

No. 395P98

Case below: 130 N.C.App. 757

Motion by defendant (Raintree Country Club) for temporary stay denied 10 September 1998.

REESE v. BARBEE

No. 269PA98

Case below: 129 N.C.App. 823

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998.

RICE v. JONES

No. 237P98

Case below: 129 N.C.App. 644

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Justice Wynn recused.

SARA LEE CORP. v. CARTER

No. 271PA98

Case below: 129 N.C.App. 464

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1998.

STATE v. AIKEN

No. 283P98

Case below: 130 N.C.App. 151

Petition by Attorney General for writ of supersedeas denied 30 September 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 30 September 1998. Petition by defendant for discretionary review as to additional issues dismissed as moot 30 September 1998.

STATE v. ALEXANDER

No. 230P98

Case below: 129 N.C.App. 648

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. ALLEN

No. 248P98

Case below: 126 N.C.App. 221

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 October 1998.

STATE v. BOGGS

No. 364P98

Case below: 130 N.C.App. 341

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. BOJORQUEZ

No. 326P98

Case below: 130 N.C.App. 151

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Justice Wynn recused.

STATE v. BRICKHOUSE

No. 240P98

Case below: 129 N.C.App. 644

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 8 October 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. DOVE

No. 410P98

Case below: 130 N.C.App. 758

Motion by Attorney General for temporary stay denied 18 September 1998. Petition by Attorney General for writ of supersedeas denied 18 September 1998.

STATE v. FOUST

No. 333P98

Case below: 130 N.C.App. 152

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 October 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. FOY

No. 357P98

Case below: 130 N.C.App. 466

Motion by Attorney General for temporary stay allowed 21 August 1998. Petition by Attorney General for writ of supersedeas denied and stay dissolved 14 September 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 14 September 1998. Motion by defendant (Foy) to expedite determination of State's petition for discretionary review and writ of supersedeas allowed 14 September 1998.

STATE v. FULLWOOD

No. 37A86-4

Case below: Buncombe County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Buncombe County denied 8 October 1998. Motion by defendant for temporary stay of ruling on petition for writ of certiorari denied 8 October 1998. Justice Orr recused.

STATE v. GOINS

No. 224P98

Case below: 129 N.C.App. 431

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. HAYES

No. 311PA98

Case below: 130 N.C.App. 154

Motion by Attorney General for temporary stay denied 7 August 1998. Petition by Attorney General for writ of supersedeas allowed 30 September 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1998. Motion by Attorney General to dismiss Appeal denied 30 September 1998.

STATE v. HILL

No. 233A91-4

Case below: Buncombe County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Buncombe County denied 7 August 1998. Motion by defendant (Hill) for summary reversal denied 7 August 1998.

STATE v. HOLYFIELD

No. 302P98

Case below: 130 N.C.App. 342

Motion by Attorney General for temporary stay allowed 3 August 1998. Petition by Attorney General for writ of supersedeas denied and stay dissolved 8 October 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Motion by Attorney General to dismiss appeal allowed 8 October 1998.

STATE v. JOHNSON

No. 339P98

Case below: 130 N.C.App. 152

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. McKISSICK

No. 322P98

Case below: 127 N.C.App. 756

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 October 1998. Motion by defendant (McKissick) for leave to file an untimely petition for discretionary review denied 8 October 1998.

STATE v. MILLIGAN

No. 350A98

Case below: 130 N.C.App. 342

Motion by Attorney General to dismiss appeals allowed 8 October 1998.

STATE v. MOORE

No. 366A98

Case below: 130 N.C.App. 342

Motion by Attorney General to dismiss appeal allowed 8 October 1998.

STATE v. O'NEAL

No. 353P98

Case below: 130 N.C.App. 343

Notice of appeal by defendant (pro se) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 8 October 1998. Petition filed by defendant's attorney for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. QUALLS

No. 331A98

Case below: 130 N.C.App. 1

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 8 October 1998.

STATE v. REYNOLDS

No. 219P98

Case below: 129 N.C.App. 429

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 October 1998.

STATE v. RICH

No. 315P98

Case below: 130 N.C.App. 113

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Justice Wynn recused.

STATE v. RICH

No. 384A95-2

Case below: Greene County Superior Court

Petition by Malcolm Ray Hunter as Appellate Defender on his own motion for writ of certiorari to review the order of the Superior Court, Greene County denied 17 September 1998. Motion by Malcolm Ray Hunter as appellate defender on his own motion to vacate order of execution denied 17 September 1998.

STATE v. RICH

No. 384A95-3

Case below: Greene County Superior Court

Petition by Marshall Dayan, as Next Friend of James David Rich, for writ of certiorari to review the decision of the Superior Court, Greene County denied 17 September 1998. Motion by Marshall Dayan, as Next Friend of defendant James David Rich, for stay of execution denied 17 September 1998.

STATE v. ROBINSON

No. 304P98

Case below: 130 N.C.App. 152

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 October 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. ROTH

No. 369P98

Case below: 130 N.C.App. 614

Motion by Attorney General for temporary stay allowed 1 September 1998.

STATE v. RYAN

No. 235P98

Case below: 129 N.C.App. 430

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 October 1998.

STATE v. SARTORI

No. 323P98

Case below: 129 N.C.App. 845

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 October 1998.

STATE v. STUKES

No. 287P98

Case below: 129 N.C.App. 845

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE v. VAUGHN

No. 332P98

Case below: 130 N.C.App. 456

Motion by Attorney General for temporary stay allowed 18 August 1998.

STATE v. WALLS

No. 42A93-2

Case below: Northampton County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Northampton County denied 30 September 1998.

STATE v. WILLIAMSON

No. 312PA97

Case below: 347 N.C. 140

126 N.C.App. 349

The Superior Court, Johnston County, having ordered a new trial "on all or any of the charges pursuant to the provisions of G.S. 15A-1417(a)(1)," the order of this Court allowing defendant's petition for discretionary review is withdrawn and this case is remanded to the Court of Appeals for further consideration and such action as may be appropriate. By order of the Court in conference this the 15th day of September 1998.

STATE ex rel. LONG v. PETREE STOCKTON, LLP

No. 246PA98

Case below: 129 N.C.App. 432

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed as to constructive fraud issue 8 October 1998. Motions by defendants to dismiss petition for discretionary review allowed 8 October 1998. Motion by defendant (Iseman) to dismiss appeal dismissed 8 October 1998.

STATE FARM MUT. AUTO. INS. CO. v. LONG

No. 192A98

Case below: 129 N.C.App. 164

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 8 October 1998. Motion by defendants to dismiss appeal as to Questions 3, 4, and 5 allowed 8 October 1998.

STEM v. RICHARDSON

No. 153PA98

Case below: 128 N.C.App. 754

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 8 October 1998.

STRADER v. SUNSTATES CORP.

No. 266P98

Case below: 129 N.C.App. 562

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 September 1998.

SWEENEY v. WAKE COUNTY

No. 277PA98

Case below: 129 N.C.App. 846

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1998.

TAR HEEL HOME HEALTH, INC. v. N.C. DEPT. OF HUMAN RESOURCES

No. 244P98

Case below: 129 N.C.App. 646

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Justice Wynn recused.

TOWN OF SPENCER v. TOWN OF EAST SPENCER

No. 285PA98

Case below: 129 N.C.App. 751

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 18 August 1998. Petition by plaintiff for writ of supersedeas and motion for temporary stay allowed 18 August 1998.

WARREN v. GUILFORD COUNTY

No. 293P98

Case below: 129 N.C.App. 836

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied and defendant's additional issues dismissed as moot 8 October 1998.

WASHINGTON v. MITCHELL

No. 238P98

Case below: 129 N.C.App. 648

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Justice Wynn recused.

WILLIAMS v. TOWN OF KERNERSVILLE

No. 278P98

Case below: 129 N.C.App. 734

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998. Justice Wynn recused.

WORD v. JONES

No. 336PA98

Case below: 130 N.C.App. 100

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 October 1998.

PETITIONS TO REHEAR

BETHANIA TOWN LOT COMMITTEE v. CITY OF WINSTON-SALEM

No. 402PA97

Case below: 348 N.C. 664

Petition by plaintiffs (Bethania Town Lot Committee) to rehear pursuant to Rule 31 denied 16 September 1998.

BRING v. N.C. STATE BAR

No. 355PA97

Case below: 348 N.C. 655

Petition by plaintiff to rehear pursuant to Rule 31 denied 30 September 1998.

MARTIN v. BENSON

No. 119A97

Case below: 348 N.C. 684

Petition by plaintiffs to rehear pursuant to Rule 31 denied 8 October 1998.

SMITH CHAPEL BAPTIST CHURCH v. CITY OF DURHAM

No. 250PA97

Case below: 348 N.C. 632

Petition by plaintiffs to rehear pursuant to Rule 31 allowed 30 September 1998.

STATE OF NORTH CAROLINA v. ANGEL GUEVARA A/K/A JOSE ROSADO

No. 296A96

(Filed 6 November 1998)

1. Evidence and Witnesses § 1606 (NCI4th)— shooting of officer—eyewitness account—lawfulness of entry irrelevant

Regardless of whether a deputy lawfully entered defendant's home without a warrant, another officer's eyewitness account of the subsequent shooting of the deputy by defendant was not barred as "fruit of the poisonous tree" by application of the exclusionary rule. The exclusionary rule does not require the exclusion of evidence obtained after an illegal entry when that evidence is offered to prove the murder of one of the officers making the entry.

2. Searches and Seizures § 28 (NCI4th)— arrest—warrantless entry into home—exigent circumstances

A deputy's warrantless entry into defendant's home to arrest defendant was lawful due to the presence of exigent circumstances where the deputy had probable cause to arrest defendant for felony charges pending against him in North Carolina and New York; upon hearing another officer state to a dispatcher that they would take defendant in, defendant retreated into his home and slammed the door, which created the appearance that he was fleeing or trying to escape; and defendant was accompanied by a young child.

3. Criminal Law § 503 (NCI4th Rev.)— review of testimony—request by jury—denial as exercise of discretion

Assuming that the jury's request for "Medlin's testimony" was a request for a transcript of this witness's testimony or alternatively to have the testimony read back by the court reporter, the record shows that the trial court properly exercised its discretion under N.C.G.S. § 15A-1233(a) in declining to provide to the jury a review of the witness's testimony where the fact that the trial court considered the jury's request and acknowledged it had authority to provide the testimony to the jury is indicated by the trial court's comment that "frequently that's done," and the trial court did not indicate that it could not make the transcript or review of the testimony available to the jury.

4. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—statutory mitigating circumstances—absence of mitigating value—jury not misled

The prosecutor's statement in his concluding argument about statutory and nonstatutory mitigating circumstances in a capital sentencing proceeding that he didn't "see how any of these mitigating factors have any mitigating value whatsoever" could not have misled the jurors to believe that they could accord the statutory mitigating circumstances no mitigating value when viewed in the overall context in which the statement was made. Furthermore, any error was rendered harmless by the trial court's instruction making a clear distinction between statutory and nonstatutory mitigating circumstances, the distinction made on the Issues and Recommendation as to Punishment form, and instructions and closing arguments reiterating the jurors' duty to follow the law as given to them by the trial court.

5. Criminal Law § 1369 (NCI4th Rev.)— capital sentencing—aggravating circumstances—law officer engaged in official duties—effect of illegal entry

The trial court properly submitted to the jury in a capital sentencing proceeding the (e)(8) aggravating circumstance that the murder was committed against a law enforcement officer "while engaged in the performance of his official duties" even if the officer improperly entered defendant's home without a warrant to arrest defendant, since defendant was still not justified in using deadly force against an officer attempting to effect an arrest. N.C.G.S. § 15A-2000(e)(8); N.C.G.S. § 15A-401(f)(1), (2).

6. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—victim impact statement

The prosecutor's victim impact argument in a capital sentencing proceeding that the victim "was a good father, husband, son, brother and friend" was supported by the evidence and was not improper.

7. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—crowd at trial—victim as family man—no gross impropriety

The prosecutor's argument in a capital sentencing proceeding that "I think you can tell from the size of the crowd which had attended most of this trial" that the victim was a family man was

not so grossly improper as to require the trial court to intervene *ex mero motu*.

8. Criminal Law § 475 (NCI4th Rev.)— capital sentencing—prosecutor's irrelevant closing argument—no due process denial

The prosecutor's irrelevant argument in a capital sentencing proceeding that Michael Jordan wept on Father's Day after winning the NBA championship was not so grossly improper as to result in a denial of defendant's right to due process, especially since the trial court sustained defendant's objection and advised the jurors not to consider the statement.

9. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—use of song lyrics—no gross impropriety

The prosecutor's use of the lyrics of a song during his closing argument in a capital sentencing proceeding for the murder of a law officer did not improperly suggest that the cards were stacked against the State at the sentencing phase or impugn defendant's right to counsel so as to require the trial court to exclude these comments *ex mero motu*. Assuming *arguendo* that the lyrics could be so interpreted, the prosecutor's argument was not so unduly prejudicial as to render the sentencing phase of the trial fundamentally unfair.

10. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—not general deterrence argument

The prosecutor did not improperly argue general deterrence in a capital sentencing proceeding when he commented that a State's exhibit showed the way the victim was left and his plea was answered and that "unless the killing of a law enforcement officer is dealt with the upmost seriousness, then the disrespect for law and order that is inherent in that despicable act is encouraged"; rather, the comments were a proper argument on the seriousness of the crime.

11. Criminal Law § 1066 (NCI4th Rev.)— capital sentencing—disallowance of allocution

It is not error for the trial court in a capital case to disallow allocution.

12. Criminal Law § 1374 (NCI4th Rev.)— capital sentencing—course of conduct aggravating circumstance—failure to convict of felony murder

The trial court did not err in submitting to the jury in a capital sentencing proceeding the (e)(11) course of conduct aggravating circumstance when the jury did not mark whether it found defendant guilty of felony murder since the jury also found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury on a second victim, and the jury's affirmative response that it found defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation did not indicate that the jury rejected conviction under the felony murder rule. N.C.G.S. § 15A-2000(e)(11).

13. Criminal Law § 1351 (NCI4th Rev.)— capital sentencing—use of "may" in sentencing issues

The trial court did not commit constitutional error in a capital sentencing proceeding by its use of the word "may" in sentencing Issues Three and Four.

14. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing—instructions—nonstatutory mitigating circumstances—mitigating value

The trial court did not err by instructing the jurors that they could reject nonstatutory mitigating circumstances on the basis that they had no mitigating value.

15. Criminal Law § 1378 (NCI4th Rev.)— capital sentencing—instructions—existence of mitigating circumstances

The trial court did not err by instructing the jury in a capital sentencing proceeding that it must be satisfied that any mitigating circumstances exist.

16. 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 where the evidence showed that defendant stood in his mobile home and used a rifle to kill a deputy sheriff, including the firing of shots at the officer after the officer was down; defendant shot a second officer from a distance and severely wounded him; defendant made no attempt to assist the officers but fled in his truck; the jury convicted defendant under the theory of premeditation and delibera-

tion; and the jury found as aggravating circumstances that the murder was committed against a law enforcement officer engaged in the performance of his official duties and that the murder was part of a course of conduct which included a crime of violence against another person.

Justice FRYE concurring.

Justice WHICHARD joins in this concurring opinion.

Justice WYNN did not participate in the consideration or decision of this case.

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 Jenkins, J., at the 6 May 1996 Criminal Session of Superior Court, Johnston County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for assault with a deadly weapon with intent to kill inflicting serious injury was allowed by this Court 28 July 1997. Heard in the Supreme Court 10 March 1998.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

The defendant was indicted for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was tried capitally to a jury at the 6 May 1996 Criminal Session of Superior Court, Johnston County, Judge Knox V. Jenkins, Jr., presiding. The jury found defendant guilty of both charges. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to death for the first-degree murder conviction. On 20 June 1996, the trial court sentenced defendant to death for the first-degree murder conviction and to a term of 92 to 120 months' imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury conviction.

At trial, the State presented evidence tending to show that on the afternoon of 2 September 1995, when the temperature was approximately eighty-five degrees, Benjamin Becker, a security officer, dis-

covered an automobile parked outside North Hills Mall in Raleigh, North Carolina, with the doors locked and windows up, and three small children inside. Officer Becker was investigating the situation when defendant approached and started screaming and pointing his fingers in the officer's face. Without provocation, defendant pulled out an approximately four-inch knife and repeatedly lunged towards the unarmed officer. Defendant eventually leaped back into his car and quickly drove away. Officer Becker obtained the license plate number and reported the incident to the Raleigh Police Department. Pursuant to a license plate check, Detective Paula O'Neal determined Jose Rosado of 39 Morehead Drive, West Johnston Mobile Home Park, in Johnston County, to be a suspect. Jose Rosado was also wanted for the felony of false pretense and in an assault case.

On the morning of 11 September 1995, in response to a request from the Raleigh Police Department, two officers with the Johnston County Sheriff's Department, Lieutenant Ronald Medlin and Deputy Paul West, went to a Johnston County mobile home park to verify the address of a man named Jose Rosado. Upon the officers' arrival at 39 Morehead Drive, West Johnston Mobile Home Park, Lieutenant Medlin knocked at the front door for several minutes, but no one responded. A red Mustang convertible and a gray Dodge Ram pickup truck were parked outside. Deputy Medlin asked the dispatcher, Phyllis Edwards, to run a license check on the Mustang, and the dispatcher responded that the automobile was registered to Jose Rosado. Lieutenant Medlin then turned around and saw defendant, accompanied by a two- or three-year-old boy, standing outside the mobile home's back door. The officers asked defendant if he was Jose Rosado, and he informed the officers that Rosado was not there. After being asked for identification, defendant handed Lieutenant Medlin a passport which contained defendant's picture and indicated that he was Angel Guevara. The officers believed that he was Rosado and that he was wanted on an outstanding arrest warrant in North Carolina for the felony of false pretense. The officers further learned from the dispatcher that Rosado was also wanted in New York City under the name of Angel Guevara for the felony of reckless endangerment.

Lieutenant Medlin, standing near defendant's door, used his walkie-talkie to ask the dispatcher to check with New York authorities as to whether defendant was still wanted. Upon confirmation that defendant was still wanted, Lieutenant Medlin stated that they would take him in. Defendant heard Lieutenant Medlin's words and

retreated into his home and slammed the back door. Deputy West pushed the door open and entered the mobile home. Lieutenant Medlin did not lose sight of Deputy West at any time. In a matter of seconds, Lieutenant Medlin saw Deputy West throw his right hand up and heard him say, "No, no, no, don't, don't." Lieutenant Medlin heard a shot, and Deputy West fell to the floor facedown, where he died.

Lieutenant Medlin called for assistance and headed towards the door of the mobile home with his gun drawn. He heard another shot and was knocked by the bullet onto the hood of a car which was parked nearby. Lieutenant Medlin could see defendant inside the mobile home and could see Deputy West lying on the floor, his weapon still inside its holster. Lieutenant Medlin, although severely injured, managed to make his way back to his marked sheriff's car. He heard another shot, then saw defendant come out of the mobile home, get into his truck and speed away. Other officers and emergency personnel quickly arrived at the scene. Defendant was arrested several days later in New York City. Lieutenant Medlin sustained three serious wounds to the right side of his chest and, as of the time of trial, had not been able to return to work. An autopsy report indicated that Deputy West sustained a large, fatal bullet wound to the left side of his chest; another gunshot wound to the left groin area; multiple blunt-force injuries to his head; and severe bruises on his head, neck, lower chest area and left shoulder.

[1] In his first assignment of error, defendant contends that the trial court erred in declining to suppress Lieutenant Medlin's eyewitness account of the shooting of Deputy West. Defendant argues that this testimony was the "fruit of the poisonous tree" because Deputy West illegally entered defendant's home without a warrant. We conclude that the trial court correctly declined to suppress Lieutenant Medlin's eyewitness account.

We first note that under the circumstances here presented, it is unnecessary to consider whether Deputy West lawfully entered defendant's home. This Court has held that under the exclusionary rule, "[w]hen evidence is obtained *as the result* of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the '*fruit*' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992) (emphasis added). However, this Court has further held that the exclusionary rule "must be discerned in light of the facts in each case. When so considered, it is apparent that the rule does not require the

exclusion of evidence obtained after an illegal entry when that evidence is offered to prove the murder of one of the officers making the entry." *State v. Miller*, 282 N.C. 633, 641, 194 S.E.2d 353, 358 (1973). As we noted in *Miller*, application of the exclusionary rule to exclude evidence of crimes directed against the person of trespassing officers "would in effect give the victims of illegal searches a license to assault and murder the officers involved—a result manifestly unacceptable." *Id.* Therefore, in the case sub *judice*, regardless of whether Deputy West lawfully entered defendant's home, Lieutenant Medlin's eyewitness account of the events which transpired subsequent thereto is not barred by application of the exclusionary rule.

[2] Although it is thus unnecessary for this Court to discuss the legality of Deputy West's entry, we note that his entry into defendant's home was indeed lawful due to the presence of exigent circumstances. The United States Supreme Court held in *Payton v. New York*, 445 U.S. 573, 63 L. Ed. 2d 639 (1980), that even when probable cause exists, a suspect may not be arrested in his home without an arrest warrant. However, in the presence of an emergency or dangerous situation described as an "exigent circumstance," officials may lawfully make a warrantless entry into a home to effect an arrest. *Id.* at 583, 63 L. Ed. 2d at 648-49. To determine whether exigent circumstances were present in the case *sub judice*, we must consider the totality of the circumstances. *State v. Worsley*, 336 N.C. 268, 282, 443 S.E.2d 68, 75 (1994). The United States Supreme Court has indicated that a suspect's fleeing or seeking to escape could be considered an exigent circumstance. *Minnesota v. Olson*, 495 U.S. 91, 109 L. Ed. 2d 85 (1990). The Supreme Court there stated in reviewing the lower court's decision:

> The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling."

Id. at 100, 109 L. Ed. 2d at 95 (quoting *State v. Olson*, 436 N.W.2d 92, 96 (Minn. 1989)). In the case *sub judice*, the defendant's actions, in suddenly withdrawing into his home and slamming the door, created the appearance that he was fleeing or trying to escape, and this coupled with the presence of a young child suddenly caught in such circumstances created an exigent circumstance justifying Deputy West's

entry without a warrant. We note that Deputy West clearly had probable cause to arrest defendant in light of the felony charges pending against defendant in both North Carolina and New York. Accordingly, based on the circumstances in this case, we hold that Deputy West's entry into defendant's home was indeed lawful. We conclude that the trial court correctly declined to suppress Lieutenant Medlin's eyewitness account of the shooting of Deputy West. This assignment of error is overruled.

[3] In his second assignment of error, defendant contends that the trial court committed reversible error by failing to exercise discretion in determining the proper response to a jury request with regard to the testimony of Lieutenant Medlin. We disagree. The record reflects that the trial court adequately complied with N.C.G.S. § 15A-1233(a), which governs the trial court's duty to respond to an inquiry from the jury.

At trial, while the jury was deliberating, the trial court received a paper writing from the jury inquiring about three items: two exhibits, including an enlargement of a 911 transcript, and a reference to "Medlin's testimony." The parties and the trial court discussed the meaning of the jury's request, and the trial court then decided that as to "Medlin's testimony," the jury was referring to a transcript of Lieutenant Medlin's testimony. The trial court stated in this regard, "Well, you know, frequently that's done. All of us know that." Pursuant to N.C.G.S. § 15A-1233(b), the State objected to the exhibits going into the jury room but agreed to the jury's reviewing the exhibits in the courtroom. The jurors were then returned to the courtroom, where the 911 transcript exhibit and one of defendant's exhibits were re-presented to them. The trial court then stated, "We do not have prepared transcripts of the testimony of each witness. It is the duty of the jury to recall the testimony of the witness as it was presented during the trial of the case." The jurors inquired no further with regard to Lieutenant Medlin's testimony and resumed their deliberations.

Defendant now asserts that the jury was not merely requesting a transcript of Lieutenant Medlin's testimony but, alternatively, was requesting the opportunity to have his testimony read back by the court reporter. Defendant thus claims the trial court erred because it did not exercise its discretion in deciding whether to allow the requested review. Assuming *arguendo* that the jury's inquiry was as defendant contends, we find the trial court properly exercised its discretion in this case. N.C.G.S. § 15A-1233(a) provides:

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

N.C.G.S. § 15A-1233(a) (1997). "This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue." *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 657 (1985). This Court has held that "[w]hen no reason is assigned by the court for a ruling which may be made as a matter of discretion . . . , the presumption on appeal is that the court made the ruling in the exercise of its discretion." *Brittain v. Piedmont Aviation, Inc.*, 254 N.C. 697, 703, 120 S.E.2d 72, 76 (1961).

In the case *sub judice*, the defendant has failed to show that the trial court abused its discretion under N.C.G.S. § 15A-1233(a) in declining to provide the jury a review of Lieutenant Medlin's testimony. This Court has held that a trial court does not commit reversible error by denying a jury request to review testimony of a particular witness when "[i]t is clear from [the] record that the trial court was aware of its authority to exercise its discretion and allow the jury to review the expert's testimony." *State v. Lee*, 335 N.C. 244, 290, 439 S.E.2d 547, 571, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). However, this Court has found reversible error when a trial court's comments indicate that the court misunderstood its authority to allow a review of a witness' testimony or failed to exercise discretion in this regard. For instance, this Court concluded in *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980), that the trial court's comment to the jury that "the transcript was *not available* to them was an indication that [it] did not exercise [its] discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error." *Id.* at 511, 272 S.E.2d at 125. In the case *sub judice*, the fact that the trial court considered the jury's request and acknowledged that it had the

authority to provide the jury with Lieutenant Medlin's testimony is indicated by the trial court's comment that "frequently that's done." The trial court did not say or indicate that it could not make the transcript or review of the testimony available to the jury. The record therefore reflects that the trial court considered, but in its discretion denied, the jury's request in compliance with the statute. Accordingly, this assignment of error is overruled.

[4] In his third assignment of error, defendant contends that the prosecutor was improperly permitted to argue over defendant's objection that the jurors could find that the statutory mitigating circumstances had no mitigating value. Defendant therefore contends that he is entitled to a new sentencing proceeding. We disagree. When read as a whole and viewed in the overall context in which the prosecutor's statements were made, we find that the jurors could not have been led to believe that they could accord the statutory mitigating circumstances no mitigating value.

This Court has held that a prosecutor's statements in jury argument "must be reviewed in the overall context in which they were made and in view of the overall factual circumstances to which they referred." *State v. Penland*, 343 N.C. 634, 662, 472 S.E.2d 734, 750 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997). In this case, during jury argument, the prosecutor addressed statutory and nonstatutory circumstances. In concluding his argument, the prosecutor stated:

> The bottom line is I don't see how any of these mitigating factors have any mitigating value whatsoever . . . with what you are talking about. Do they reduce the moral culpability of what was done to Paul West? Now, you will next move on to weighing the aggravating and mitigating factors. And even if one or more of you should find that all of the mitigating factors not only exist but also have mitigating value, I contend to you that there is no way the mitigating factors outweigh the aggravating factors that the State has proven to you beyond a reasonable doubt.

In order for a prosecutor's argument to constitute prejudicial error, the "comments must have so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Clearly, the prosecutor did not categorically tell the jurors that *they* could not give the statutory miti-

gating circumstances any mitigating value. In fact, the prosecutor went on to argue that if one or more jurors found the circumstances to "have mitigating value," the mitigators did not outweigh the aggravators.

Even assuming *arguendo* that the prosecutor's remarks did not fully and correctly state the law in this respect, these statements were certainly clarified by other means. First, the trial court correctly instructed the jury on the law regarding mitigating circumstances from the pattern jury instructions, making a clear distinction between statutory and nonstatutory mitigating circumstances. Further, the Issues and Recommendation as to Punishment form made this distinction clear. Second, the trial court repeatedly and clearly instructed the jurors to follow the law as it was given to them. Finally, both prosecutors and one of defendant's attorneys, in their closing arguments at the penalty phase, reiterated to the jurors their duty to follow the law as given to them by the trial court. We presume that juries follow the trial court's instructions. *State v. Richardson*, 346 N.C. 520, 538, 488 S.E.2d 148, 158 (1997), *cert. denied*, —— U.S. ——, 239 L. Ed. 2d 652 (1998); *State v. Johnson*, 341 N.C. 104, 115, 459 S.E.2d 246, 252 (1995). We therefore conclude that in light of the arguments overall and the trial court's correct instructions on mitigating circumstances, the jury could not have been misled and in fact followed these instructions. Accordingly, this assignment of error is overruled.

[5] In his fourth assignment of error, defendant contends that because Deputy West's death occurred during his illegal entry into defendant's residence, the trial court incorrectly submitted the aggravating circumstance that the murder was committed against a law enforcement officer "while engaged in the performance of his official duties." N.C.G.S. § 15A-2000(e)(8) (1997). We disagree. First, as we have noted above, Deputy West's entry was not illegal. Further, we reiterate that we need not address the legality of Deputy West's entry into defendant's mobile home because even if Deputy West improperly entered defendant's home, defendant had no right to use deadly force under the circumstances of this situation. N.C.G.S. § 15A-401(f) provides in part:

> Use of Deadly Weapon or Deadly Force to Resist Arrest.—
>
> (1) A person is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force, when the person knows or has reason to

know that the officer is a law-enforcement officer and that the officer is effecting or attempting to effect an arrest.

(2) The fact that the arrest was not authorized under this section is no defense to an otherwise valid criminal charge arising out of the use of such deadly weapon or deadly force.

N.C.G.S. § 15A-401(f)(1), (2) (1997). Therefore, in accordance with N.C.G.S. § 15A-401(f), even assuming *arguendo* that Deputy West in some way improperly performed his official duties, defendant was still not justified in using deadly force against a law enforcement officer attempting to effect an arrest. The (e)(8) aggravating circumstance was thus properly submitted to the jury. This assignment of error is overruled.

[6] In defendant's fifth assignment of error, he further contends that the trial court committed reversible error, depriving defendant of due process of law, by failing to exclude additional portions of the prosecutor's closing argument for death during the sentencing phase. Defendant first claims in this assignment of error that the prosecutor's victim-impact argument—unsworn assertions that Deputy West "was a good father, husband, son, brother and friend"—was unsupported by the evidence and improperly considered. We do not agree with this assessment.

In *State v. Moody*, 345 N.C. 563, 481 S.E.2d 629, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 125 (1997), this Court noted the United States Supreme Court held that

> "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."

Id. at 573, 481 S.E.2d at 633 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 736 (1991)). Victim-impact statements may be admitted at a capital sentencing proceeding unless the evidence "is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. at 825, 115 L. Ed. 2d at 735. "Victim impact evidence is admissible in capital sentencing proceedings." *State v. Robinson*, 339 N.C. 263, 278, 451 S.E.2d 196, 205 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). This Court has held that the prosecution is allowed "some latitude in fleshing out the

humanity of the victim so long as it does not go too far." *State v. Reeves*, 337 N.C. 700, 723, 448 S.E.2d 802, 812 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995).

A review of the record reflects that the prosecutor's comments that Deputy West "was a good father, son, brother and friend" were in fact supported by the evidence. In her testimony, the wife of Deputy West spoke about him in reference to his family and identified a guardian angel pin which he wore on his uniform and a photograph of him. From Mrs. West's testimony, the photographs and the angel pin, the prosecutor emphasized to the jury that Deputy West was a family man. The prosecutor also referred to Lieutenant Medlin's testimony and to Deputy West's first words to the defendant, "hey good buddy," to suggest to the jury that these words reflected the kind of man Deputy West was.

[7] Although defendant failed to object during the prosecutor's closing argument, he now contends that the prosecutor improperly stated, "I think you can tell from the size of the crowd which had attended most of this trial," to suggest that Deputy West was a family man. Although the number of people attending the trial is an indicator of community interest and possibly esteem, this alone was clearly not evidence as to what kind of man Deputy West was. We nevertheless conclude that this limited comment, particularly in light of the other evidence, was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[8] Defendant additionally contends that the prosecutor's victim-impact argument went too far. The prosecutor argued:

> The second reason I say this trial is coming at a most appropriate time is the passage of this past Sunday's Father's Day. And on that very day immediately after winning the NBA championship and being recognized perhaps as the greatest basketball player to ever live, Michael Jordan felt pain, not joy. Why? . . . Because he wept like a baby.

The trial court sustained defendant's objection to this comment. Although this argument was improper, it was not so grossly improper as to result in a denial of due process. It was, in essence, a meaningless, irrelevant aside, having nothing to do with the defendant or the trial. Thus, we conclude this comment did not "stray so far from the bounds of propriety as to impede the defendant's right to a fair trial." *State v. Davis*, 305 N.C. 400, 422, 290 S.E.2d 574, 587 (1982). Further,

the trial court properly sustained defendant's objection which "advised the jurors that they should not consider the statement." *State v. Larry*, 345 N.C. 497, 527, 481 S.E.2d 907, 924, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 234 (1997).

[9] Defendant next argues that the prosecutor used the lyrics of a song to improperly suggest that the cards were procedurally stacked against the State at the sentencing phase and to exploit or impugn defendant's right to counsel. The prosecutor stated:

> And I can think of no better expression of this sentiment than the words of a song, a requiem, if you will, that I want to leave with you.
>
> Somebody killed a policeman today and a part of America died. A piece of country that he swore to protect will be buried right by his side. The suspect who shot him must stand up in court with counsel demanding his rights. While the young widowed mother must work for her kids and cry a many a long, long night.

We do not conclude that the lyrics of this song suggest that the cards were procedurally stacked against the State or that they in any way implicated or impugned defendant's right to counsel. Even assuming *arguendo* that these lyrics could be interpreted as defendant contends, this argument is clearly not so unduly prejudicial as to render the sentencing phase of the trial fundamentally unfair. Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). We further emphasize that

> statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred. Further, it must be remembered that the prosecutor in a capital case has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty.

Green, 336 N.C. at 188, 443 S.E.2d at 41. This Court has also noted that although counsel is allowed wide latitude in both the guilt-innocence and sentencing phases of trial, " 'the foci of the arguments in the two phases are significantly different, and rhetoric that might be prejudicially improper in the guilt phase is acceptable in the sentenc-

ing phase.' " *State v. Bishop*, 343 N.C. 518, 552, 472 S.E.2d 842, 860 (1996) (quoting *State v. Artis*, 325 N.C. 278, 324, 384 S.E.2d 470, 496 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997). Thus, based on these principles, we hold that the trial court did not err in failing to exclude *ex mero motu* these comments by the prosecutor.

[10] Finally, defendant contends the prosecutor improperly argued general deterrence. The prosecutor argued:

> State's exhibit number 9, it is not pleasant to look at it. And I know undoubtedly you feel that you've seen it enough, but that's the way Paul West was left and his plea was answered. You see unless the killing of a law enforcement officer is dealt with the utmost seriousness, then the disrespect for law and order that is inherent in that despicable act is encouraged.

We conclude that this argument in overall context did not constitute a general deterrence argument but merely focused the jury's attention on the seriousness of the crime and the importance of the jury's duty. We have previously held that the prosecutor is allowed to argue the seriousness of the crime. *State v. Barrett*, 343 N.C. 164, 181, 469 S.E.2d 888, 898, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 259 (1996); *see State v. Jones*, 339 N.C. 114, 159, 451 S.E.2d 826, 850 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995); *State v. Artis*, 325 N.C. at 329, 384 S.E.2d at 499.

We conclude that all these statements complained of did not result in a denial of " 'that fundamental fairness essential to the very concept of justice.' " *Donnelly v. De Christoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 436 (1974) (quoting *Lisenba v. California*, 314 U.S. 219, 236, 86 L. Ed. 166, 180 (1941)). We hold that all of defendant's complaints under this assignment of error are not so unduly prejudicial so as to deny defendant fundamental fairness in the sentencing proceeding.

PRESERVATION ISSUES

[11] Defendant, in his sixth assignment of error, asserts that the trial court violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in not allowing him the opportunity for allocution before the jury. This Court has previously ruled that it is not error for the trial court in a capital case to disallow allocution. *State v. Wright*, 342 N.C. 179, 463

S.E.2d 388 (1995). Upon consideration of defendant's argument and authorities cited, we find no compelling reason for this Court to overrule our prior holding on this issue. This assignment of error is overruled.

[12] In his seventh assignment of error, defendant asserts that the trial court committed federal constitutional error in submitting to the jury the (e)(11) course of conduct aggravating circumstance, in that the jury did not mark the verdict sheet and so did not convict defendant under the felony murder rule. *See* N.C.G.S. § 15A-2000(e)(11). We first note that the jury in this case additionally convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury. Furthermore, this Court has held contrary to defendant's position in *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). In the case *sub judice*, as in *McCollum*, the jury failed to answer both questions on the verdict sheet with respect to whether defendant was guilty on the basis of malice, premeditation and deliberation and under the felony murder rule. The jury's failure to follow the trial court's instructions to give a "yes" or "no" answer to both questions does not indicate that the jury found defendant blameless under the felony murder rule. *Id.* at 220-22, 433 S.E.2d at 150-51. The jury's affirmative response that it did find defendant guilty of first-degree murder under one theory, on the basis of malice, premeditation and deliberation, does not indicate that the jury rejected conviction under another theory, in this case the felony murder rule. *See id.* This assignment of error is without merit.

[13] Next, in his eighth assignment of error, defendant contends that the trial court committed federal constitutional error in its use of the word "may" in sentencing Issues Three and Four. Defendant acknowledges that this Court has previously decided this issue adversely to defendant's position and upheld the constitutionality of this instruction. *State v. Lee*, 335 N.C. at 286-87, 439 S.E.2d at 569-70. We find no basis for reversing our prior holding in this regard. Accordingly, this assignment of error is overruled.

[14] In his ninth assignment of error, defendant contends that the trial court erred by instructing the jury on nonstatutory mitigating circumstances in a way which allowed the jurors to reject such circumstances on the basis that they had no mitigating value. As defendant acknowledges, this Court has previously found this argument to be without merit. 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 either our state or federal Constitution. *State v. Womble*, 343 N.C. 667, 694, 473 S.E.2d 291, 307 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). As we have previously stated, this instruction does not limit or prevent the jury's consideration of any relevant evidence in mitigation but merely requires the jury to find both the existence of the nonstatutory circumstance and that it has mitigating value. *State v. Stephens*, 347 N.C. 352, 366, 493 S.E.2d 435, 444 (1997), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 66 (1998). We therefore reject this assignment of error.

[15] In his tenth assignment of error, defendant argues that the trial court erred by instructing the jury that it must be satisfied that any mitigating circumstance exists. This Court has repeatedly rejected this argument. *State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). We have consistently held that "[i]t is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury." *State v. Hutchins*, 303 N.C. 321, 356, 279 S.E.2d 788, 809 (1981); *see also State v. Green*, 336 N.C. at 185, 443 S.E.2d at 39; *State v. Brown*, 306 N.C. 151, 178, 293 S.E.2d 569, 586-87, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). We find no compelling reason to reconsider our prior holding in this regard. Accordingly, this assignment of error is overruled.

PROPORTIONALITY REVIEW

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). After thoroughly reviewing the record, transcript and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

One purpose of proportionality review is to 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). 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. at 198, 443 S.E.2d at 47.

[16] The sentence of death in this case is not 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 in this case found both aggravating circumstances that were submitted. First, the jury specifically found that the murder was committed against a law enforcement officer engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(8). Second, the jury found that the murder was part of a course of conduct in which defendant engaged and which included a crime of violence against another person. N.C.G.S. § 15A-2000(e)(11). As Justice (now Chief Justice) Mitchell succinctly stated in *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984):

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

Id. at 488, 319 S.E.2d at 177 (Mitchell, J., concurring in part and dissenting in part). The United States Supreme Court has also recog-

nized the importance of protecting our nation's police officers. In *Roberts v. Louisiana*, 431 U.S. 633, 52 L. Ed. 2d 637 (1977), the Supreme Court stated: "There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property." *Id.* at 636, 52 L. Ed. 2d at 641.

This Court has found death sentences disproportionate in seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (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; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We find the instant case distinguishable from each of these cases. None of these cases, with the exception of *State v. Hill*, involved the first-degree murder of a police officer engaged in the performance of his official duties. The brutal murder in the case *sub judice* was also part of a course of conduct which included another violent crime, the severe wounding of another police officer. This case is distinguishable from *Hill*, where the defendant was also convicted of the first-degree murder of a police officer and sentenced to death. There, the defendant was convicted of first-degree murder for killing a police officer with the officer's own gun after the two struggled. This Court vacated the sentence of death because of speculative evidence about what the defendant was doing prior to his encounter with the officer and lack of evidence as to who drew the murder weapon out of the officer's holster. We find the present case distinguishable from *Hill* in several respects. First, in the case *sub judice*, defendant stood in his mobile home and used his own rifle to kill Deputy West, including the firing of shots at him while the officer lay on the floor facedown, his weapon still inside its holster. Second, defendant shot another officer, Lieutenant Medlin, from a distance, severely wounding him. Third, after shooting both officers, defendant made no effort to assist the officers but instead leapt into his truck and quickly fled. Fourth, the jury convicted defendant of first-degree murder under the theory of premeditation and deliberation and found the existence of two aggravating circumstances: (1) the murder was committed against a law enforcement officer in the performance of his official duties, the

(e)(8) aggravating circumstance; and (2) the murder was part of a course of conduct including other violent crimes, the (e)(11) aggravating circumstance. "The course of conduct circumstance is often present in cases where the jury imposes death instead of life imprisonment." *State v. Miller*, 339 N.C. 663, 694, 455 S.E.2d 137, 154, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995).

This case is similar to cases in which we have found the death penalty proportionate. In *State v. Harden*, 344 N.C. 542, 476 S.E.2d 658 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997), we affirmed a sentence of death where the defendant shot two police officers who were trying to arrest him. The jury there found the same two aggravating circumstances as found here. Similarly, in *State v. Page*, 346 N.C. 689, 488 S.E.2d 225 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 651 (1998), we affirmed a sentence of death where the jury found the same two aggravators. We thus conclude that this case is similar to cases in which we have found the sentence of death proportionate and not similar to any case where we have found the death penalty disproportionate.

We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

Justice FRYE concurring.

I agree that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error, and that defendant's sentence of death is not disproportionate.

I agree with the majority that "in the case *sub judice*, regardless of whether Deputy West lawfully entered defendant's home, Lieutenant Medlin's eyewitness account of the events which transpired subsequent thereto is not barred by application of the exclusionary rule." *State v. Guevara*, 349 N.C. 243, 250, 506 S.E.2d 711, 716 (1998). However, I also agree with the majority that "it is unnecessary for this Court to discuss the legality of Deputy West's entry." *Id.* Accordingly, I would neither discuss nor decide this issue.

Justice WHICHARD joins in this concurring opinion.

STATE OF NORTH CAROLINA v. SAMUEL R. FLIPPEN

No. 178A95-2

(Filed 6 November 1998)

1. **Criminal Law § 1398 (NCI4th Rev.)— prior death sentence reversed—new sentencing hearing rather than life imprisonment—no error**

The North Carolina Supreme Court was not required to overturn a death sentence and impose a sentence of life imprisonment where the Court in the previous appeal had remanded the case under N.C.G.S. § 15A-2000(d)(3) for error in the instructions and had not reached the question of arbitrariness under N.C.G.S. § 15A-2000(d)(2).

2. **Criminal Law § 1370 (NCI4th Rev.)— capital sentencing—aggravating circumstances—particularly heinous, atrocious or cruel—death of child**

The trial court did not err in a capital resentencing hearing by submitting the especially heinous, atrocious, or cruel aggravating circumstance where defendant contended that allowing the submission of the circumstance creates a new statutory aggravating circumstance for all cases in which the homicide victim is a child. In this case, ample evidence demonstrated that defendant had a parental relationship with the victim; the victim was only two years and four months old and was particularly vulnerable and at defendant's mercy; and defendant inflicted numerous blows upon her head, neck and abdomen resulting in injuries which went beyond what would have been necessary to kill her.

3. **Criminal Law § 693 (NCI4th Rev.)— capital resentencing—mitigating circumstance—no significant history of prior criminal activity—no peremptory instruction**

The trial court did not err in a capital resentencing by failing to give a mandatory peremptory instruction on the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the State and defendant had stipulated in the first trial that defendant had no significant history of prior criminal activity. A prior stipulation or concession regarding capital sentencing circumstances does not limit the parties' presentation of evidence when relevant evidence contradicts that prior stipulation. N.C.G.S. § 15A-2000(f)(1).

4. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstances—instructions

The trial court did not err in a capital resentencing by failing to require the jury to make separate findings as to whether nonstatutory mitigating circumstances existed and whether they had mitigating value. The trial court properly instructed the jury regarding each nonstatutory mitigating circumstance pursuant to *State v. Robinson*, 336 N.C. 78, and it is presumed under *State v. Jennings*, 333 N.C. 579, that the jury followed the instructions. The jury's rejection of a nonstatutory mitigating circumstance that exists does not render the sentencing recommendation arbitrary and does not hinder appellate review of the recommendation.

5. Criminal Law § 1343 (NCI4th Rev.)— capital resentencing—two-year-old victim—videotape—admissible

The trial court did not abuse its discretion in a capital resentencing for the murder of a child by admitting into evidence a videotape of the victim. The rules of evidence do not apply in sentencing proceedings although the trial court here admitted the evidence after a thorough consideration of its probative value.

6. Appeal and Error § 147 (NCI4th)— capital resentencing—defendant's prior treatment of victim—reviewable only for plain error—plain error review waived

Defendant in a capital resentencing waived review of whether the court erred by admitting testimony regarding defendant's prior treatment of the child victim where defendant neither moved *in limine* to exclude this testimony nor objected to it, so that the issue was reviewable only for plain error, and defendant also waived plain error review by failing to allege in his assignment of error that the trial court committed plain error.

7. Criminal Law § 448 (NCI4th Rev.)— capital resentencing—jury selection—prosecutor's statement—courage required to vote for death penalty

The trial court did not abuse its discretion in a capital resentencing by allowing the prosecutor to refer during jury selection to the courage required to vote for the death penalty.

8. Appeal and Error § 147 (NCI4th)— capital resentencing—question about defendant's testimony in first trial—no objection—no assignment of error—constitutional issue not raised at sentencing

An assignment of error in a capital resentencing to a question about defendant's testimony in his first trial was not properly preserved for appellate review where defendant did not object at trial, waived plain error review by failing to allege in his assignment of error that the trial court committed plain error, and further waived review of any constitutional issue by failing to raise it at the sentencing proceeding.

9. Criminal Law § 439 (NCI4th Rev.)— capital resentencing—prosecutor's characterization of defendant's demeanor—no abuse of discretion

The trial court did not abuse its discretion in a capital resentencing by failing to sustain defendant's objection to the prosecutor's characterization of defendant's demeanor at trial as "sniveling." Remarks relating to a defendant's demeanor are permissible because the defendant's demeanor is before the jury at all times.

10. Criminal Law § 690 (NCI4th Rev.)— capital resentencing—peremptory instructions denied—no error

The trial court did not err in a capital resentencing by denying defendant's request for peremptory instructions on the nonstatutory mitigating circumstances that defendant was kind and considerate to others, that defendant assisted the emergency medical technicians, and that defendant loved his stepdaughter, the victim. The evidence was controverted in each instance in which the trial court denied defendant's request and the trial court acted properly in denying the request.

11. Criminal Law § 1402 (NCI4th Rev.)— death sentence—supported by evidence—not entered under influence of passion, or prejudice—not disproportionate

The evidence in a capital resentencing in which the jury returned a death sentence fully supported the aggravating circumstance found by the jury, and there was no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

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

A sentence of death for the beating death of a two-year-old child by her stepfather was not disproportionate where defendant contended that his effort to assist the victim by calling 911 rendered the death sentence disproportionate, but he failed to direct the medical personnel to the victim's fatal injuries, left those injuries concealed beneath her clothing, and misled the medical personnel about her injuries. This case is more similar to cases in which the sentence of death was found proportionate to those in which it was found disproportionate.

Justice WYNN did not participate in the consideration or decision of this case.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Greeson, J., on 23 May 1997 in Superior Court, Forsyth County. Heard in the Supreme Court 28 September 1998.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

White and Crumpler, by David B. Freedman, Dudley A. Witt, and Fred G. Crumpler, Jr., for defendant-appellant.

WHICHARD, Justice.

On 31 October 1994 defendant was indicted for first-degree murder. He was tried capitally in February 1995. The jury found defendant guilty and recommended that he be sentenced to death. The trial court imposed the death sentence. This Court found no error in the guilt-innocence phase of defendant's trial but vacated defendant's death sentence and remanded for a new capital sentencing proceeding. *State v. Flippen*, 344 N.C. 689, 477 S.E.2d 158 (1996) (*Flippen I*). Defendant's new capital sentencing proceeding was held at the 19 May 1997 Criminal Session of Superior Court, Forsyth County. A jury again recommended a sentence of death for the first-degree murder, and the trial court sentenced defendant accordingly. Defendant appeals from this sentence. We hold that defendant received a fair sentencing proceeding, free from prejudicial error, and that the sentence of death is not disproportionate.

The facts were presented in our earlier opinion, *id.* at 693-94, 477 S.E.2d at 161, and need not be restated in detail here. During defendant's new capital sentencing proceeding, the State presented evidence that defendant inflicted one or more fatal blows to his two-year-old stepdaughter's stomach. These blows tore the stepdaughter's liver and pancreas and caused internal bleeding. Prior to her death, the victim lived for approximately thirty minutes with these fatal injuries.

During this time defendant called 911 to seek medical attention for his stepdaughter. Defendant told medical personnel that the stepdaughter had fallen from a chair. Consequently, as the victim rode to the hospital in an emergency vehicle, the paramedics initially treated her for a head or C-spine injury. As the victim demonstrated increasing difficulty breathing, the paramedics removed her clothes to try to open her airway; they noticed bruising on the victim's abdomen. The paramedics then no longer believed that the victim suffered from a head or C-spine injury. The victim stopped breathing on her way to the hospital, and her heartbeat steadily decreased and ultimately quit. The paramedics performed infant CPR, and they were still performing it when the emergency vehicle arrived at the hospital, where the victim was pronounced dead.

Defendant offered as mitigating evidence that he was a high-school graduate who regularly attended church, that he maintained regular employment, and that he had a good reputation in the community for being a fine and upstanding citizen. He presented evidence that he genuinely loved his stepdaughter and had a good relationship with her with no history of physical abuse.

The jury found one aggravating circumstance: that defendant's crime was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1997). The jury also found one mitigating circumstance: that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). The jury then determined that the mitigating circumstance found was insufficient to outweigh the aggravating circumstance found and that the aggravating circumstance, when considered with the mitigating circumstance, was sufficiently substantial to call for imposition of the death penalty.

[1] Defendant first contends that this Court erred in *Flippen I* when it found prejudicial error in the trial court's sentencing-phase jury charge and remanded this matter for a new sentencing proceeding under N.C.G.S. § 15A-2000(d)(3). *See Flippen I*, 344 N.C. at 702, 477

S.E.2d at 166. Defendant argues that this Court was required to overturn the death sentence and impose a sentence of life imprisonment in lieu thereof under N.C.G.S. § 15A-2000(d)(2) because his first jury arbitrarily recommended the death sentence under the influence of passion and prejudice.

Once this Court concludes that an error exists in the instructions to the jury in the sentencing phase of a capital trial, it must remand the matter for resentencing under N.C.G.S. § 15A-2000(d)(3), which provides: "If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted." When this Court finds prejudicial error in a sentencing-phase jury instruction, it does not reach the question of arbitrariness under N.C.G.S. § 15A-2000(d)(2). *See, e.g., State v. Bonnett*, 348 N.C. 417, 449, 502 S.E.2d 563, 584 (1998) (considering whether the imposition of the death penalty was arbitrary or disproportionate under N.C.G.S. § 15A-2000(d)(2) only *after* "[h]aving found no prejudicial error in either the guilt-innocence phase or the sentencing proceeding"). Thus, when this Court finds error in the instructions in the sentencing phase, we remand the case for resentencing under N.C.G.S. § 15A-2000(d)(3) and do not reach the question of whether the defendant's sentence of death should be overturned under N.C.G.S. § 15A-2000(d)(2).

In *Flippen I* we held that during the sentencing phase of defendant's capital trial, "the trial court erred by failing to instruct the jury that the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance existed as a matter of law and must be given weight." *Flippen I*, 344 N.C. at 701, 477 S.E.2d at 165. We further concluded that this error was prejudicial. *Id.* at 702, 477 S.E.2d at 166. Thus, we properly remanded for a new sentencing proceeding as required by N.C.G.S. § 15A-2000(d)(3) rather than overturning the sentence of death under N.C.G.S. § 15A-2000(d)(2). Defendant's assignment of error is overruled.

[2] Defendant next contends that the trial court erred in submitting the especially heinous, atrocious, or cruel aggravating circumstance over defendant's objection. *See* N.C.G.S. § 15A-2000(e)(9). Defendant submits that the State offered insufficient evidence to support this statutory aggravating circumstance. He argues that if we permit trial courts to submit the (e)(9) circumstance under the facts here, we will be creating a new statutory aggravating circumstance encompassed within the (e)(9) circumstance for all cases in which the homicide victim is a child.

Whether a trial court properly submitted the (e)(9) aggravating circumstance depends on the facts of the case. *State v. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 356 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). The capital offense must not be merely heinous, atrocious, or cruel; it must be especially heinous, atrocious, or cruel. *Id.* A murder is especially heinous, atrocious, or cruel when it is a conscienceless or pitiless crime which is unnecessarily torturous to the victim. *State v. Burr*, 341 N.C. 263, 307, 461 S.E.2d 602, 626 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

Evidence of "the victim's age and the existence of a parental relationship between the victim and defendant" may be considered in determining the existence of the (e)(9) aggravating circumstance. *Id.* Evidence that the defendant was the primary caregiver of the victim also supports the (e)(9) aggravator because such a "killing betrays the trust that a baby has for its primary caregiver." *State v. Huff*, 325 N.C. 1, 56, 381 S.E.2d 635, 667 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Evidence that "the injuries inflicted upon the child were numerous, going beyond what would be necessary to kill the victim" further supports a conclusion that this aggravator was properly submitted. *Burr*, 341 N.C. at 308, 461 S.E.2d at 626.

In determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravator, we must consider the evidence "in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *State v. 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).

Applying these principles here, we conclude that the evidence was sufficient to support submission of the (e)(9) aggravating circumstance. Ample evidence demonstrated that defendant had a parental relationship with the victim. The victim called defendant "Daddy." On the morning of the murder, defendant was alone with her in their home, and he was her primary caregiver. The victim was only two years and four months old. As such, she was particularly vulnerable and at defendant's mercy. Defendant inflicted numerous blows upon her head, neck, and abdomen; the resulting injuries went beyond what would have been necessary to kill her. Viewing this evidence in the light most favorable to the State, we hold that the trial court did not err in submitting the (e)(9) aggravating circumstance.

[3] Defendant next contends that the trial court erred in failing to give a mandatory peremptory instruction on the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. *See* N.C.G.S. § 15A-2000(f)(1). In defendant's first trial, the State and defendant stipulated that defendant had no significant history of prior criminal activity. Defendant contends that this stipulation in his first sentencing proceeding precluded the jury's consideration of contrary evidence presented at his new sentencing proceeding and conclusively established the (f)(1) mitigating circumstance in that proceeding.

"Any evidence that the trial court 'deems relevant to sentenc[ing]' may be introduced in the sentencing proceeding." *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*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996)), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997). The State must be allowed to present *any* competent evidence in support of the death penalty. *Id.*

A prior stipulation or concession regarding capital sentencing circumstances does not limit the parties' presentation of evidence when relevant evidence contradicts that prior stipulation. *See State v. Adams*, 347 N.C. 48, 56-58, 490 S.E.2d 220, 223-25 (1997) (recognizing that although the State had stipulated in the defendant's first sentencing proceeding that insufficient evidence existed to support a statutory aggravating circumstance, the State could introduce evidence at the defendant's new sentencing proceeding to support that aggravating circumstance), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 878 (1998). This rule allows "both sides to introduce evidence in support of [or in opposition to] aggravating and mitigating circumstances which have been admitted into evidence by stipulation." *State v. McDougall*, 308 N.C. 1, 20-21, 301 S.E.2d 308, 320, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

Despite the existence of a prior stipulation on a mitigating circumstance, a "defendant is not entitled to a peremptory instruction when the evidence supporting a mitigating circumstance is controverted." *State v. Womble*, 343 N.C. 667, 683, 473 S.E.2d 291, 300 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 719 (1997). Defendant is entitled to a peremptory instruction on a mitigating circumstance only when that circumstance is supported by uncontroverted evidence. *Id.* The record shows that the evidence regarding the existence of the (f)(1) mitigating circumstance was not uncontroverted.

Although the parties stipulated in defendant's first sentencing proceeding that defendant had no significant history of prior criminal activity, this stipulation did not limit the presentation of subsequently discovered, contradictory evidence at defendant's new sentencing proceeding. *See Adams*, 347 N.C. at 56-58, 490 S.E.2d at 224-25. At defendant's new sentencing proceeding, the State properly produced evidence that defendant had twice assaulted his wife. This evidence tends to contradict the prior stipulation. Because the evidence regarding the (f)(1) mitigating circumstance was not uncontroverted at defendant's new sentencing proceeding, the trial court properly refused to peremptorily instruct the jury on the existence of this mitigator.

[4] Defendant next contends that the trial court erred in its jury instructions on nonstatutory mitigating circumstances by failing to require the jury to make separate findings as to whether those mitigating circumstances existed and whether they had mitigating value. In support of this contention, defendant explains that the allegedly erroneous instruction precludes this Court's review of his argument that the jury acted arbitrarily in rejecting nonstatutory mitigating circumstances supported by the evidence.

> The trial court instructed the jury as follows:
>
> If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreperson write "yes" in the space provided after this mitigating circumstance on this Issues and Recommendations form. Now, if none of you finds the circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreperson write "no" in that space.

The trial court gave these instructions in substantially the same form for all of the nonstatutory mitigating circumstances submitted.

We have consistently upheld nearly identical instructions on nonstatutory mitigating circumstances, *see, e.g.*, *State v. Robinson*, 336 N.C. 78, 117, 443 S.E.2d 306, 325 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), and "[w]e presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them,' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting *Francis v. Franklin*, 471 U.S. 307, 324

n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Nonstatutory mitigating circumstances do not have mitigating value as a matter of law, and although there may be substantial evidence to support the proffered mitigating circumstances, a jury's failure to find that the circumstances have mitigating value does not render its sentencing recommendation arbitrary and require that it be set aside. *State v. Lee*, 335 N.C. 244, 292, 439 S.E.2d 547, 572, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994).

Here, pursuant to *Robinson*, the trial court properly instructed the jury regarding each nonstatutory mitigating circumstance, and under *Jennings* we presume that the jury followed the instructions. Thus, pursuant to the trial court's instructions, we presume that in instances in which evidence supported the existence of a nonstatutory mitigating circumstance, the jury rejected the circumstance because it determined that the circumstance did not have mitigating value. Because nonstatutory mitigators do not have mitigating value as a matter of law, the jury may properly reject a nonstatutory mitigating circumstance that exists. *Id.* This does not render the jury's sentencing recommendation arbitrary, and it does not hinder this Court's review of that recommendation. Defendant's assignment of error is overruled.

[5] Defendant next contends that the trial court committed prejudicial error by admitting into evidence a videotape of the victim, filmed forty-nine days prior to her death, and testimony about defendant's prior treatment of the victim. Defendant asserts that the trial court failed to properly perform the balancing test required by N.C.G.S. § 8C-1, Rule 403, and that this evidence was inadmissible because it possessed little probative value, created a great danger of prejudice, and served merely to inflame the passions of the jury.

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 . . . which will substantially support the imposition of the death penalty." *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Thus, trial courts are not required to perform the Rule 403 balancing test during a sentencing proceeding. *Daughtry*, 340 N.C. at 517-18, 459 S.E.2d at 762.

"Whether the use of photographic evidence . . . is more probative than prejudicial [is a] matter[] generally left to the sound discretion of the trial court." *State v. Harden*, 344 N.C. 542, 559, 476 S.E.2d 658, 666 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 483 (1997). " '[W]e have repeatedly held that showing photographs of victims made during their lives is not prejudicial error.' " *State v. Bishop*, 346 N.C. 365, 388, 488 S.E.2d 769, 781 (1997) (quoting *State v. Norwood*, 344 N.C. 511, 532, 476 S.E.2d 349, 358 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 500 (1997)). Likewise, the trial court may, in its discretion, admit evidence of the defendant's prior conduct toward the victim because prior physical mistreatment or malicious behavior by a defendant toward a homicide victim is relevant to prove malice, ill will, intent, and premeditation and deliberation. *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).

Here, the trial court determined that the videotape depicting the two-year-old, thirty-pound victim forty-nine days prior to her death was "probative of the State's case to show [the victim's] vulnerability and . . . to show why it would be heinous, atrocious or cruel" for a man as large and powerful as defendant to murder her with his hands while she was in his care. The court recognized "the fact that [the videotape] is prejudicial," but it also noted that "just the mere fact of a young two year old child being murdered, of course, is prejudicial." Ultimately, the court concluded that "it's not unfairly prejudicial in [sic] a probative value, I would think, would fair [sic] exceed and outweigh any prejudicial effect." The trial court did not abuse its discretion by admitting this evidence after thorough consideration of its probative value. *See Bishop*, 346 N.C. at 388, 488 S.E.2d at 780.

[6] The trial court also admitted testimony of Felicia Carle about her observations of defendant's prior treatment of the victim. Carle testified that she once saw the victim start to cry as defendant approached her and that she once witnessed defendant say he would rather play basketball than watch the victim on an evening when the victim's mother was going to a concert. Defendant neither moved *in limine* to exclude this testimony nor objected to it. Defendant thus failed to properly preserve his right to appellate review. *See* N.C. R. App. P. 10(b)(1). Because this issue was not preserved for appeal, we may review it only for plain error. *State v. Allen*, 339 N.C. 545, 555, 453 S.E.2d 150, 155 (1995), *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). Defendant also waived plain error review by fail-

ing to allege in his assignment of error that the trial court committed plain error. N.C. R. App. P. 10(c)(4); *State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995). This assignment of error is overruled.

[7] In defendant's final assignments of error, he contends that the trial court abused its discretion in a number of its rulings regarding various prosecutorial statements, questions, and arguments, and in its denial of defendant's requests for peremptory instructions regarding three nonstatutory mitigating circumstances. Defendant first contends that the trial court erred in overruling objections to three similar statements by the prosecutor during jury selection. The prosecutor stated to one prospective juror, "I understand that it takes a lot of courage to vote for the death penalty in a case." He similarly stated to another, "Let me assure you that the State of North Carolina understands what we're asking you to do and we understand it takes a lot of courage." The prosecutor also asked another, "You feel like you have the courage to be able to vote for the death penalty in a particular case?"

Trial judges do not abuse their discretion by allowing prosecutors to ask jurors whether they have the "backbone" to impose the death penalty, *State v. Hinson*, 310 N.C. 245, 252, 311 S.E.2d 256, 261, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984), or whether they are "strong enough to recommend the death penalty," *State v. Smith*, 328 N.C. 99, 130, 400 S.E.2d 712, 729 (1991). Thus, the trial court properly overruled defendant's objections to each of the identified comments about prospective jurors' "courage" or ability to impose the death penalty.

[8] Defendant next complains of questions the prosecutor asked of a defense witness about defendant's testimony in his first trial. Defendant contends that these questions drew attention to the fact that defendant did not testify in the new sentencing proceeding, thus violating defendant's Fifth Amendment rights. The prosecutor asked a defense witness, "But you heard his testimony last time, did you not?" The witness answered that he had heard defendant's prior testimony, and the prosecutor then asked, "And he testified [that the victim] fell from a chair, didn't he?" Defendant did not object to either of these questions about defendant's prior testimony. Later, defendant objected to questions about the impression such testimony left with the jury. The trial court ultimately sustained defendant's objection to questions about the first jury's impression of defendant's prior

testimony. Defendant never raised a constitutional issue before the trial court stemming from any questioning regarding defendant's prior testimony.

In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection, or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. N.C. R. App. P. 10(b)(1). Defendant did not object at trial to the questions he complains of here, and he thus failed to properly preserve this issue for our review. Because this issue was not preserved, we may review it only for plain error. *Allen*, 339 N.C. at 555, 453 S.E.2d at 155. However, defendant also waived plain-error review by failing to allege in his assignment of error that the trial court committed plain error. N.C. R. App. P. 10(c)(4); *Truesdale*, 340 N.C. at 232-33, 456 S.E.2d at 301. Defendant further waived review of any constitutional issue by failing to raise a constitutional issue at the sentencing proceeding. *State v. Elliott*, 344 N.C. 242, 277, 475 S.E.2d 202, 218 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997). Defendant's assignment of error is overruled.

[9] Defendant also complains that the trial court erred in failing to sustain defendant's objection to the prosecutor's characterization of defendant's demeanor at trial as "sniveling." A prosecutor may properly comment on a defendant's demeanor displayed throughout the trial. *State v. Price*, 326 N.C. 56, 85, 388 S.E.2d 84, 100, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Remarks relating to a defendant's demeanor are permissible because the defendant's demeanor is "before the jury at all times." *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980). Thus, the trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's remark.

[10] Defendant next complains that the trial court erred and abused its discretion in denying defendant's requests for peremptory instructions on the following nonstatutory mitigating circumstances: (1) that defendant was kind and considerate to others, (2) that defendant assisted the emergency medical technicians, and (3) that defendant loved his stepdaughter. A defendant is not entitled to a peremptory instruction when the evidence supporting a mitigating circumstance is controverted. *Womble*, 343 N.C. at 683, 473 S.E.2d at 300. Although some evidence suggested that defendant was kind and considerate toward others, other evidence showed that defendant assaulted his

wife twice, became angry with his stepdaughter easily, and scared his stepdaughter. Although defendant called 911 and directed the emergency medical technicians to his injured stepdaughter, defendant also failed to tell the technicians that the victim suffered from injuries around her abdomen as a result of his punches. Because defendant failed to provide full information to the emergency medical technicians, they initially treated the victim for head and spinal injuries rather than for the internal bleeding that ultimately caused her death. A jury could reasonably conclude that defendant's failure to provide full information to the emergency medical technicians hindered, rather than assisted, the technicians in identifying and treating the victim's fatal injuries. Finally, a jury could reasonably conclude that the evidence regarding defendant's brutal and fatal beating of his stepdaughter reflected a lack of love for her. Thus, in each instance in which the trial court denied defendant's request for a peremptory instruction on nonstatutory mitigating circumstances, the evidence was controverted, and the trial court acted properly under *Womble* in denying the request.

[11] We now turn to our duty to ascertain: (1) whether the evidence supports the aggravating circumstances found by the jury; (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 the (e)(9) aggravating circumstance that defendant's murder of his stepdaughter was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). The record fully supports the jury's finding of this aggravating circumstance, and we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We therefore turn to our final duty of proportionality review.

[12] One purpose of proportionality review is to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury." *Lee*, 335 N.C. at 294, 439 S.E.2d at 573. 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). 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 dispro-

portionate. *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 Gaines*, 345 N.C. at 647, 483 S.E.2d at 396, *and Vandiver*, 321 N.C. at 570, 364 S.E.2d at 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). This case is distinguishable from each of those cases.

Defendant contends that his effort to assist the victim by calling 911 renders his death sentence disproportionate. Although defendant does not direct us to any authority to support this assertion, we recognize that we have considered evidence of a defendant's remorse for his action as important in proportionality review. In *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182, we stated that "[w]e deem it important in amelioration of defendant's senseless act that immediately after he shot the victim, he exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." The defendant in *Bondurant* exhibited his remorse as he "readily spoke with policemen at the hospital, confessing that he fired the shot which killed [the victim]." *Id.* at 694, 309 S.E.2d at 183.

Defendant here did not exhibit the kind of conduct we recognized as ameliorating in *Bondurant*. Defendant failed to direct the medical personnel to the victim's fatal injuries and left those injuries concealed beneath her clothing. Further, defendant misled the medical personnel about the victim's injuries, telling them that the victim fell from a chair. Thus, although the defendant called 911, he failed to exhibit sufficient remorse to ameliorate his murder of his stepdaughter as did the defendant in *Bondurant*.

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. *See, e.g.*, *Burr*, 341 N.C. at 315, 461 S.E.2d at 631 (concluding that the death penalty was proportionate in a case in which an infant was shaken and beaten to death by the mother's boyfriend).

After comparing this case to similar cases as to the crime and the defendant, we cannot conclude that this death sentence is excessive or disproportionate. Defendant received a fair capital sentencing pro-

ceeding, free from prejudicial error. Therefore, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. MIKELSON JOSHUA LAPLANCHE A/K/A MICHAEL J. WILLIS

No. 582A97

(Filed 6 November 1998)

1. Criminal Law § 111 (NCI4th Rev.)— *Anders* appeal—State's failure to inform defense of witness statement—no error

There was no error in an appeal from a first- and second-degree murder conviction on an *Anders* brief from the trial court's failure to impose sanctions for the State's failure to inform the defense until jury selection began that a witness had given a statement to police concerning what he saw the night of the shootings. The record demonstrates that there was no intent on the part of the State to withhold the statements, the trial court took prompt action to insure that the statements were provided to defendant, and any information favorable to defendant was fully revealed in sufficient time for him to prepare his case.

2. Constitutional Law § 164 (NCI4th)— murder—*Anders* brief—State's unknowing use of false evidence—no error

There was no prejudicial error in a murder prosecution appealed with an *Anders* brief where defendant contended that the State knowingly called a witness under a false name. There was no evidence that the prosecutor knew that the witness was known by any other name, the identity of the witness was not material to the case, and there is no reasonable likelihood that the fact that the witness was testifying under a false name could have affected the judgment of the jury.

3. Homicide § 253 (NCI4th)— first-degree murder—sufficiency of evidence

In a first-degree murder prosecution appealed with an *Anders* brief, a reasonable inference of premeditation and deliberation could be drawn from substantial evidence that the second victim was killed minutes after defendant killed the first, that the second victim was unarmed and hiding in a closet when he was shot, and that he sustained four gunshot wounds to the forehead at close range.

4. Evidence and Witnesses § 1693 (NCI4th)— murder—photographs of victim—admissible

There was no error in a murder prosecution appealed on an *Anders* brief where defendant objected to introduction of photographs of the victims. The State presented a limited number of photographs, the photographs were used to illustrate the testimony of witnesses, the trial court conducted a thorough review of the photographs and witnesses outside the presence of the jury and concluded that the photographs were relevant and that their probative value outweighed the danger of unfair prejudice, and there is no indication that the jury viewed the photographs repeatedly.

5. Criminal Law § 1034 (NCI4th Rev.)— first- and second-degree murder—consecutive sentences—no abuse of discretion

There was no abuse of discretion in a murder prosecution appealed on an *Anders* brief where the court sentenced defendant to serve forty-nine years for second-degree murder, commencing at the expiration of an unrelated twenty-year sentence then being served, and to life imprisonment for first-degree murder, that sentence to commence at the expiration of the forty-nine-year sentence. It is undisputed that the trial court has express authority under N.C.G.S. § 15A-1354(a) to impose consecutive sentences and there is no meritorious argument that the consecutive sentences violated any constitutional requirement of proportionality.

Justice WYNN did not participate in the consideration or decision of this case.

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

Jr.), J., on 25 August 1995, in Superior Court, Wake County, upon a jury verdict of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for second-degree murder was allowed 30 June 1998. Calendared in the Supreme Court 30 September 1998; determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d) upon motion of the parties.

Michael F. Easley, Attorney General, by Teresa L. Harris, Assistant Attorney General, for the State.

Thomas H. Eagen for defendant-appellant.

FRYE, Justice.

On 7 March 1994, defendant was indicted for the murders of Gail Ann Brown and Curtis Melvin Brice. The two cases were joined for trial. In a capital trial, defendant was convicted by a jury of first-degree murder for the killing of Mr. Brice and second-degree murder for the killing of Ms. Brown. In a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed a sentence of life imprisonment for the first-degree murder conviction. Defendant was also sentenced to forty-nine years' imprisonment for the second-degree murder conviction. Defendant appeals from both convictions.

The State's evidence tended to show that defendant shot both victims multiple times at close range with a .380 Browning semiautomatic handgun. Defendant authorized his trial attorneys to concede that he was guilty of second-degree murder, but to argue that his actions were not premeditated or deliberate. Defendant did not present any evidence and did not testify at the guilt phase of his trial, and he did not testify at his capital sentencing proceeding.

Defendant's appellate counsel, in his brief filed with this Court, states that, "after a conscientious examination of this case, [counsel] has been unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal." However, in accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), *State v. Noble*, 326 N.C. 581, 391 S.E.2d 168 (1990), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), defense counsel discusses five possible assignments of error "that might arguably support the appeal." He also states that he believes the appeal to be "wholly frivolous," but requests that the Court review the record to determine whether there is any prejudicial error. Defendant's attorney has sent a copy of his

brief, the record, and the trial transcript to defendant and has advised defendant that he may independently file written arguments with this Court. Defendant has not submitted a brief. We conclude that defendant's appellate counsel has fully complied with *Anders*.

[1] We have examined the five assignments of error in the record, and we agree with defendant's attorney that an appeal based upon them is wholly frivolous. The first assignment of error addresses the trial court's failure to impose sanctions on the State for a purported violation of discovery rules. Defendant argued at trial that the State should prohibit the testimony of a witness, Steve Griffin, because the State failed to inform the defense, until jury selection began, that Griffin had given a statement to police concerning what he saw the night of the shootings. Defendant contended that Griffin's statement might constitute exculpatory material which the State was obligated to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

The trial court ordered the State to prepare any and all statements of Griffin and give them to the defense at the time Griffin testified, and the State ultimately provided defendant a copy of the interview materials prior to Griffin's testimony. At trial, defendant conceded that the State had complied with discovery requirements and that he had a reasonable time to review the materials. The record demonstrates that there was no intent on the part of the State to withhold Griffin's statements from defendant. The trial court took prompt action to ensure that the statements were provided to defendant. Any information favorable to defendant was fully revealed in sufficient time for him to prepare his case. For these reasons, there was no basis for the imposition of sanctions.

[2] The second assignment of error asserts that the trial court erred in allowing the State to call Steve Griffin and have him testify before the jury when in fact the witness was not "Steve Griffin," but rather "Gaspard Mureau." A defendant is entitled to a new trial when the State knowingly and intentionally uses testimony which is both false and material in order to obtain a conviction. *State v. Williams*, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 870 (1996). In this case, there is no evidence in the record that the prosecutor knew that the witness was known by any name other than Steve Griffin. Further, the identity of the witness was not material to the case. After a complete examination of the evidence presented, we conclude there is no reasonable likelihood that the fact

that this witness may have been testifying under a false name could have affected the judgment of the jury.

[3] The third assignment of error challenges the sufficiency of the evidence to support the charge of first-degree murder. Defendant admitted to the second-degree murder of Gail Brown and Curtis Brice. Thus, the only element at issue was whether defendant committed the murders with premeditation and deliberation. Substantial evidence tended to establish that Mr. Brice was killed minutes after defendant killed Ms. Brown, that Mr. Brice was unarmed and hiding in a closet when he was shot, and that he sustained four gunshot wounds to the forehead fired at close range. When all the evidence in the record is considered in a light most favorable to the State, a reasonable inference of premeditation and deliberation could be drawn from the circumstances; thus, the trial court did not err in submitting the charge of first-degree murder. *See State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 198-99 (1995).

[4] The next assignment of error is that the trial court erred by allowing the State to introduce into evidence, over defendant's objection, photographs of the victims and by allowing the jury to view the photographs repeatedly. "Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). A careful examination of the record reveals that the State presented a limited number of photographs of the victims; that the photographs were used to illustrate the testimony of witnesses; and that the trial court conducted a thorough review of the photographs and witnesses, outside the presence of the jury, prior to allowing the photographs to be admitted into evidence. The trial court concluded that the photographs were relevant and that their probative value outweighed the danger of unfair prejudice. Further, there is no indication that the jury viewed the photographs "repeatedly." There is no meaningful argument on this record that the trial court abused its discretion in admitting these photographs into evidence or that their admission deprived defendant of a fair trial.

[5] The final assignment of error is that the trial court abused its discretion in sentencing defendant to serve forty-nine years' imprisonment for second-degree murder, that sentence to commence at the expiration of an unrelated twenty-year sentence then being served by

defendant, and to life imprisonment for first-degree murder, that sentence to commence at the expiration of the forty-nine-year sentence for second-degree murder. This assignment of error also charges that the consecutive sentencing was disproportionate when compared with that of similarly situated defendants. It is undisputed that the trial court has express authority under N.C.G.S. § 15A-1354(a) to impose consecutive sentences. *See State v. Barts*, 316 N.C. 666, 697, 343 S.E.2d 828, 847 (1986). Additionally, "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). We conclude there is no meritorious argument that the trial court abused its discretion in sentencing defendant to consecutive terms or that, based on the facts of this case, the consecutive sentences violated any constitutional requirement of proportionality.

In accordance with our duty under *Anders*, we have conducted a thorough review of the record, the transcript, and the brief filed by defendant's appellate counsel. We find no error warranting reversal of defendant's convictions or modification of his sentences. We find the appeal to be wholly frivolous.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

COUNTY OF CARTERET v. CURTIS L. LONG; RICHARD RICHARDSON AND WIFE, ARLETHA RICHARDSON; THE STATE OF NORTH CAROLINA (LIENOR)

No. 87A98

(Filed 6 November 1998)

Taxation § 208 (NCI4th)— state tax lien—priority over ad valorem tax lien

State tax liens are superior to local ad valorem tax liens when they are docketed in the office of the county clerk of court prior to the date the ad valorem tax liens are perfected by operation of law.

Appeal by defendant-State 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. 477, 495 S.E.2d 391 (1998), affirming a judgment for plaintiff entered by Waddell, J., on 26 September 1996 in District, Carteret County. Heard in the Supreme Court 12 October 1998.

Bevin W. Wall for plaintiff-appellee.

Michael F. Easley, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the defendant-appellant State of North Carolina.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion by Judge Greene.

REVERSED.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JERRY LEE BALLARD

No. 488A97

(Filed 6 November 1998)

Criminal Law § 1095 (NCI4th Rev.)— second-degree murder—automobile accident—aggravating factor—position of trust or confidence—insufficient evidence

The evidence was insufficient to support the trial court's finding of the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense of second-degree murder arising from the death of a twelve-year-old child in an automobile accident while defendant was intoxicated and being pursued by a deputy sheriff.

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. 316, 489 S.E.2d 454 (1997), finding no prejudicial error in a judgment entered by Johnson (Marcus), J., on 5 June 1996 in Superior Court, Buncombe County. On 10 March 1998, the Supreme Court allowed discretionary review of additional issues. Heard in the Supreme Court 30 September 1998.

Michael F. Easley, Attorney General, by Reuben F. Young, Assistant Attorney General, for the State.

Belser & Parke, P.A., by David G. Belser, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion for the Court of Appeals by Martin (John C.), J., the decision of the Court of Appeals is reversed. We conclude that defendant's petition for discretionary review as to additional issues was improvidently allowed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. DANIEL JUNIOR JACKSON

No. 126PA98

(Filed 6 November 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 626, 495 S.E.2d 916 (1998), finding no error in a jury trial resulting in a judgment entered by Stanback, J., on 31 October 1996 in Superior Court, Durham County. Heard in the Supreme Court 13 October 1998.

Michael F. Easley, Attorney General, by Jill B. Hickey, Assistant Attorney General, for the State.

Mark E. Edwards for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MORGAN v. STATE FARM MUT. AUTO. INS. CO.

[349 N.C. 288 (1998)]

BRADLEY R. MORGAN AND WIFE, TONJA D. MORGAN AND BRADLEY DALE MORGAN v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 175A98

(Filed 6 November 1998)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 129 N.C. App. 200, 497 S.E.2d 834 (1998), affirming the order allowing defendant's motion for summary judgment entered by Phillips, J., on 29 April 1997, in Superior Court, Carteret County. Heard in the Supreme Court on 13 October 1998.

Wheatly, Wheatly, Nobles & Weeks, P.A., by Stevenson L. Weeks, for plaintiff-appellants.

Bailey, Way & Jerzak, by Glenn Bailey, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. HULON LEON WILSON, JR.

No. 97PA98

(Filed 6 November 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 688, 497 S.E.2d 416 (1998), vacating judgment entered 22 May 1996 by Manning, J., in Superior Court, Durham County, and remanding this case to the trial court for imposition of judgment and sentence on false imprisonment. Heard in the Supreme Court 12 October 1998.

Michael F. Easley, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for the State-appellant.

Daniel Shatz for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice WYNN did not participate in the consideration or decision of this case.

POLAROID CORPORATION v. MURIEL K. OFFERMAN, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 70PA98

(Filed 4 December 1998)

1. Taxation § 114 (NCI4th)— corporate income tax—patent infringement damages—test for business or nonbusiness income

The Court of Appeals erred by reversing a trial court's summary judgment for the North Carolina Secretary of Revenue in an action to determine the North Carolina tax classification of monies Polaroid received from a patent infringement suit against Kodak. The definition of business income under the North Carolina Corporate Income Tax Act includes the functional test, based upon canons of statutory construction, pertinent administrative rules, and the legislative history surrounding the Act and the UDITPA, the uniform act upon which the North Carolina act was based. N.C.G.S. § 105-130.4(a)(1).

2. Taxation § 114 (NCI4th)— damages from patent infringement action—lost profits—functional test—business income

The award of lost profits to Polaroid in a patent infringement lawsuit against Kodak constituted business income under the North Carolina Corporate Income Tax Act pursuant to the functional test even though the income was obtained as a result of court proceedings rather than marketplace sales. Once a corporation's assets are found to constitute an integral part of the corporation's regular trade or business, income resulting from the acquisition, management, and/or disposition of those assets constitutes business income regardless of how that income is received. Since the Kodak judgment constitutes income "in lieu of" profits Polaroid ordinarily would have obtained in the marketplace, the "lost profits" award fits squarely within the functional test for the definition of business income.

3. Taxation § 114 (NCI4th)— patent infringement—reasonable royalties—in lieu of profits—business income

Royalties received as a portion of a patent infringement judgment constitute business income under the functional test for purposes of North Carolina's Corporate Income Tax Act. In those

situations where the patentee decides to keep a close monopoly and not grant licenses, the "reasonable royalty" measure in reality represents lost profits and therefore constitutes business income because it is income received in lieu of profits that would constitute business income and be taxable as such absent the infringement.

4. **Taxation § 114 (NCI4th)— patent infringement—prejudgment and post-judgment interest—business income**

Interest received by Polaroid as a result of a patent infringement judgment against Kodak constitutes business income under the North Carolina Corporate Income Tax Act. Although Polaroid argues that the interest could not consist of income "in lieu of" that which it would have earned absent the infringement because it would not have allowed its normal business accounts to be overdue long enough to produce this amount of interest, the interest portion of the judgment was "in lieu of " interest which it otherwise would have received from its own investments. Classifying the interest portion of the judgment as business income fits squarely within the "in lieu of" formula of apportioning damages.

5. **Constitutional Law § 157 (NCI4th)— judgment in patent infringement suit from another state—business income in North Carolina—no due process or commerce clause violation**

North Carolina acted within its constitutional rights by classifying Polaroid's patent infringement judgment against Kodak as business income and taxing it accordingly.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 422, 496 S.E.2d 399 (1998), reversing an order entered by Cashwell, J., on 28 February 1997 in Superior Court, Wake County, and remanding for entry of summary judgment for plaintiff. Heard in the Supreme Court 12 October 1998.

Alston & Bird, P.L.L.C., by Jasper L. Cummings, Jr., for plaintiff-appellee.

Michael F. Easley, Attorney General, by Andrew A. Vanore, Jr., General Counsel; George W. Boylan, Special Deputy Attorney General; and Kay Linn Miller Hobart, Assistant Attorney General, for defendant-appellant.

Multistate Tax Commission, by Paull Mines, General Counsel, amicus curiae.

WYNN, Justice.

Plaintiff Polaroid Corporation ("Polaroid"), a Massachusetts corporation, develops, manufactures, and sells photographic equipment. As one of the world's predominant manufacturers of instant photographic equipment, Polaroid continually develops and refines methods of designing and marketing those products. Under this market-leading approach, Polaroid has obtained an extraordinary number of patents; however, it has never licensed its core technology to an unrelated third party.

In 1976, Polaroid sued Eastman Kodak Company ("Kodak") under 35 U.S.C. § 271(a) to enjoin Kodak's alleged infringement of Polaroid's patents and to recover damages caused thereby. Approximately nine years thereafter, the United States District Court for the District of Massachusetts ruled for Polaroid, enjoined Kodak, and reserved the issue of damages for later determination. *See Polaroid Corp. v. Eastman Kodak Co.*, 641 F. Supp. 828 (D. Mass. 1985), *aff'd*, 789 F.2d 1556 (Fed. Cir.), *cert. denied*, 479 U.S. 850, 93 L. Ed. 2d 114 (1986).

Following a hearing in 1990, that federal district court resolved the damages issue by determining lost profits to be the primary measure of damages and, as required under 35 U.S.C. § 284, by using the alternative "reasonable royalty" measure to set a floor below which the damages could not fall. *See Polaroid Corp. v. Eastman Kodak Co.*, 17 U.S.P.Q.2d 1711 (D. Mass. 1991). Accordingly, the final order awarded Polaroid damages of $233,055,432 for "lost profits," an additional $204,467,854 for "lost profits" determined on the basis of a "reasonable royalty," and prejudgment interest in the amount of $435,635,685.[1]

As stated, the Kodak lawsuit did not occur in North Carolina. None of Polaroid's property or personnel relating to the Kodak lawsuit were located in this state, nor were any of the infringed-upon patents utilized by Kodak. Moreover, Polaroid did not utilize the judgment proceeds in the regular course of its business in North Carolina. Indeed, the record indicates that Polaroid used the proceeds to pay

1. Polaroid ultimately collected $924,526,554, the difference constituting additional postjudgment interest.

income taxes, repay debt, redeem both preferred and common stock, and provide its employees with a special bonus.

In 1991, Polaroid classified the Kodak judgment for North Carolina corporate income-tax purposes as "nonbusiness income" under N.C.G.S. § 105-130.4(a)(1). Hence, Polaroid allocated the entire judgment to Massachusetts, the state of its commercial domicile. The North Carolina Department of Revenue, however, disagreed with Polaroid's classification of the award as nonbusiness income and therefore reclassified it as business income. This reclassification, in turn, increased Polaroid's North Carolina tax liability by $499,177. After Polaroid objected to the reclassification of the award as business income, an administrative hearing was held before the Secretary of Revenue, who upheld the Department of Revenue's decision. Thereafter, Polaroid tendered the requisite amount and filed this refund action under N.C.G.S. § 105-241.4.

The parties filed motions for summary judgment which were heard at the 9 December 1996 Civil Session of the Superior Court, Wake County, before the Honorable Narley L. Cashwell. Judge Cashwell, on 28 February 1997, granted the Secretary of Revenue's motion and denied Polaroid's. Thereafter, Polaroid appealed to the Court of Appeals, which reversed the trial court's decision and remanded to the trial court for summary judgment for Polaroid. *See Polaroid Corp. v. Offerman,* 128 N.C. App. 422, 496 S.E.2d 399 (1998).

On 2 April 1998, this Court granted the Secretary of Revenue's petition for discretionary review to decide whether the damages Polaroid received as a result of the Kodak lawsuit constitute business income under N.C.G.S. § 105-130.4(a)(1).

I. BACKGROUND

[1] North Carolina is one of seventeen states which comprise the associate membership of the Multistate Tax Commission, an administrative agency of the Multistate Tax Compact ("Compact").[2] The Compact was created to promote uniformity and compatibility in significant components of state tax systems and to avoid duplicative taxation. *In re Appeal of Chief Indus.*, 255 Kan. 640, 652, 875 P.2d 278, 286 (1994). One of the Commission's central goals is to promote

2. There are currently twenty-one full-member states of the Multistate Tax Commission. Member states differ from associate-member states in that member states have enacted legislation making the Compact a part of their statutory law. Associate states, on the other hand, though expressing a commitment to the Commission's goals, have not incorporated the Compact into their statutory law.

uniformity in the states' taxation of interstate and foreign commerce. Additionally, uniformity among the states with respect to taxation of interstate and foreign commerce constitutes the basis behind the Compact's almost word-for-word incorporation of the Uniform Division of Income for Tax Purposes Act, 7A U.L.A. 331 (1985) ("UDITPA"). So, given North Carolina's commitment to the Compact and its goal of achieving uniform taxation nationwide, it is not surprising that this state's Corporate Income Tax Act is modeled after UDITPA. *See* N.C.G.S. § 105-130.4 (1989); *National Serv. Indus. v. Powers*, 98 N.C. App. 504, 391 S.E.2d 509, *appeal dismissed and disc. rev. denied*, 327 N.C. 431, 395 S.E.2d 685 (1990).

Under both the North Carolina Corporate Income Tax Act and UDITPA, a multistate or multinational corporation's net taxable income is divided into two classes: (1) business income which is apportioned among the Compact taxing states according to a three-part formula based upon property, payroll, and sales factors, N.C.G.S. § 105-130.4(i); and (2) nonbusiness income which is allocated in a manner whereby it is taxed only by the state with which the asset that generated the income is most closely associated, N.C.G.S. § 105-130.4(h). *See National Serv. Indus.*, 98 N.C. App. at 506-07, 391 S.E.2d at 511.

Thus, at the threshold, a taxpayer must identify and segregate its "business" income from its "nonbusiness" income. Section 105-130.4(a)(1) of the North Carolina Corporate Income Tax Act defines business income as

> income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations.[3]

Nonbusiness income, on the other hand, is defined as "all income other than business income." N.C.G.S. § 105-130.4(a)(5).

In the case *sub judice*, the parties disagree over the proper construction of the statutory definition of business income.

3. North Carolina's definition of business income is slightly broader than the definition found under the Uniform Act. Specifically, North Carolina's definition reads "acquisition, management, and/or disposition of the property," as opposed to the definition in UDITPA, which uses the conjunction "and" rather than "and/or." Moreover, North Carolina's definition utilizes the term "corporation" instead of "taxpayer." These distinctions are irrelevant to the case *sub judice*.

Unquestionably, the first clause of N.C.G.S. § 105-130.4(a)(1) and UDITPA—which provides that business income is "income arising from transactions and activity in the regular course of the corporation's trade or business"—sets forth the "transactional test." Under the transactional test, to determine whether business income is derived from a transaction or activity in the regular course of the corporation's trade or business, one must consider the frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income. *See National Serv. Indus.*, 98 N.C. App. at 508-09, 391 S.E.2d at 512; *Ross-Araco Corp. v. Commissioner of Bd. of Fin. & Revenue*, 544 Pa. 74, 76, 674 A.2d 691, 693 (1996); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 92 (Tenn. 1993). Therefore, the central inquiry under the transactional test revolves around the nature of the particular transaction giving rise to the income. *See Union Carbide Corp.*, 854 S.W.2d at 92.

With respect to the statutory definition's second clause—which provides that business income "includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations"—the parties debate whether this clause simply modifies the first clause or whether it sets forth a second, independent test for business income.

Some state supreme courts read the second clause of UDITPA as simply modifying the first clause and therefore hold that the definition of business income under UDITPA contains only the transactional test. *See, e.g., Phillips Petroleum Co. v. Iowa Dep't of Revenue & Fin.*, 511 N.W.2d 608 (Iowa 1993); *In re Appeal of Chief Indus.*, 255 Kan. 640, 875 P.2d 278; *Federated Stores Realty v. Huddleston*, 852 S.W.2d 206 (Tenn. 1992). However, after these decisions, the legislatures of those states promptly amended their respective tax statutes to explicitly include the functional test within their definition of business income. *See* Act of May 1, 1995, ch. 141, sec. 1, 1995 Iowa Acts 256, 256 (effective retroactive to 1 January 1995); Act of May 17, 1996, ch. 264, sec. 1, 1996 Kan. Sess. Laws 1868, 1868; Act of May 6, 1993, ch. 182, secs. 1, 2, 1993 Tenn. Pub. Acts 442, 442.

Other UDITPA states, however, recognized the second clause as encompassing a second independent test known as the "functional test." *See, e.g., Pledger v. Getty Oil Exploration Co.*, 309 Ark. 257, 831 S.W.2d 121 (1992); *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 695 N.E.2d 481 (1998); *Simpson Timber Co. v. Department*

of Revenue, 326 Or. 370, 953 P.2d 366 (1998); *Ross-Araco Corp. v. Commissioner of Bd. of Fin. & Revenue*, 544 Pa. 74, 674 A.2d 691. These states concluded either that the plain language of UDITPA includes the functional test or that the definition of business income is ambiguous, and therefore the respective state supreme courts had the right to construe the statute to include the functional test.

Under the functional test, income is classified as business income if it arises from the acquisition, management, and/or disposition of an asset that was used by the taxpayer in the regular course of business. *See Texaco-Cities*, 182 Ill. 2d at 268, 695 N.E.2d at 484. When determining whether a source of income constitutes business income under the functional test, the extraordinary nature or infrequency of the event is irrelevant. *Id.*

In the instant case, we are called upon to determine whether the second clause of N.C.G.S. § 105-130.4(a)(1) should be construed as modifying the first clause, thereby mandating that business income include only those transactions that occur in the regular course of the corporation's business, or whether the second clause encompasses the independent functional test, thereby allowing extraordinary transactions to constitute business income so long as the relevant asset was used by the corporation in the regular course of business. This determination is of particular import in this case because Polaroid's recovery from the Kodak lawsuit constitutes an extraordinary or unusual transaction which provided Polaroid with income from assets—the patents—which are integral parts of its regular trade or business operations.

We note that *National Serv. Indus.*, 98 N.C. App. 504, 391 S.E.2d 509, is the only North Carolina case addressing the "business income" issue. In that case, our Court of Appeals was asked to decide whether income obtained from "safe-harbor leases" of electric-generating equipment constituted business income when the taxpayer was not in the business of generating, leasing, or selling electricity or electrical equipment. *Id.* at 508, 391 S.E.2d at 512. In finding that the income constituted business income under North Carolina's statutory definition, the Court of Appeals stated that the determinative question was "whether the return on [the taxpayer's] investment is an integral part of the [taxpayer's] trade or business." *Id.* The Court then concluded that since the lease arrangement was a means of gaining working capital and increasing cash flow for all of the taxpayer's business operations, it accordingly was an "integral part" of the taxpayer's business.

Id. The Court, however, failed to determine the threshold issue of whether this state's statutory definition of business income includes the functional test. We now address this issue of first impression—whether North Carolina's statutory definition of "business income" contains the functional test—by using the canons of statutory construction, pertinent administrative rules, and the legislative history surrounding both the Act itself and UDITPA.

A. STATUTORY CONSTRUCTION

Under the canons of statutory construction, the cardinal principle is to ensure accomplishment of the legislative intent. *See L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, —, 502 S.E.2d 415, 417 (1998). To that end, we must consider "the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). Moreover, undefined words are accorded their plain meaning so long as it is reasonable to do so. *See Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991). Further, the Court will evaluate the statute as a whole and will not construe an individual section in a manner that renders another provision of the same statute meaningless. *See Williams v. Holsclaw*, 128 N.C. App. 205, 212, 495 S.E.2d 166, 170, *aff'd*, 349 N.C. 225, 504 S.E.2d 784 (1998). Significantly, in matters of statutory construction, an ambiguous tax statute shall be strictly construed against the state and in favor of the taxpayer. *See In re Appeal of Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974).

In this case, Polaroid contends, *inter alia*, that under N.C.G.S. § 105-130.4(a)(1), business income "arise[s] from transactions or activit[ies] in the regular course of the corporation's trade or business" and that the phrase "and includes" merely modifies this first clause by providing examples of what fits within the definition. The Secretary of Revenue, on the other hand, argues that the statutory definition of business income contains a compound predicate and thus encompasses both the transactional test and the functional test.

Under the preceding rules of statutory construction, we cannot agree with Polaroid's contention that the second clause of N.C.G.S. § 105-130.4(a)(1) simply modifies that section's first clause by providing examples of business income. First, grammatically speaking, business income constitutes the subject of the sentence, which is thereafter defined by two independent clauses, each with its own verb and subsequent definitional language. In fact, the statute could

grammatically be read as stating: "Business income means income arising from transactions and activity in the regular course of the corporation's trade or business, and [business income] includes income from tangible and intangible property . . . ." That is, N.C.G.S. § 105-130.4(a)(1) does not contain a misplaced modifier, but rather utilizes a compound predicate to illustrate that "business income" includes the definitions set forth in both the first and second clauses. *See Kroger Co. v. Department of Revenue*, 284 Ill. App. 3d 473, 479, 673 N.E.2d 710, 713 (1996), *appeal denied*, 171 Ill. 2d 567, 677 N.E.2d 966 (1997).

Moreover, the General Assembly's decision to employ different language between the two clauses further demonstrates its intention of defining business income in a manner encompassing both the transactional test and the functional test. Indeed, the first clause states that business income can arise from "transactions or activity" in the "regular course" of the corporation's "trade or business." N.C.G.S. § 105-130.4(a)(1). The second clause, on the other hand, states that business income can arise from "property" which constitutes "integral parts" of the corporation's "trade or business operations." *Id.* Therefore, the triggering events in the first clause—"transactions or activities"—are replaced in the second phrase by the triggering events of "acquir[ing], manag[ing], and/or dispos[ing] of . . . property." Moreover, the predicate phrase found in the first clause—"in the regular course of the corporation's trade or business"—is replaced in the second clause with "integral parts of the corporation's regular trade or business operations." Accordingly, the second clause contains a definition distinct from that set forth in the first.

Our reading of N.C.G.S. § 105-130.4(a)(1) comports with that of other state supreme courts which have confronted this exact argument with respect to similarly worded statutes. For example, in *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 695 N.E.2d 481, Texaco-Cities argued that income is business income only if it arises from transactions and activities occurring in the regular course of the taxpayer's business. The Supreme Court of Illinois, in rejecting this argument, stated:

> The first clause consists of general language encompassing all activity in the "regular course of the taxpayer's trade or business." The second clause enlarges this definition to include income from property, as long as its "acquisition, management,

and disposition" constitute "integral parts of the taxpayer's regular trade or business operations."

Id. at 270, 695 N.E.2d at 485 (quoting 35 Ill. Comp. Stat. 5/1501(a)(1) (West 1994)). The court then concluded that the functional test was consistent with the plain language of the statute. *Id.*

Similarly, in *Simpson Timber Co. v. Department of Revenue*, 326 Or. 370, 953 P.2d 366, the Supreme Court of Oregon held that its definition of business income—also modeled after UDITPA—encompassed the functional test.[4] In *Simpson*, the Oregon court was asked to determine whether monies received by Simpson Timber as compensation for the federal government's condemnation of its timberland and timber constituted business income. *Id.* at 374, 953 P.2d at 368. Simpson Timber argued that because it did not voluntarily dispose of the property, the disposition could not constitute an integral part of its regular business operations. *Id.* at 375, 953 P.2d at 369. The Supreme Court of Oregon, in rejecting this argument, construed Oregon's definition of business income as including "[i]ncome from tangible and intangible property . . . 'if' the 'acquisition,' 'management,' 'use,' and 'disposition' of [it] are integral parts of taxpayer's regular business operations." *Id.* at 374, 953 P.2d at 369 (quoting Or. Rev. Stat. § 314.610(1) (1987)). The Oregon court concluded that since the timber and the land on which it was growing were assets admittedly acquired and used as integral parts of Simpson Timber's business, the income received from those assets, no matter how acquired, constituted business income. *Id.* at 376, 953 P.2d at 370.

New Mexico also applies an approach which, though utilizing the phrase "use test" instead of "functional test," appears to be consistent with our holding. *See Kewanee Indus. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993). In *Kewanee*, the Supreme Court of New Mexico was asked to determine whether rental income received from dragline[5] leases constituted business income when the lessor was an oil and gas company which had no history of leasing or financing assets of

4. Oregon's definition of business income differs slightly from North Carolina's definition in that Oregon's definition refers to the "acquisition, the management, *use or rental*, and the disposition of property constitut[ing] integral parts of the taxpayer's regular trade or business operations." Or. Rev. Stat. § 314.610(1) (1987) (emphasis added). The addition of "use or rental" to the definition does not change the analysis with respect to whether the second clause of the definition constitutes an independent test for business income.

5. A dragline is a large piece of equipment used in the surface mining of hard minerals.

any kind. *Id.* at 786, 845 P.2d at 1240. The New Mexico court, in classifying the income as business income, defined the use test as an inquiry into whether the income received constituted a gain beyond mere appreciation from a passive investment. *Id.* at 789, 845 P.2d at 1243. Significantly, the New Mexico court cited a lower court's construction of section 72-15A-17(A) (now codified as N.M. Stat. Ann. § 7-4-2), defining business income as including income arising from " 'situations in which ". . . the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." ' " *Id.* at 788, 845 P.2d at 1242 (quoting *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue*, 88 N.M. 521, 522-23, 543 P.2d 489, 490-91 (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1975)).

Lastly, we note that our holding is consistent with that of the Supreme Court of Pennsylvania, which found its definition of business income to encompass both the transactional and functional tests. *See Laurel Pipe Line Co. v. Commissioner of Bd. of Fin. & Revenue*, 537 Pa. 205, 642 A.2d 472 (1994). In *Laurel*, the Pennsylvania court partly analyzed the issue of whether its UDITPA-based definition of business income included the functional test by referring to other states' discussion on the issue. *Id.* at 208, 642 A.2d at 475. The Pennsylvania court concluded that the second clause of the definition sets forth an alternative and independent "functional" test by which earnings may be characterized as business income if the earnings arise from the acquisition, management, and disposition of property which constitutes integral parts of the taxpayer's regular trade or business. *Id.* Specifically, the court stated that under the functional test, the gain arising from the sale of an asset will be classified as business income if the asset produced business income while it was owned by the taxpayer. *Id.* at 210, 642 A.2d at 475.

In reaching a conclusion contrary to both this Court's and other state supreme courts' rulings, our Court of Appeals relied upon a 1917 probate case, *Miller v. Johnston*, 173 N.C. 62, 69, 91 S.E. 593, 597 (1917), wherein this Court interpreted the phrase "including the five front half-acre lots" in a manner such that the term "including" could not be construed as "in addition to." The Court of Appeals improperly relied upon this holding.

First, *Miller* involved discerning the intent of a devisee, not statutory construction. Moreover, this Court construed the modifying term "including," not the conjunctive phrase "and includes" at issue here.

Notably, subsequent to *Miller*, this Court stated that the word "includes," as set forth in this state's Turnpike Authority Act, indicates the General Assembly's intention to enlarge, not limit, the statutory definition. *See N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965); *see also Baker v. Chavis*, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (1991) (concluding that the phrase "shall include" indicates an intent to enlarge the statutory definition, not limit it). Therefore, we conclude that the Court of Appeals erroneously relied on our prior ruling in *Miller* when it determined that the phrase "and includes" cannot be read as meaning "in addition to."

Given our determination that the plain language of N.C.G.S. § 105-130.4(a)(1) encompasses both the transactional test and the functional test, we now focus upon the second clause's plain language to define the functional test. First, we note that the phrase "acquisition, management, and/or disposition" contemplates the indicia of owning corporate property. *See Texaco-Cities*, 182 Ill. 2d at 270, 695 N.E.2d at 485. Moreover, Webster's Dictionary defines "integral" as meaning "essential to completeness." *Merriam-Webster's Collegiate Dictionary* 607 (10th ed. 1993). Therefore, reading the second clause as a whole, business income includes income obtained from acquiring, managing, and/or disposing of property which is essential to the corporation's business operations.

In sum, both the general rules of statutory construction and the plain language of N.C.G.S. § 105-130.4(a)(1) lend support to the conclusion that this state's definition of business income for corporate income-tax purposes includes both the transactional test and the functional test. To hold otherwise would be to improperly read the conjunctive phrase "and includes" as the modifying term "including." Moreover, it would ignore general rules of grammar and syntax by displacing business income as the overriding subject for that section. *See Valentine v. Gill*, 223 N.C. 396, 398, 27 S.E.2d 2, 5 (1943) ("we need hardly go much further than the grammatical construction and syntax of the law to find its meaning").

B. ADMINISTRATIVE RULE 17 NCAC 5C .0703

We find further support for our ruling in North Carolina Administrative Rule 17 NCAC 5C .0703. "The construction adopted by the administrators who execute and administer a law in question is one consideration where an issue of statutory construction arises." *John R. Sexton & Co. v. Justus*, 342 N.C. 374, 380, 464 S.E.2d 268, 271

(1995). This Court has said that such construction is "strongly persuasive" and therefore is entitled to "due consideration." *See Shealy v. Associated Transp., Inc.*, 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960). Indeed, "an interpretation by the Secretary of Revenue is *prima facie* correct. When the Secretary of Revenue interprets a law by adopting a rule or publishing a bulletin on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation." *In re Petition of Vanderbilt Univ.*, 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960); *see* N.C.G.S. § 105-264 (Supp. 1994).

Since the inception of the North Carolina Corporate Income Tax Act, the Secretary of Revenue has adopted the UDITPA approach of defining business income to include both the transactional test and the functional test. The UDITPA approach has been reflected in the Secretary of Revenue's administrative rules since 1976 and is currently set forth in North Carolina Administrative Rule 17 NCAC 5C .0703—labeled "Business and Nonbusiness Income"—which provides in pertinent part:

> The classification of income by the labels customarily given them, such as interest, rents, royalties, capital gains, is of no aid in determining whether that income is business or nonbusiness income. The gain or loss recognized on the sale of property, for example, may be business income or nonbusiness income depending upon the relation to the taxpayer's trade or business:
>
> . . . .
>
> (2) *A gain or loss from the sale, exchange or other disposition of real or personal property constitutes business income if the property while owned by the taxpayer was used to produce business income. . . .*
>
> . . . .
>
> (5) Patent and copyright royalties are business income if the patent or copyright was created or used as an integral part of a principal business activity of the taxpayer.

17 NCAC 5C .0703(2), (5) (June 1998) (emphasis added). The plain language of this rule clearly demonstrates the Secretary of Revenue's interpretation of business income as encompassing the functional test. Moreover, Polaroid has failed to produce sufficient evidence to rebut the presumption that the Secretary of Revenue's interpretation is *prima facie* correct. Therefore, we conclude that rule 17 NCAC 5C .0703 further supports our holding that business income, as defined

under the North Carolina Corporate Income Tax Act, includes the functional test.

Further, it is significant that the Secretary of Revenue's interpretation, as codified in rule 17 NCAC 5C .0703, has remained virtually unchanged for over twenty years. On the other hand, the General Assembly has revised the North Carolina Corporate Income Tax Act numerous times, and the specific statute at issue in the case *sub judice* has been amended six times. *See* Act of June 18, 1982, ch. 1212, 1981 N.C. Sess. Laws (Reg. Sess. 1982) 108, 108 (clarifying when a corporation may apportion part of its net income or net loss to another state); Act of Aug. 13, 1987, ch. 804, sec. 2, 1987 N.C. Sess. Laws 1695, 1695 (providing for apportionment of business income of an air or water transportation corporation); Act of June 27, 1988, ch. 994, sec. 1, 1987 N.C. Sess. Laws (Reg. Sess. 1988) 176, 176 (amending the formula used to apportion the income of multistate corporations to this state for income taxation and to conform the formula for payment of estimated taxes to the federal formula); Act of July 24, 1993, ch. 532, sec. 12, 1993 N.C. Sess. Laws 2239, 2264 (changing mandatory language to permissive); Act of June 29, 1995, ch. 350, sec. 3, 1995 N.C. Sess. Laws 828, 829 (making conforming changes to tax law in light of federal law preempting state regulation of most motor freight carriers); Act of Aug. 2, 1996, ch. 14, sec. 5, 1995 N.C. Sess. Laws (2d Extra Sess. 1996) 589, 592 (reforming unconstitutional tax provisions). We reiterate that the legislature is always presumed to act with full knowledge of prior and existing law and that where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that interpretation. *See State v. Benton*, 276 N.C. 641, 658-59, 174 S.E.2d 793, 804-05 (1970). We further reiterate that "long acquiescence in the practical interpretation of a statute is entitled to great weight in arriving at its meaning." *State v. Emery*, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944). Thus, the absence of any pertinent amendment for so long a period, especially given the General Assembly's willingness to amend other provisions of the Corporate Income Tax Act, indicates legislative approval of the Secretary of Revenue's construction of the statute.

In summation, we conclude that the Secretary of Revenue's interpretation of business income as defined under N.C.G.S. § 105-130.4(a)(1) is entitled to due consideration and considered *prima facie* correct. This *prima facie* presumption is significant given Polaroid's failure to adequately rebut the Secretary of

Revenue's interpretation. Moreover, the General Assembly's failure to amend N.C.G.S. § 105-130.4(a)(1) demonstrates its implied acquiescence in the Secretary of Revenue's interpretation, thereby providing further support for our conclusion that the North Carolina Corporate Income Tax Act defines business income in a manner encompassing both the transactional and functional tests.

C. LEGISLATIVE HISTORY

Additional support for our determination that North Carolina's definition of business income includes the functional test can be found in the legislative history surrounding both the North Carolina Corporate Income Tax Act and UDITPA. In determining the legislative intent behind North Carolina's Corporate Income Tax Act, this Court should consider not only the language utilized by the General Assembly, but also the history, spirit, and goals of the Act. *See Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 479, 500 S.E.2d 439, 442 (1998). Also, because it is well established that the North Carolina Corporate Income Tax Act was based upon UDITPA and prefaced upon meeting the goals of the Multistate Tax Compact, the policies underlying both UDITPA and the Compact lend a better understanding of the meaning behind North Carolina's Act.

UDITPA was designed to apportion among the states in which a multistate or multinational corporation does business the fair amount of net taxable business income earned by the corporation's activities in each state. *See Pledger*, 309 Ark. at 262, 831 S.W.2d at 124. UDITPA was needed because the divergence in state tax laws unfairly subjected multistate corporations to tax liability on greater than 100% of their income and debilitated their profit margins by increasing their compliance costs. *Id.* UDITPA was drafted to reduce this diversity and to therefore eliminate the accompanying overtaxation and high compliance costs associated with it.

We note that the uniform definition of business income, as set forth in UDITPA, finds its origins in early California jurisprudence. James H. Peters, *The Distinction Between Business Income and Nonbusiness Income*, 25 S. Cal. Tax Inst. 251, 272 (1973). Interestingly, the original draft of UDITPA failed to distinguish between business and nonbusiness income and was amended to reflect such a distinction only after the State of California suggested the value of such a distinction. *Id.* at 275. Ultimately, the uniform definition of business income was modeled after a proposed definition submitted by John Warren of California to the California State Tax Board in

February 1965. *Id.* In that letter, Mr. Warren discussed the allocation of royalty income and stated:

> [W]e felt the treatment of royalties was in conflict with the decisions of the State Board of Equalization . . . which had upheld formula apportionment of such income where the acquisition, management and disposition of the patents or copyrights constituted integral parts of the taxpayer's regular trade or business.

Id. The final draft of UDITPA encompasses this formula apportionment approach and thereby provides for the direct allocation of income only to the extent that such income is classified as nonbusiness income. *Id.; see also Texaco-Cities*, 182 Ill. 2d at 272, 695 N.E.2d at 486 (stating that the functional test was "adopted directly from the comment underlying the UDITPA").

Further, in *In re Appeal of Borden, Inc.*, Cal. St. Bd. of Equal., Cal. Tax Rep. (CCH) ¶ 205-616 (Feb. 3, 1997), the California Board of Equalization was faced with the question of whether the second prong of UDITPA contained the functional test. The Board determined that the uniform definition of business income encompassed the functional test and therefore held that "income from assets which are an integral part of the taxpayer's business is subject to apportionment by formula, regardless of whether the income may arise from an occasional or extraordinary transaction." *Id.* at 24, Cal. Tax Rep. (CCH) ¶ 205-616, at 14,897-59. In so ruling, the Board noted the recent rejections of the functional test by two other states but dismissed them as improper because those courts did not consider the fact that the uniform definition was derived from California jurisprudence and did not examine the uniform regulations interpreting the definition. *Id.* at 26, Cal. Tax Rep. (CCH) ¶ 205-616, at 14,897-59. Moreover, the Board noted that these decisions were in direct conflict with the Multistate Tax Commission's regulations. *Id.*

The preceding probe into the policies underlying the drafting of UDITPA convincingly shows that the UDITPA definition of business income encompasses the functional test. As stated, the North Carolina Corporate Income Tax Act was patterned after UDITPA. *See National Serv. Indus.*, 98 N.C. App. at 506, 391 S.E.2d at 511. Moreover, the timing of the adoption of the North Carolina Corporate Income Tax Act—effective 1 July 1967—illustrates that North Carolina was reacting to the nationwide trend of adopting legislation which increased the uniformity and compatibility of state income-tax laws with respect to interstate commerce. Therefore, we conclude

that North Carolina embraced both the uniform definition and the national trend and accordingly adopted the functional test as part of its definition of business income.

II. APPLICATION

[2] Given our determination that the North Carolina Corporate Income Tax Act defines business income to include the functional test, we must now consider the question of whether Polaroid's award in the Kodak lawsuit constitutes business income under that test. As stated, Polaroid's damage award comprised three separate categories of relief: (1) $233,055,432 for "lost profits," (2) $204,467,854 for "lost profits" determined on the basis of a "reasonable royalty" as required under 35 U.S.C. § 284, and (3) $487,003,268 constituting prejudgment and postjudgment interest. We will address the classification of each category respectively.

A. LOST PROFITS

It is undisputed that Polaroid's patents are an "integral part of its regular trade or business operations." Indeed, in its brief, Polaroid notes that Kodak's infringement constituted a "potentially devastating threat to the business of Polaroid" and that protection of Polaroid's patents was crucial to its ability to carry on its regular trade or business operations. Therefore, the patents can be characterized only as integral income-producing assets.

In the case *sub judice*, the question becomes whether income from these integral assets should be classified as nonbusiness income when that income is obtained as a result of court proceedings, rather than from marketplace sales. We hold that once a corporation's assets are found to constitute integral parts of the corporation's regular trade or business, income resulting from the acquisition, management, and/or disposition of those assets constitutes business income regardless of how that income is received.[6]

First, we note United States Supreme Court jurisprudence indicating that damages recovered by a patentee under 35 U.S.C. § 284 constitute compensation for any pecuniary loss suffered and are intended to return the patentee to the same condition in which it would have been had the infringement not occurred. *See Aro Mfg. Co.*

6. We do note, however, that cases involving liquidation are in a category by themselves. Indeed, true liquidation cases are inapplicable to these situations because the asset and transaction at issue are not in furtherance of the unitary business, but rather a means of cessation.

v. Convertible Top Replacement Co., 377 U.S. 476, 507, 12 L. Ed. 2d 457, 480 (1964). Indeed, the Supreme Court has explicitly stated that under the current statutory framework, an infringed-upon patentee can recover only its *damages*, as opposed to recovering profits obtained by the infringer or other monies punitive in nature. *Id.* at 506, 12 L. Ed. 2d at 480.

Using the aforementioned cases for general guidance, we now turn more specifically to two state supreme court cases outside of this jurisdiction which more directly guide us to our result. First, in *Simpson Timber*, the Supreme Court of Oregon was asked to determine whether condemnation proceeds resulting from a government taking of timberland and timber constituted business income. *Simpson Timber*, 326 Or. 370, 953 P.2d 366. The Oregon court, in classifying the proceeds as business income, first noted that the ultimate sources of the income were the standing timber and the land upon which it was growing—assets admittedly acquired and used as integral parts of the taxpayer's business. *Id.* at 376, 953 P.2d at 370. The court continued: "[W]hen the timber and land on which it was growing were disposed of by an involuntary sale to the government through condemnation, that disposition was as much an integral part of the taxpayer's regular business operations for purposes of the statutory definition as were the initial acquisition, management, and use of the timberland." *Id.* Thus, the court held that "[w]hether the conditions and terms of that sale were set by law, including constitutional law, does not alter that concept. Nor does it alter the additional fact that the compensation paid by the government for the timberland was compensation paid for property that the taxpayer intended to use to produce 'business income.' " *Id.* at 375, 953 P.2d at 369. Therefore, the court implicitly held that income received "in lieu of" prospective profits—income that would normally be characterized as business income—is considered business income for corporate income-tax purposes.

Similarly, in *Dover Corp. v. Department of Revenue*, 271 Ill. App. 3d 700, 648 N.E.2d 1089, *appeal denied*, 163 Ill. 2d 552, 657 N.E.2d 618 (1995), an Illinois appellate court held that a patent-infringement judgment representing reasonable royalties constituted business income under UDITPA. In so ruling, that court stated that "royalty income does not become nonbusiness income merely because Dover enforced its right to receive such income through litigation." *Id.* at 712, 648 N.E.2d at 1097. That is, the court determined that the patents themselves were integral assets used in Dover's regular trade or busi-

ness operations, and therefore any income obtained from the assets via the judgment constituted income "in lieu of" profits it normally would have received absent the infringement. Accordingly, since those profits would have been taxed as business income, any monies received "in lieu of" those profits should be taxed similarly.

We find the holdings in *Simpson Timber* and *Dover* persuasive. It is undisputed that the Kodak judgment was designed to compensate Polaroid for Kodak's infringement of its patents. Moreover, it is undisputed that Polaroid's patents were an integral part of its regular trade or business operations. In fact, Polaroid's primary source of income results from the sale of products based upon its patents. Therefore, given that the Kodak judgment constituted "income" stemming from the "acquisition, management, and/or disposition" of Polaroid's integral assets and in lieu of normal marketplace sales, we hold that it should be classified as business income for North Carolina corporate income-tax purposes.

Further, this Court is guided by United States Supreme Court precedent with respect to taxing litigation awards. In *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 80 L. Ed. 500 (1936), the United States Supreme Court held that in patent-infringement cases, compensatory damages representing lost profits should be taxed in the same manner as if the profits were earned in the normal manner. Significantly, both statutory law and United States Supreme Court jurisprudence provide that patent-infringement damage awards are intended to put the infringed-upon party in the same pecuniary position as if the infringement had never occurred. *See* 35 U.S.C. § 284 (1981); *Aro Mfg. Co.*, 377 U.S. at 507, 12 L. Ed. 2d at 480. These damage awards implicitly provide infringed-upon parties with the profits they would have received from sales absent the infringement—profits which undeniably would have been taxable as business income. Since the Kodak judgment constitutes income "in lieu of" profits Polaroid ordinarily would have obtained in the marketplace, we hold that the "lost profits" award fits squarely within the functional test and this state's definition of business income.

B. "REASONABLE ROYALTY"

[3] We now consider whether the portion of Polaroid's judgment which represents "reasonable royalties" constitutes business income under the functional test. As stated, Polaroid has never licensed out its patents to an unrelated third party, and accordingly, Polaroid has

never received royalties as a percentage of its business income. Therefore, Polaroid argues that under the "in lieu of" approach set forth in the preceding section of this opinion, this Court cannot find that the "reasonable royalties" it recovered under the Kodak judgment constituted income "in lieu of" that which it would have received absent Kodak's infringement.

The Secretary of Revenue, on the other hand, argues that North Carolina Administrative Rule 17 NCAC 5C .0703(5) is directly on point. Under rule 17 NCAC 5C .0703(5), "[p]atent and copyright royalties are business income if the patent or copyright was created or used as an integral part of a principal business activity of the taxpayer." Therefore, the Secretary of Revenue argues that since there is no dispute that the patents at issue were created and used as integral parts of Polaroid's business, the amount Polaroid received as a reasonable royalty is properly classified as business income. Neither of these arguments guides our determination of this issue.

Instead, we consider the pertinent patent-law statute, 35 U.S.C. § 284. Under that statute, a party whose patent is found to be infringed upon is entitled to recover "*damages* adequate to compensate for the infringement, but in no event less than a *reasonable royalty* for the use made of the invention by the infringer, together with interest and costs as fixed by the court." (Emphasis added.) Significantly, section 284 contemplates a distinction between "damages" and "profits" recoverable in a patent-infringement suit: "In patent nomenclature, what the infringer makes is 'profits,' what the owner of the patent loses by such infringement is 'damages.' " *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448, 451, 80 L. Ed. 1274, 1278 (1936).

Prior to 1946, the statutory precursor to section 284, Rev. Stat. § 4921, allowed both damages and profits to be recovered. *See Aro Mfg. Co.*, 377 U.S. at 505, 12 L. Ed. 2d at 479. In 1946, however, Congress amended the statute to allow an infringed-upon patentee to recover only "damages." *See* 35 U.S.C. § 284; *Aro Mfg. Co.*, 377 U.S. at 505, 12 L. Ed. 2d at 479. The purpose of this change was to ensure that a patentee's recovery was limited only to those "damages" it suffered as a result of the infringement. *Aro Mfg. Co.*, 377 U.S. at 505, 12 L. Ed. 2d at 479. Indeed, prior to this amendment, a patentee could recover not only the damages it suffered as a result of the infringement, but also any *profits* made by the infringer so as to force the infringer to disgorge the fruits of the infringement. *See General*

Motors Corp. v. Devex Corp., 461 U.S. 648, 654, 76 L. Ed. 2d 211, 217 (1983). The patentee could recover those profits even if the infringement itself caused the patentee no harm. *Id.*

As stated, 35 U.S.C. § 284 allows the award of a reasonable royalty so long as the amount constitutes "damages" resulting from the infringement. *See Aro Mfg. Co.*, 377 U.S. at 505, 12 L. Ed. 2d at 479. These damages, in turn, are defined as constituting " 'compensation for the pecuniary loss [the patentee] has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts.' " *Id.* at 507, 12 L. Ed. 2d at 480 (quoting *Coupe v. Royer*, 155 U.S. 565, 582, 39 L. Ed. 263, 269 (1895)). Moreover, these damages "constitute 'the difference between [the patentee's] pecuniary condition after the infringement and what [its] condition would have been if the infringement had not occurred.' " *Id.* (quoting *Yale Lock Mfg. Co. v. Sargent*, 117 U.S. 536, 552, 29 L. Ed. 954, 960 (1886)). Thus, the pertinent question to be answered when determining damages is "how much had the Patent Holder . . . suffered by the infringement. And that question [is] primarily: had the Infringer not infringed, what would Patent Holder-Licensee have made?" *Livesay Window Co. v. Livesay Indus.*, 251 F.2d 469, 471 (5th Cir. 1958).

The preceding rules used to determine damages in patent-infringement suits apply in two situations. In the first situation, the patentee exercises its patent rights by granting licenses to others, and the infringer is liable for damages because it acted without a license. *See Marvel Specialty Co. v. Bell Hosiery Mills, Inc.*, 386 F.2d 287, 290 (4th Cir. 1967), *cert. denied*, 390 U.S. 1030, 20 L. Ed. 2d 286 (1968). In this situation, the court will determine a reasonable royalty by inquiring into whether the patentee has established a fixed royalty. *Id.* If no fixed royalty has been established, the court will thereafter inquire into what constitutes a reasonable royalty given the facts presented. *Id.* The second situation involves those times when the patentee exercises its patent rights through a policy of not licensing out its patents and thereby maintains the patent and any accompanying invention as a close monopoly. *Id.* In this situation, there is no established royalty, and therefore the patentee's damages consist of "the money [the patentee] would have realized from a monopoly if there had been no infringement as, for example, the sales [the patentee] would have made and the profits [the patentee] would have realized, or what would have been a reasonable royalty had the patentee undertaken to grant licenses." *Id.* In either case, if the patentee can-

not prove its damages by a sufficient showing of lost profits or the establishment of a fixed royalty, the court must establish a reasonable royalty to provide the patentee with adequate compensation for the infringement. *See Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978).

There are two established means of determining a reasonable royalty. The first requires an analysis into the infringer's own internal profit projections and motives. *See TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 898 (Fed. Cir.), *cert. denied*, 479 U.S. 852, 93 L. Ed. 2d 117 (1986). The second, more common, approach involves the construction of a hypothetical negotiation between a willing licensor and a willing licensee. *See Trilogy Communications, Inc. v. Comm Scope Co.*, 754 F. Supp. 468, 512 (W.D.N.C. 1990); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870, 30 L. Ed. 2d 114 (1971). In either case, "the calculation is not a mere academic exercise in setting some percentage figure as a 'royalty.' The determination remains one of *damages* to the injured party." *Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568, 1574 (Fed. Cir. 1988). In reality, this device is a legal fiction designed to compensate when profits are not provable, partly because the patentee decided not to license its patents. *Id.* Moreover, it comports with the overarching goal of patent-infringement damage law to place the patent holder in as good a position as that in which it would have been absent the infringement. *See General Motors Corp.*, 461 U.S. at 655, 76 L. Ed. 2d at 217.

The preceding consideration of the pertinent patent-law statute and relevant case law convincingly demonstrates that the term "reasonable royalty," as set forth in 35 U.S.C. § 284, is a legal fiction used to help measure the damages an infringed-upon party is entitled to recover when that party is unable to produce satisfactory evidence of lost profits. Significantly, case law illustrates that "reasonable royalties" are used to return the patentee to the same pecuniary position it would have been in absent the infringement. Indeed, even a cursory reading of the trial court's damages opinion reveals that the trial judge based his "reasonable royalty" decision upon what he believed Polaroid would have earned absent Kodak's infringement. It follows that in those situations where the patentee decides to keep a close monopoly and not grant licenses, the "reasonable royalty" measure, in reality, represents lost profits. *See Marvel Specialty Co.*, 386 F.2d at 290. Therefore, in those situations where the patentee decides not

to license out its patents, we equate damages recovered under the label "reasonable royalties" with lost profits.

Given our determination that the reasonable royalties equate to lost profits, we accordingly reject Polaroid's argument that this aspect of its recovery cannot be assessed as income "in lieu of" lost profits. Moreover, because this part of the award does not, in reality, represent royalties, we reject the Secretary of Revenue's application of rule 17 NCAC 5C .0703(5). Rather, we hold that Polaroid's "reasonable royalty" recovery constitutes business income because it is income received "in lieu of" profits that, absent the infringement, would constitute business income and be taxable as such.

C. PREJUDGMENT AND POSTJUDGMENT INTEREST

[4] Lastly, Polaroid contends that any interest it received as a result of the Kodak judgment does not constitute business income because it "would not have allowed its normal business accounts to be overdue long enough to produce over $450 million in interest." That is, the interest could not consist of income "in lieu of" that which would have been earned absent the infringement. Again, we find Polaroid's argument without merit.

According to the United States Supreme Court, a court determining damages in a patent-infringement lawsuit should ordinarily consider interest "to ensure that the patent holder is placed in as good a position as that in which he would have been had the infringer entered into a reasonable royalty agreement." *General Motors Corp.*, 461 U.S. at 655, 76 L. Ed. 2d at 217. Indeed, the United States Supreme Court has held that an award of prejudgment interest to a patentee was necessary to ensure full, complete, and adequate compensation since the patentee's damages consisted not only of the value of the lost royalty payments, but also of the foregone use of the money between the time of the infringement and the date of the judgment. *Id.*; *see also Waite v. United States*, 282 U.S. 508, 509, 75 L. Ed. 494, 495 (1931). Thus, United States Supreme Court jurisprudence demonstrates that an infringed-upon patentee's recovery of interest constitutes compensation for income it would have earned absent the infringement—income that would have been taxable as business income had it been obtained in the marketplace as opposed to the courtroom. Because the interest portion of the Kodak judgment constituted interest Polaroid received "in lieu of" that which it otherwise would have received from its own investments, classifying the inter-

est portion of the judgment as business income fits squarely within our "in lieu of" formula of apportioning damages.

We find further support for our conclusion in North Carolina Administrative Rule 17 NCAC 5C .0703(3). Under rule 17 NCAC 5C .0703(3):

> Interest income is business income if the intangible with respect to which the interest is received arises out of or was created by a business activity of the taxpayer and in those situations where the purpose for acquiring the intangible is directly related to the business activity of the taxpayer.

In this case, Polaroid's patents arose out of and were created by Polaroid's business activities. Further, Polaroid's purpose for acquiring the patents is undoubtedly related to its primary business activity of selling instant photographic equipment. Additionally, the interest income at issue arose out of the Kodak lawsuit and accompanying judgment. The interest represented income lost as a result of Polaroid's being unable to earn interest on the monies it should have received from sales absent the infringement. Thus, to the extent that the damage award constitutes prejudgment and postjudgment interest, it is properly characterized as business income.

With respect to Polaroid's argument that it would not have allowed that much interest to accrue in overdue accounts, we note that a decision to award interest in a patent-infringement lawsuit is in the trial court's discretion and will be set aside only if it constitutes an abuse of discretion. *See General Motors Corp.*, 461 U.S. at 657, 76 L. Ed. 2d at 219. Because Polaroid has failed to produce adequate evidence demonstrating that the trial court abused its discretion, we affirm the amount of the interest awarded.

III. CONSTITUTIONALITY

[5] Finally, Polaroid argues that should we construe N.C.G.S. § 105-130.4(a) as including the functional test, then we must conclude that it violates the Due Process Clause of the United States Constitution by taxing income it has no power to tax and that it violates the Commerce Clause by overtaxing corporations doing business in interstate commerce. *See Allied-Signal, Inc. v. Director of Div. of Taxation*, 504 U.S. 768, 119 L. Ed. 2d 533 (1992) (holding a state may not constitutionally tax income unless it is attributable to "business activities" within the state). We find Polaroid's argument without merit.

Under the United States Constitution, a corporation's "entire net income . . . generated by interstate as well as intrastate activities [can] be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 460, 3 L. Ed. 2d 421, 428 (1959). North Carolina has determined its fair taxable share utilizing a formula which examines the in-state aspects of a corporation's property, payroll, and sales. *See* N.C.G.S. § 105-130.4(i). Moreover, the apportionment formula utilized by North Carolina is the same one the Supreme Court found constitutional in *Butler Bros. v. McColgan*, 315 U.S. 501, 86 L. Ed. 991 (1942), and more recently cited with approval in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 77 L. Ed. 2d 545 (1983).

Furthermore, to successfully challenge the constitutionality of a state's apportionment scheme, a taxpayer must demonstrate by "clear and cogent evidence" that the scheme results in extraterritorial values being taxed. *See Butler Bros.*, 315 U.S. at 507, 86 L. Ed. at 996. Polaroid has failed to provide such evidence.

Finally, North Carolina can constitutionally tax Polaroid's recovery from the Kodak lawsuit under the unitary business principle. According to the unitary business principle, a state may tax a corporation on an apportionable share of the multistate business carried on in part in the taxing state. *See Allied-Signal, Inc.*, 504 U.S. at 778, 119 L. Ed. 2d at 546. "In order to exclude certain income from the apportionment formula, the corporation must prove that the income was earned in the course of activities unrelated to those carried out in the taxing State." *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 223, 65 L. Ed. 2d 66, 81 (1980). For example, a state may include within a nondomiciliary corporation's apportionable income interest earned on deposits in a bank located outside of the state, if that income forms part of the corporation's working capital. *See Allied-Signal, Inc.*, 504 U.S. at 777-78, 119 L. Ed. 2d at 546-47.

In this case, Polaroid's judgment from the Kodak lawsuit constitutes income earned from activities related to North Carolina. The judgment partly represents profits which Polaroid would have earned absent Kodak's infringement. Those profits would have properly been considered apportionable income had they been earned in the normal manner. The fact that they were received in the courtroom instead of the marketplace is irrelevant. Moreover, the monies received from the Kodak lawsuit were used as part of Polaroid's working capital and

therefore constitute part of Polaroid's unitary business. Therefore, North Carolina acted within its constitutional rights by classifying the Kodak judgment as business income and taxing it accordingly.

IV. CONCLUSION

We conclude that the definition of business income under the North Carolina Corporate Income Tax Act includes the functional test. This ruling is based upon canons of statutory construction, pertinent administrative rules, and the legislative history surrounding both the Act itself and UDITPA. Moreover, given that Polaroid's recovery constituted income in lieu of profits, that income should be classified as business income because it represents the disposition of assets integral to Polaroid's regular trade or business operations. Lastly, under United States Supreme Court jurisprudence, we conclude that subjecting Polaroid's recovery from the Kodak lawsuit to North Carolina income tax is constitutional under the unitary business principle.

REVERSED.

WILLIAM H. PEACE, III, PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT

WILLIAM H. PEACE, III, PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT

No. 599A97

(Filed 4 December 1998)

1. Labor and Employment § 68 (NCI4th)— property interest in continued employment

Under North Carolina law, an employee has a protected "property" interest in continued employment only if the employee can show a legitimate claim to continued employment under a contract, a state statute, or a local ordinance.

2. Public Officers and Employees § 66 (NCI4th)— State employee—just cause protection—property interest

Petitioner, as a career State employee, is entitled to the "just cause" protection of the State Personnel Act and is thereby

imbued with a constitutionally protected "property" interest in continued employment. N.C.G.S. § 126-35.

3. Public Officers and Employees § 66 (NCI4th)— State employee—dismissal for just cause—burden of proof on employee—due process

The allocation of the burden of proof to a career State employee in an action contesting the validity of a "just cause" termination pursuant to N.C.G.S. § 126-35 does not violate procedural due process under the Fourteenth Amendment to the United States Constitution. Under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, the individual "property" interest sought to be protected by the employee, while important and significant, is decisively outweighed by the substantial government interest in maintaining a productive and efficient work force, and there is a very minimal risk of erroneous decision making when the existing administrative and judicial review protections are utilized. U.S. Const. amend. XIV.

4. Public Officers and Employees § 66 (NCI4th)— State employee—dismissal for just cause—burden of proof on employee—N.C. law

A career State employee terminated pursuant to the "just cause" provision of N.C.G.S. § 126-35 should bear the burden of proof under North Carolina law in an action contesting the validity of that termination since the employee is the party attempting to alter the status quo; and neither party in a "just cause" termination dispute has peculiar knowledge not available to the opposing party because the employee may utilize available statutory and administrative procedures to obtain all necessary information to establish and advocate his or her position.

Justice FRYE concurring in part and dissenting in part.

Justice WHICHARD joins in this concurring and dissenting opinion.

Justice WYNN did not participate in the consideration or decision of this case.

Appeal by petitioner 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. 1, 493 S.E.2d 466 (1997), remanding an order entered by Bowen, J., on 13 March 1995 in Superior Court, Wake County.

On 5 February 1998, the Supreme Court retained the Employment Security Commission's notice of appeal of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and allowed discretionary review of an additional issue from the unanimous portion of that same decision of the Court of Appeals reversing and remanding an order entered by Cashwell, J., on 12 August 1994 in Superior Court, Wake County. Heard in the Supreme Court 29 May 1998.

Hilliard & Jones, by Thomas Hilliard, III, for petitioner-appellant Peace.

Michael F. Easley, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General; John R. Corne, Special Deputy Attorney General; and Sylvia Thibaut, Assistant Attorney General, for respondent-appellant and -appellee Employment Security Commission.

LAKE, Justice.

The essential question presented for review is whether the Court of Appeals erred in affirming the trial court's determination that the State Personnel Commission improperly placed the burden of proof on the Employment Security Commission of North Carolina (ESC) in a claim for "just cause" termination pursuant to N.C.G.S. § 126-35. For the reasons discussed herein, we conclude that allocating the burden of proof to the disciplined employee does not violate that employee's rights to due process. Accordingly, we affirm the Court of Appeals.

Petitioner, William H. Peace, III, was hired by respondent ESC on 5 October 1985 as its Equal Employment Opportunity (EEO) officer. Petitioner was responsible for the direction of the employee relations section, and his duties included the administration of both internal and external EEO programs. During his employee orientation in 1985, petitioner learned that the ESC office employees maintained a petty fund, with monthly dues of $2.00. Petitioner also learned that participation in the petty fund entitled participants to an occasional cup of coffee from the personnel file room. Petitioner chose to participate in the fund, paid his monthly dues, and occasionally obtained coffee from the file room. However, petitioner's normal habit was to obtain coffee each morning from the agency cafeteria.

Generally, petitioner did not attend the staff meetings where the employees discussed office policies, including the petty fund. At some point following petitioner's 1985 orientation, a local commer-

cial coffee service was contracted with, and a new and separate coffee fund, with monthly dues of $3.40, was established. The office employees maintained the new coffee fund separate from and in addition to the office petty fund. Petitioner was not aware of the new coffee fund, and he was not asked to participate in or contribute to the new fund.

On 10 April 1991, petitioner was involved in an incident with a co-worker, Ms. Catherine High, concerning access to coffee from the personnel file room. As was his normal custom, petitioner went to the agency cafeteria the morning of 10 April 1991 to obtain a cup of coffee. However, the cafeteria was out of coffee, so petitioner proceeded to obtain coffee from the personnel file room. As he was leaving the file room, Ms. High confronted petitioner and stated, "[Y]ou are going to have to pay me for that coffee." Petitioner refused to pay for the coffee, and a heated exchange ensued. Following the exchange, petitioner alleged that Ms. High stated, "If you get another cup of coffee and do not pay me, I'm going to get a cup of coffee and scald you with it." Several other office employees witnessed the argument between petitioner and Ms. High. Ms. High also informed her supervisor of the incident.

Petitioner contacted the magistrate's office on the afternoon of 10 April 1991 concerning the alleged threat made by his co-worker, Ms. High. The magistrate advised petitioner that if he believed Ms. High to be capable of carrying out her threat, he should take out a warrant. Petitioner approached Ms. High following his discussion with the magistrate, seeking an apology for her earlier actions and statements. Ms. High refused to provide an apology for the morning coffee incident. Later that same afternoon, petitioner again contacted the Wake County magistrate's office and formally filed criminal charges against his co-worker for communicating a threat. On 21 May 1991, the trial court dismissed the charge as frivolous and ordered petitioner to pay court costs.

Petitioner's supervisors did not contact or question petitioner about the coffee incident pending resolution of the criminal charges. On 5 June 1991, petitioner's immediate supervisor, Gene Baker, informed petitioner by written memorandum of a 6 June 1991 predismissal conference. The conference culminated in a decision to discharge petitioner from employment for "unacceptable personal conduct." A 7 June 1991 letter from Ann Q. Duncan, chairperson of ESC, further explained petitioner's dismissal. The 7 June letter reaffirmed

the dismissal for "unacceptable personal conduct," including the taking of coffee without payment and the filing of frivolous charges against a co-worker. The letter explained that the "unacceptable personal conduct" diminished petitioner's respect among fellow employees and called into question his reputation as the EEO officer for the ESC.

Petitioner filed two appeals from the ESC's decision to discharge him from employment. Petitioner contended (1) that the ESC lacked "just cause" to dismiss him pursuant to N.C.G.S. § 126-35; and (2) that he had been terminated in retaliation for a discrimination complaint he filed against the ESC in 1989, for violation of title VII, section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (1988).

The Civil Rights Division of the Office of Administrative Hearings (OAH) investigated petitioner's retaliatory discharge claim pursuant to N.C.G.S. § 7A-759. The OAH found that there was reasonable cause to believe that a title VII violation had occurred. The OAH determined that petitioner could select one of three options: (1) receive a right-to-sue letter, (2) commence a contested-case hearing in OAH, or (3) do nothing. Petitioner decided to pursue his retaliatory discharge claim by commencing a contested-case hearing. As for his claim that the ESC lacked "just cause" to dismiss him, petitioner filed another petition for contested-case hearing pursuant to N.C.G.S. § 126-35.

A consolidated hearing was conducted on petitioner's two administrative appeals by Administrative Law Judge (ALJ) Sammie Chess, Jr. on 12-14 July 1993. ALJ Chess determined that under the applicable "just cause" termination statute, the ESC bears the ultimate burden of persuasion to demonstrate the validity of the termination. In his recommended decision to the State Personnel Commission (SPC), the ALJ concluded that the ESC had failed to meet its burden of proof and recommended petitioner's reinstatement with back pay.

In determining petitioner's claim as to retaliatory discharge under title VII, ALJ Chess again put the burden of proof on the ESC. The ALJ then found petitioner was the victim of a retaliatory discharge, and he therefore ordered reinstatement.

The SPC adopted the ALJ's recommendation for petitioner's "just cause" claim with slight modification by an order dated 3 November 1994. The SPC agreed that the ESC bore the burden of proof in a "just cause" termination and affirmed the order reinstating petitioner with back pay.

The ESC petitioned for judicial review of the SPC decision and the ALJ decision separately, pursuant to N.C.G.S. § 150B-50. In a 12 August 1994 order, Superior Court Judge Narley L. Cashwell upheld the ALJ's final decision as to petitioner's retaliatory discharge claim. By order dated 13 March 1995, Superior Court Judge Wiley F. Bowen reversed the SPC's decision with prejudice and dismissed petitioner's "just cause" claim on the basis of two prejudicial errors of law: (1) that the SPC inappropriately placed the burden of proof on the ESC, and (2) that the SPC incorrectly concluded that petitioner was dismissed without "just cause."

The ESC then appealed to the Court of Appeals Judge Cashwell's order affirming the decision concerning petitioner's retaliatory discharge claim. Petitioner also appealed to the Court of Appeals Judge Bowen's order reversing the SPC's decision to reinstate him. The Court of Appeals consolidated the ESC's appeal and petitioner's appeal, and both were originally heard in the Court of Appeals on 7 May 1996. *See Employment Sec. Comm'n v. Peace*, 122 N.C. App. 313, 740 S.E.2d 63 (1996). This Court allowed the ESC's petition for discretionary review and thereupon remanded the case to the Court of Appeals in order for the Court of Appeals to reconsider its ruling in light of *Soles v. City of Raleigh Civil Serv. Comm'n*, 345 N.C. 443, 480 S.E.2d 685 (1997). *Employment Sec. Comm'n v. Peace*, 345 N.C. 640, 483 S.E.2d 706 (1997).

On 2 December 1997, the Court of Appeals, on remand, with Judge Greene dissenting, held that the burden of proof in "just cause" claims pursuant to N.C.G.S. § 126-35 may be allocated to an employee without violating due process. The Court of Appeals ruled that while the trial court may not substitute its judgment for that of the agency with respect to the evidence, the trial court did not err in determining that the SPC's decision and order improperly placed the burden of proof on the ESC. *Employment Sec. Comm'n v. Peace*, 128 N.C. App. 1, 14, 493 S.E.2d 466, 474 (1997). Therefore, the Court of Appeals remanded the matter to the superior court for further remand to the SPC for application of the proper burden of proof. *Id.* at 14, 493 S.E.2d at 474-75. Petitioner subsequently filed his notice of appeal, based on the dissent, to this Court on 17 December 1997.

On 6 January 1998, the ESC petitioned this Court for discretionary review seeking to have this Court determine whether the OAH acted *ultra vires* when it adjudicated petitioner's title VII claim. Contemporaneously with its petition for discretionary review, ESC

filed with this Court a notice of appeal asserting a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) as to whether the provisions of N.C.G.S. § 7A-759(d) and (e) violate the provisions of Article IV, Sections 1 and 3 of the North Carolina Constitution. This Court entered an order allowing discretionary review and retaining ESC's notice of appeal; upon review, we conclude this petition was improvidently allowed, and such appeal should be dismissed.

With respect to the issue which this Court previously remanded to the Court of Appeals and which is again before us by virtue of the dissent, petitioner asserts that the Court of Appeals incorrectly concluded that this Court's holding in *Soles* mandates the assignment of the burden of proof in "just cause" termination disputes to the employee. Petitioner also contends that the assignment of the burden of proof to the employee following a "just cause" termination violates the procedural protections required by the Due Process Clause of the Fourteenth Amendment. For the reasons stated below, we reject these assertions.

Procedural due process restricts governmental actions and decisions which "deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976). A terminated employee must initially demonstrate a "property" interest in continued employment in order to invoke procedural due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 33 L. Ed. 2d 548, 557 (1972). State law determines whether an individual employee does or does not possess a constitutionally protected "property" interest in continued employment. *Bishop v. Wood*, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 690 (1976).

[1],[2] Under North Carolina law, an employee has a protected "property" interest in continued employment only if the employee can show a legitimate claim to continued employment under a contract, a state statute or a local ordinance. *Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 226 S.E.2d 340 (1976). The North Carolina General Assembly created, by enactment of the State Personnel Act, a constitutionally protected "property" interest in the continued employment of career State employees. N.C.G.S. § 126-35 provides, in pertinent part, that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35(a) (1995). It

is undisputed in the case *sub judice* that petitioner, as a career State employee, is entitled to the "just cause" protection of the State Personnel Act and is thereby imbued with a constitutionally protected "property" interest. *Board of Regents*, 408 U.S. at 577, 33 L. Ed. 2d at 561; *Leiphart v. N.C. Sch. of the Arts*, 80 N.C. App. 339, 348, 342 S.E.2d 914, 921, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

[3] While the demonstration of a protected "property" interest is a condition precedent to procedural due process protection, the existence of the "property" interest does not resolve the matter before this Court. We must inquire further and determine exactly what procedure or "process" is due. The fundamental premise of procedural due process protection is notice and the opportunity to be heard. *Cleveland Bd. of Educ. v Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503 (1985). Moreover, the opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965). While the United States Supreme Court has consistently held that some form of hearing is required prior to a final deprivation of a protected "property" interest, the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy. *Mathews*, 424 U.S. at 333, 47 L. Ed. 2d at 32; *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 41 L. Ed. 2d 935, 952 (1974).

The United States Supreme Court has never required the allocation of a particular burden of proof in an employee termination dispute. In *Lavine v. Milne*, 424 U.S. 577, 47 L. Ed. 2d 249 (1976), the Supreme Court did recognize the important and potentially dispositive effect of the allocation of the burden of proof. However, in that decision, the Court also stated, "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Id.* at 585, 47 L. Ed. 2d at 256. Only in cases involving the deprivation of a fundamental right has the United States Supreme Court found a constitutionally protected right to a particular allocation of the burden of proof. *See Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323 (1979) (fundamental right to physical liberty associated with involuntary commitment to state hospital); *Speiser v. Randall*, 357 U.S. 513, 2 L. Ed. 2d 1460 (1958) (fundamental right to freedom of speech). Fundamental rights are those rights "deeply rooted in this Nation's history" and "implicit in the concept of ordered liberty."

Washington v. Glucksberg, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 787-88 (1997).

The United States Supreme Court has held that an interest in continued employment is not a constitutionally protected fundamental right, but rather a "property" right subject to traditional procedural due process protections. *Board of Regents*, 408 U.S. at 576-78, 33 L. Ed. 2d at 560-61. In this case, petitioner has failed to identify the impingement of any fundamental right in his "just cause" termination claim.

The United States Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, set forth a three-part balancing test to determine the appropriate procedures required to comply with procedural due process protection in any given situation. The Supreme Court in *Mathews* reiterated that procedural due process protection is a flexible, not fixed, concept governed by the unique circumstances and characteristics of the interest sought to be protected. The Court there identified the following three factors:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 47 L. Ed. 2d at 33.

There is no dispute that the initial *Mathews-Eldridge* factor, the private interest affected by the official action, is of significant importance in the matter before this Court. The ability to obtain and retain employment is of utmost concern to individuals as they strive to provide support for themselves and their families, as well as in seeking to achieve their aspirations and goals. The United States Supreme Court has emphasized that the private interest in continued employment cannot be denied. *Loudermill*, 470 U.S. at 541, 84 L. Ed. 2d at 503. However, an individual employee's interest in retaining employment is not absolute and must be evaluated in the light of additional factors. *See Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18; *Arnett v. Kennedy*, 416 U.S. 134, 40 L. Ed. 2d 15 (1974).

The second factor discussed by the *Mathews* Court requires an objective evaluation of the risk of erroneous deprivation of the pro-

tected interest under the present procedures, as well as the potential value of additional safeguards. It is upon this second *Mathews-Eldridge* factor that the central dispute between petitioner and the ESC rests. Petitioner asserts that the allocation of the burden of proof upon an employee in a "just cause" termination controversy deprives the employee of procedural due process protection because of the serious and significant potential for erroneous decision making. We find this assertion to be without support in either federal or state statutory schemes and case law.

The *Mathews-Eldridge* analysis places emphasis upon the fairness and reliability of the currently utilized procedures. However, procedural due process protection clearly does not prescribe or require a failsafe process that totally precludes any possibility of error. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320, 87 L. Ed. 2d 220, 233 (1985). While the United States Supreme Court has consistently held that some type of hearing is required prior to the deprivation of a "property" interest, in only one case, *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970), has the Supreme Court held that an evidentiary hearing is mandated. *See Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18. The *Goldberg* Court carefully considered the potential impact of the deprivation of welfare benefits and placed considerable emphasis on the unique fact that welfare recipients live on the margin of existence. *Goldberg*, 397 U.S. at 264, 25 L. Ed. 2d at 297. A temporary, but erroneous, deprivation of benefits to a welfare recipient would often have major consequences, depriving "an *eligible* recipient of the very means by which to live." *Id.*

In contrast, a career State employee contesting a "just cause" termination does not face the same dire consequences from loss of employment. A typical terminated State employee, much like the Social Security benefit recipient considered in *Mathews*, may have other independent sources of support, including savings, gifts from family members, as well as government-assistance programs. Additionally, the terminated employee is free to and can readily seek alternate gainful employment, utilizing his or her skills and experience, within the available job market.

The *Mathews-Eldridge* analysis requires careful consideration of the protections and procedures available to "just cause" terminated employees under our current administrative and judicial review system. It is readily apparent that the appeal and review guidelines and

procedures mandated by the North Carolina General Assembly provide ample protection against potential erroneous decisions accompanying "just cause" terminations pursuant to N.C.G.S. § 126-35. The ESC fully complied with the established legislative scheme in the matter now before this Court.

N.C.G.S. § 126-35 establishes a mandatory notice and hearing requirement in "just cause" terminations involving employees, such as petitioner, protected by the State Personnel Act. The statute requires the provision of a written statement detailing for the employee the reasons for the discharge as well as detailed instructions describing access to the administrative-appeals process. The statute provides, in pertinent part:

> In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the department. However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. The employee, if he is not satisfied with the final decision of the head of the department, or if he is unable, within a reasonable period of time, to obtain a final decision by the head of the department, may appeal to the State Personnel Commission.

N.C.G.S. § 126-35(a).

The North Carolina statutory scheme provides a detailed mechanism within article 8 of chapter 126 for resolution of the "just cause" dispute. The scope of the administrative-appeal procedure for the State Personnel System is basically set forth in N.C.G.S. § 126-37, which provides in part:

> (a) Appeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B . . . . The State Personnel Commission shall make a final decision in these cases . . . .
>
> . . . .

(b2) The final decision is subject to judicial review pursuant to Article 4 of Chapter 150B of the General Statutes.

N.C.G.S. § 126-37(a)-(b2) (1995).

The OAH has adopted, pursuant to its rule-making authority, procedures and rules designed to assist a terminated employee in obtaining an accurate and fair resolution of the dispute. The OAH allows the employee access to traditional evidentiary tools and processes in the investigation for preparation and presentation of his complaint. The OAH procedure allows a terminated employee to readily obtain all the information relied on by the State agency in making the termination decision. The North Carolina Administrative Code provides in pertinent part:

> Governed by the principles of fairness, uniformity, and punctuality, the following general rules apply:
>
> (1) The Rules of Civil Procedure as contained in G.S. 1A-1, the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes . . . shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule . . . provides otherwise.
>
> . . . .
>
> (5) Except as otherwise provided by statutes or by rules promulgated under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

26 NCAC 3 .0101(1)-(7) (February 1994).

N.C.G.S. § 150B-43 further creates a final statutory safeguard against an erroneous decision by providing a right to judicial review of final agency decisions. The statute provides in part:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute.

N.C.G.S. § 150B-43 (1995).

The statutory protections afford a terminated State employee a comprehensive and effective deterrent against erroneous decisions. A terminated employee may avail himself not only of administrative review incorporating full discovery of information and an evidentiary hearing, but may also obtain judicial review of the final agency decision. We conclude that this procedure fully comports with the constitutional procedural due process requirements mandated by the Fourteenth Amendment, and no additional safeguards are needed to avoid erroneous deprivation.

The third and final factor set out by the *Mathews-Eldridge* Court focuses on the government's interest in the dispute, including the government function involved. Consideration of this factor, the government interest involved, supports the allocation of the burden of proof to the terminated State employee in "just cause" cases. The State of North Carolina, through each of its agencies, must remain a responsible steward of the public trust by maintaining an efficient and productive government. In order to provide for efficient administration, State officials must promote and encourage employee productivity and discipline. The State Personnel System, created by chapter 126 of the General Statutes, strives to implement a program of employee management "based on accepted principles of personnel administration and applying the best methods as evolved in government and industry." N.C.G.S. § 126-1 (1995). It is imperative that agency officials maintain adequate supervision and control over personnel matters. *See Arnett v. Kennedy*, 416 U.S. at 168, 40 L. Ed. 2d at 41. The maintenance of an efficient and productive government or private employment workforce requires the availability and utilization of appropriate disciplinary procedures.

The United States Supreme Court has never indicated that procedural due process requires a particular allocation of the burden of proof among parties in a civil matter. The Supreme Court has, however, addressed the determination of the appropriate standard of proof, recognizing that the determination of an appropriate standard of proof must reflect the value society places on the individual interest sought to be protected. *Santosky*, 455 U.S. at 754-55, 71 L. Ed. 2d at 607. The *Santosky* Court utilized the *Mathews-Eldridge* balancing test to determine the appropriate standard of proof in a case involving the termination of parental rights, reaffirming the *Mathews-Eldridge* test as the benchmark for procedural due process compliance. *Id.*

[4] In addition to the *Mathews-Eldridge* analysis, we must also consider applicable North Carolina law addressing the allocation of the burden of proof. The North Carolina Constitution, like the United States Constitution, does not compel the allocation of the burden of proof to either party in a "just cause" employment termination controversy. Furthermore, the North Carolina General Assembly has not specifically addressed the proper allocation of the burden of proof in "just cause" termination cases. The State Personnel Commission likewise has not dictated a specific allocation of the burden of proof pursuant to its rule-making authority found in N.C.G.S. §§ 126-4(6), (7a), (9), (11) and 126-26.

In the absence of state constitutional or statutory direction, the appropriate burden of proof must be "judicially allocated on considerations of policy, fairness and common sense." 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed. 1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. *Id.* The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so. *Johnson v. Johnson*, 229 N.C. 541, 544, 50 S.E.2d 569, 572 (1948).

Applying these general principles to the case *sub judice*, it is clear that an employee terminated pursuant to the "just cause" provision of N.C.G.S. § 126-35 should bear the burden of proof in an action contesting the validity of that termination. Petitioner, the terminated employee, is the party attempting to alter the *status quo*. The burden should appropriately rest upon the employee who brings the action, even if the proof of that position requires the demonstration of the absence of certain events or causes. Neither party in a "just cause" termination dispute has peculiar knowledge not available to the opposing party. A terminated employee may readily utilize the procedures outlined in chapter 126 and section 1A-1 of the North Carolina General Statutes, as well as title 26 of the North Carolina Administrative Code, to obtain any and all necessary information to establish and advocate his or her position.

In the decision below, the Court of Appeals correctly noted that this Court's decision in *Soles* controls the judicial allocation of the burden of proof in "just cause" employee terminations. *Employment*

Sec. Comm'n v. Peace, 128 N.C. App. at 13-14, 493 S.E.2d at 474. In *Soles*, a city employee was terminated because of "personal conduct detrimental to City service." *Soles*, 345 N.C. at 445, 480 S.E.2d at 686. We concluded in *Soles* that the terminated city employee did not possess a constitutionally protected "property" interest in continued employment, thereby triggering procedural due process protection. *Id.* at 447, 480 S.E.2d 688. However, in reaching the *Soles* decision, we stated that "[a]ssuming a situation existed in which an employee was entitled to procedural due process protection, we agree with the City and hold that the allocation of the burden of proof to a disciplined employee does not violate the employee's guarantees of procedural due process." *Id.* at 448, 480 S.E.2d at 688.

The dispute between petitioner and the ESC raises the issue addressed by this Court in *Soles*. While the *Soles* controversy did not directly involve a "property" interest triggering due process protection, we nevertheless addressed the proper allocation of the burden of proof in employee termination cases involving such a protected interest. *Id.* We noted that the *Mathews-Eldridge* balancing test provided the proper framework to evaluate the allocation of the burden of proof. *Id.* As previously discussed, application of the *Mathews-Eldridge* factors to the dispute now before this Court leads to the inevitable conclusion that the individual "property" interest sought to be protected by petitioner, while important and significant, is decisively outweighed by the substantial government interest in maintaining a productive and efficient workforce. There is also a very minimal risk of erroneous decision making when utilizing the existing administrative and judicial protections.

For the reasons stated herein, we affirm the decision of the Court of Appeals and hold that the burden of proof is properly allocated to the employee in "just cause" termination cases pursuant to N.C.G.S. § 126-35. We further hold that respondent North Carolina Employment Security Commission's petition for discretionary review as to the additional issue was improvidently allowed, and we hereby dismiss respondent's notice of appeal on an asserted constitutional claim.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; DISMISSED IN PART.

Justice WYNN did not participate in the consideration or decision of this case.

Justice FRYE concurring in part and dissenting in part.

I agree with the majority opinion in holding that respondent's petition for discretionary review of an additional issue was improvidently allowed and in dismissing respondent's notice of appeal asserting a substantial constitutional question. I dissent only from the majority's affirmance of the Court of Appeals' holding that the employee has the burden of proof in "just cause" termination cases pursuant to N.C.G.S. § 126-35.

In *Soles v. City of Raleigh Civil Serv. Comm'n*, 345 N.C. 443, 480 S.E.2d 685 (1997), we said, "[a]ssuming a situation existed in which an employee was entitled to procedural due process protection, . . . the allocation of the burden of proof to a disciplined employee does not violate the employee's guarantees of procedural due process." *Id.* at 448, 480 S.E.2d at 688. In this case, on remand, the Court of Appeals decided, and the majority here concludes, that the burden of proof in "just cause" claims pursuant to N.C.G.S. § 126-35 may be allocated to an employee without violating due process. I agree. However, that is not the issue before us.

In the instant case, the State Personnel Commission (SPC) adopted the recommendation of the Administrative Law Judge (ALJ) placing the burden of proof on the Employment Security Commission (ESC) to demonstrate "just cause" for petitioner's termination. Upon judicial review, the superior court held that this was an error of law. The question before the Court of Appeals then was whether it was error for the SPC, the agency charged with the administration and enforcement of the State Personnel Act, to allocate the burden of proof in "just cause" termination disputes to the employer in the absence of any statutory guidance. *Soles* does not answer that question, and I do not believe that the majority here directly addresses that issue.

On the merits, Judge Smith, writing for the majority of the Court of Appeals' panel and citing 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 30 (4th ed. 1993), explains the distinctions between the burden of producing evidence and the burden of persuasion. He then continues as follows:

> When statutes fail to dictate with whom the burden of persuasion lies, the burden is judicially allocated based on "considerations of policy, fairness and common sense . . . ." [1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th

> ed. 1993).] For cases in which the burden of proof remains unallocated, it has been suggested that the burden be placed "upon the party who has peculiar knowledge of the facts and who, therefore, is better able to produce proof." *Id.* In the instant case, the party having particular knowledge as to the cause of Peace's dismissal is ESC. An employee allegedly dismissed for "just cause" would be faced with an almost insurmountable task in attempting to prove he or she was dismissed for something short of "just cause," in that the employee would be forced to prove a negative. We believe the better view is to allocate the initial burden of proof to the employer to prove that an employee was dismissed for "just cause" and then have the employee come forward with evidence showing that his or her dismissal was made without "just cause." Here, SPC expressly adopted the ALJ's Conclusion of Law Number 2, which states "[w]here just cause is an issue, the Respondent [ESC] bears the ultimate burden of persuasion." Taking into account "the specialized expertise of the staff of an administrative agency," we give great deference to SPC's decision to place the burden of proof on ESC. [*High Rock Lake Ass'n v. North Carolina Envtl. Management Comm'n*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981).]

Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 12, 493 S.E.2d 466, 473 (1997). I agree. I also agree with Judge Greene's dissenting opinion in which he said:

> I agree with the majority's well-reasoned explanation of why the burden of proof in a termination without just cause case is more fairly placed upon the employer. I add only that this Court has repeatedly acquiesced in the placement of the burden of proof on the employer in just cause cases. . . . There is no pre-existing rule mandating placement of that burden on the employee in this case. *Soles* does not, either explicitly or implicitly, require courts to place the burden of proof on the employee in just cause cases.

Id. at 15, 493 S.E.2d at 475 (Greene, J., dissenting).

Again, in *Soles*, the City of Raleigh Civil Service Commission had a preexisting rule that a terminated employee must bear the burden of proving that the termination was unjustified. We held that Soles had no constitutionally protected property interest in his continued employment with the city, but even if he had such an interest, the allocation of the burden of proof to him would not violate procedural due process. *Soles*, 345 N.C. at 447-48, 480 S.E.2d at 688. However, in

this case, although the General Assembly certainly could have directed by statute which party must carry the burden of proof in a disputed "just cause" termination, it has not. Thus, as the majority correctly notes, it is a matter for judicial allocation.

For the reasons stated in both the majority and dissenting opinions of the Court of Appeals, I would hold that the burden in this case was properly allocated to respondent ESC.

Justice WHICHARD joins in this concurring and dissenting opinion.

DONALD L. SMITH, HAROLD D. COLEY, JR., D. REID COTTRELL, AND E. MICHAEL LATTA, AND ALL OTHERS SIMILARLY SITUATED v. STATE OF NORTH CAROLINA, AND MURIEL K. OFFERMAN, SECRETARY OF REVENUE

No. 61A98

(Filed 4 December 1998)

Taxation § 92 (NCI4th)— intangibles tax—unconstitutional—refund—requirement of protest

The trial court erred by dismissing the claims of plaintiffs who paid an intangibles tax without giving notice of a challenge to the legality of the tax where the General Assembly subsequently determined to refund the tax only to taxpayers who had originally protested it. The tax at issue is valid and the thirty-day notice of challenge to the legality of the tax in N.C.G.S. § 105-267 does not control the decision. The General Assembly here took a uniformly applicable intangibles tax that was valid and enforceable and attempted to classify retroactively those taxpayers who will not be liable for the tax. Such a scheme violates the uniformity provision of the North Carolina Constitution.

Justice WYNN did not participate in the consideration or decision of the case.

Justice FRYE concurring in the result.

Justice WHICHARD joins in the concurring opinion.

On discretionary review prior to determination by the Court of Appeals, granted by the Supreme Court *ex mero motu* pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2) of the North Carolina Rules of

Appellate Procedure, of orders entered 23 May 1997 and 11 June 1997 by Manning, J., in Superior Court, Wake County. Heard in the Supreme Court 1 October 1998.

G. Eugene Boyce, and Womble Carlyle Sandridge & Rice, P.L.L.C., by William C. Raper and Keith Vaughan, for plaintiff-appellants.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Chief Deputy Attorney General; Thomas F. Moffitt, Special Deputy Attorney General; and Marilyn R. Mudge, Assistant Attorney General, for defendant-appellees.

ORR, Justice.

This action arises out of plaintiffs' challenge to the constitutionality of the intangibles tax imposed by the State of North Carolina pursuant to N.C.G.S. § 105-203 during the tax years from 1991 through 1994. Prior to plaintiffs' filing this suit, a similar constitutional challenge was brought by Fulton Corporation, a North Carolina corporation which held stock in six other corporations, only one of which did business in North Carolina. Since the present case was stayed pending the ultimate determination in *Fulton*, we begin our discussion by reviewing that course of litigation since the resolution in *Fulton* affects the ultimate result here.

For a number of years, the State of North Carolina imposed an intangibles tax pursuant to N.C.G.S. § 105-203 on the fair-market value of shares of stock owned by North Carolina taxpayers on December 31st of each year. The statute provided, in pertinent part:

> All shares of stock . . . owned by residents of this State . . . shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25 cents) on every one hundred dollars ($100.00) of the total fair market value of the stock on December 31 of each year less the proportion of the value that is equal to:
>
> (1) . . . the proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 . . . .

N.C.G.S. § 105-203(1) (1992) (repealed 1995).

Under the tax scheme, if a corporation does no business in North Carolina and has no taxable income here, then the taxable percentage of a shareholder's stock is one hundred percent. If a

> multistate corporation does business in North Carolina and earns business and/or nonbusiness income subject to North Carolina income tax, then the taxable percentage of a shareholder's stock is the inverse of the issuing corporation's net taxable income in North Carolina.

Fulton Corp. v. Justus, 110 N.C. App. 493, 496, 430 S.E.2d 494, 496 (1993).

On 1 May 1991, Fulton Corporation challenged the constitutionality of the intangibles taxing scheme alleging specifically that N.C.G.S. § 105-203 violates the Commerce Clause of the United States Constitution, as it places a heavier tax burden on stock of corporations not doing business in North Carolina. Further, the plaintiff alleged that the taxing scheme violated its due process and equal protection rights accorded by the United States and North Carolina Constitutions. The trial court granted summary judgment for the defendant Secretary of Revenue, and the plaintiff appealed.

The Court of Appeals subsequently held

> that the portion of the State's intangibles tax scheme which increases the tax liability for owners of stock in corporations whose business and property is not completely in North Carolina violates the Commerce Clause of the United States Constitution. That language is excised from N.C. Gen. Stat. § 105-203. Plaintiff is entitled to no refund. The trial court's judgment for the defendant is reversed, and the cause is remanded for entry of a judgment declaring the intangibles tax provision at issue in violation of the Commerce Clause. Plaintiff is entitled to no further relief.

Id. at 505, 430 S.E.2d at 502.

On appeal, this Court in *Fulton Corp. v. Justus*, 338 N.C. 472, 450 S.E.2d 728 (1994), reversed the Court of Appeals. "After carefully reviewing the [U.S.] Supreme Court's jurisprudence in this area of the law, which the Court itself has characterized as a 'quagmire,' (citations omitted), we conclude that the tax in question is permissible based on the Court's holding in *Darnell*." *Id.* at 476-77, 450 S.E.2d at 731. Thus, this Court, after a thorough review of precedent decided by the United States Supreme Court, concluded that the intangibles taxing scheme as enacted by the legislature was valid and enforceable in its entirety. However, this determination was not final since the United States Supreme Court on 17 April 1995 granted plaintiff's

writ of certiorari to review our decision validating the intangibles taxing scheme.

On 21 February 1996, the United States Supreme Court in *Fulton Corp. v. Faulkner*,[1] 516 U.S. 325, 133 L. Ed. 2d 796 (1996), held:

> North Carolina's intangibles tax facially discriminates against interstate commerce . . . . At the same time, of course, it is true that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *McKesson [Corp.] v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40, 110 L. Ed. 2d 17, [38] (1990). In *McKesson*, for example, we said that a State might refund the additional taxes imposed upon the victims of its discrimination or, to the extent consistent with other constitutional provisions (notably due process), retroactively impose equal burdens [on] the tax's former beneficiaries. A State may also combine these two approaches. *Ibid.* These options are available because the Constitution requires only that "the resultant tax actually assessed during the contested period reflec[t] a scheme that does not discriminate against interstate commerce." *Id.*, at 41, 110 L. Ed. 2d [at 39].

Fulton, 516 U.S. at 346-47, 133 L. Ed. 2d at 814-15. The case was then remanded to this Court for consideration of remedial issues.

On 10 February 1997, in *Fulton Corp. v. Faulkner*, 345 N.C. 419, 481 S.E.2d 8 (1997) ("*Fulton* (on remand)"), this Court stated:

> The plaintiff argues that the United States Supreme Court in this case declared the entire intangibles tax unconstitutional. We do not agree with this interpretation. The Supreme Court noted that the Court of Appeals had addressed the issue of severability and decided that the clause required severance of the taxable percentage deduction. *Fulton [Corp.] v. Faulkner*, [516] U.S. at [347] n.12, 133 L. Ed. 2d at 815 n.12. The Court gave no indication that applying the severability clause in that manner would contravene its holding or that a tax on corporate stock is per se unconstitutional. To the contrary, the Court's language and reasoning revealed the intangibles tax violated the Commerce

1. Janice Faulkner replaced former defendant Betsy Y. Justus as Secretary of Revenue in 1993. Pursuant to N.C. R. App. P. 38(c), "[w]hen a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and [her] successor is automatically substituted as a party."

> Clause because of the discriminatory portion—the taxable percentage deduction. It gave no reason to believe that absent the discriminatory deduction, the tax would violate the Commerce Clause.

Fulton (on remand), 345 N.C. at 422, 481 S.E.2d at 9-10.

> Further, this Court stated that
>
> [w]hether to enforce the tax as to all shareholders is within the province of the General Assembly.
>
> The General Assembly may forgive this tax if it so chooses. We do not have the authority to do so.
>
> We affirm that part of the decision of the Court of Appeals which holds that the unconstitutional part of N.C.G.S. § 105-203 must be severed and the balance of the section enforced.

Id. at 424, 481 S.E.2d at 11.

The effect of this Court's decision in *Fulton* (on remand) was to declare as advocated by the State that portion of the intangibles tax remaining, after severing the unconstitutional portion challenged, a valid and enforceable tax. Thus, the taxes paid by Fulton Corporation were not refundable as a matter of right.

As noted earlier, subsequent to the beginning of the *Fulton* litigation, plaintiffs in this case similarly filed suit challenging the constitutionality of the intangibles tax levied on corporate stock. On 27 December 1996, the trial court entered an order dated 27 December 1996 certifying two classes of plaintiffs, designated as Class A and Class B.

Class A members consisted of those who paid the intangibles tax for tax years 1991, 1992, 1993, and 1994, and demanded refunds of the tax within thirty days pursuant to the applicable refund statute, N.C.G.S. § 105-267 (1995) (amended 1996 for taxes paid on or after 1 November 1996). Class B consisted of taxpayers who paid the intangibles tax for the same years but failed to meet the requirements set forth in N.C.G.S. § 105-267.

On 27 December 1996, the trial court lifted the previous stay and ordered that the action be maintained as a class action on behalf of the two classes discussed above, Class A and Class B.

After this Court's opinion on 10 February 1997 in *Fulton* (on remand) responding to the ruling of the United States Supreme Court, the State was faced with two choices as noted in the opinion. The State could "enforce" the intangibles tax against all concerned, or the State could "forgive" the taxes imposed.

The General Assembly responded by enacting Chapter 17 of the 1997 Session Laws which provides as follows:

AN ACT TO PROHIBIT THE ASSESSMENT OF INTANGIBLES TAX FROM TAXPAYERS WHO BENEFITED FROM THE TAXABLE PERCENTAGE DEDUCTION IN THE FORMER INTANGIBLES TAX STATUTE.

Whereas, former G.S. 105-203 (repealed) imposed an intangibles tax on shares of stock and provided a taxable percentage deduction reducing a taxpayer's liability for this tax in proportion to the issuing company's income taxed in North Carolina; and

Whereas, the United States Supreme Court in "Fulton Corporation v. Faulkner" held the taxable percentage deduction to discriminate against interstate commerce in violation of the United States Constitution and remanded the case to the Supreme Court of North Carolina to address the remedy appropriate to redress the constitutional violation; and

Whereas, the Supreme Court of North Carolina in "Fulton Corporation v. Faulkner" (on remand) held that the taxable percentage deduction was severable from former G.S. 105-203, thereby exposing all taxpayers to liability for taxation under G.S. 105-203, including those who were not required to pay the tax on shares of stock, in whole or in part, by virtue of the taxable percentage deduction; and

Whereas, the Secretary of Revenue has been advised by the Attorney General that the Supreme Court of North Carolina's decision requires assessment and collection of intangibles tax from taxpayers who received the benefit of the taxable percentage deductions in former G.S. 105-203, unless the General Assembly directs otherwise; and

Whereas, the Supreme Court of North Carolina provided in "Fulton Corporation v. Faulkner" (on remand) that "[w]hether to enforce the tax as to all shareholders is within the province of the General Assembly"; Now, therefore,

The General Assembly of North Carolina enacts:

Section 1. The Secretary of Revenue shall take no action to assess or collect intangibles tax from any taxpayer for liability arising solely from the taxpayer's use of the taxable percentage deductions in former G.S. 105-203 (repealed) for one or more of the tax years from 1990 through 1994.

Act of Apr. 10, 1997, ch. 17, sec. 1, 1997 N.C. Sess. Laws 51, 51.

Having thus forgiven the tax liability for the group of taxpayers who had benefited from the unconstitutional taxable percentage deduction for intangible taxes, the General Assembly was required to address the status of the other taxpayers who had paid the full intangibles tax. As a result, the General Assembly enacted Chapter 318 of the 1997 Session Laws, which provides in pertinent part:

AN ACT TO DIRECT THE SECRETARY OF REVENUE TO (1) MAKE REFUNDS OF THE INTANGIBLES TAX TO TAXPAYERS WHO PRESERVED THEIR RIGHT TO A REFUND BY PROTESTING PAYMENT WITHIN THE TIME LIMITS SET BY G.S. 105-267 AND (2) NOTIFY AFFECTED INTANGIBLES TAXPAYERS BY MAIL AS SOON AS POSSIBLE OF THE COURT NOTICE IN THE CLASS ACTION LAWSUIT REGARDING REFUNDS.

The General Assembly of North Carolina enacts:

Section 1. Because the General Assembly has enacted S.L. 1997-17, prohibiting the Secretary of Revenue from collecting intangibles tax liability arising from a taxpayer's use of the taxable percentage deductions in former G.S. 105-203 (repealed) for any of the tax years from 1990 through 1994, G.S. 105-267 as it applies to those tax years entitles a taxpayer to a refund for one or more of those tax years to the extent the taxpayer meets all of the following requirements with respect to the applicable tax year:

(1) The taxpayer paid intangibles tax on shares of stock for the tax year.

(2) The taxpayer protested payment of the tax within 30 days of payment and met the other requirements of G.S. 105-267, as it then existed, to establish and preserve the taxpayer's refund claim for the tax year.

(3) The taxpayer's established and preserved refund claim was pending on February 21, 1996, the date the United States Supreme Court held the taxable percentage deduction in former G.S. 105-203 unconstitutional.

Act of July 22, 1997, ch. 318, sec. 1, 1997 N.C. Sess. Laws 771, 771. Thus, Chapter 318 in part bases the right to have the intangibles taxes paid by plaintiffs retroactively forgiven on the notice requirement set forth in N.C.G.S. § 105-267, as it then existed. That statute provided:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede provisions of G.S. 105-241.2.

After the passage of Chapter 17 but before the passage of Chapter 318, the trial court in this case on 11 June 1997 entered judgment for Class A plaintiffs against defendants. In a separate order also dated 11 June 1997, the trial court decertified the Class B plaintiffs as a class and dismissed their claims. The trial court's decision against Class B plaintiffs was based on N.C.G.S. § 105-267 and the thirty-day requirement to give notice of any protest as to the validity of the tax.

Thus, the issue brought forward to this Court is whether the trial court erred in dismissing the claims of the Class B plaintiffs—those individuals who paid the intangibles tax for the years in question but did not give notice challenging the legality of the tax. For the reasons that follow, we hold that the trial court erred in dismissing their claims.

We begin by clarifying the status of the intangibles tax after *Fulton* (on remand), 345 N.C. 419, 481 S.E.2d 8. Consistently, the intangibles tax has been referred to by the parties as if it were an illegal or unconstitutional tax, when in fact only the deduction was held by the United States Supreme Court to be unconstitutional. By severing the offending deduction as requested by the State, this Court specifically held in *Fulton* (on remand) that the remaining tax was valid and constitutional. Therefore, the taxes paid by plaintiffs in both Class A and Class B were proper and enforceable. In light of that holding, the thirty-day notice provision of N.C.G.S. § 105-267 upon which the trial court dismissed Class B plaintiffs' claims does not control the decision in this case. The tax at issue here is valid, and plaintiffs were not entitled to *any* refund. What did transpire was that the General Assembly made a policy decision by enacting Chapter 17 and mandating that the State not assess taxes against those who had previously avoided paying the intangibles tax. Having made that decision, the General Assembly was required as a constitutional matter to "forgive" the taxes of those taxpayers who had paid the tax or else run afoul again of the United States Supreme Court's decision in *Fulton*, 516 U.S. 325, 133 L. Ed. 2d 796. Thus, the real question is whether the General Assembly's determination in Chapter 318 to pay back only those taxpayers who had originally protested the intangibles tax within thirty days of payment and to not pay back those who did not give notice can be affirmed. We conclude it cannot.

Beginning with 1868, there has been a provision in the North Carolina Constitution relating to the uniformity of taxation. Article V, Section 3 provided: "Laws shall be passed taxing, *by a uniform rule*, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise . . . ." 1868 N.C. Const. art. V, § 3 (emphasis added).

Today, that provision is carried over in part into Article V, Section 2(2) of our current Constitution. "Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed *except by uniform rule* . . . ." N.C.

Const. art. V, § 2(2) (emphasis added). As noted in *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971), "[t]he Constitution does not permit a state to levy a tax which discriminates in favor of or against taxpayers in the same classification. . . . 'All taxes on property in this State for the purpose of raising revenue are imposed under the rule of uniformity. In express terms the Constitution requires that laws shall be passed taxing real and personal property . . . by a uniform rule." *Id.* at 567-68, 178 S.E.2d at 486 (quoting *Roach v. City of Durham*, 204 N.C. 587, 591, 169 S.E. 149, 151 (1933)).

"Uniformity of taxation is accomplished when the tax is levied equally and uniformly on all subjects in the same class. The right to classify imports a difference in the subjects of taxation." *Roach*, 204 N.C. at 592, 169 S.E. at 151.

Here, the General Assembly by virtue of its passage of Chapters 17 and 318 of the 1997 Session Laws of North Carolina has taken a uniformly applicable intangibles tax that was valid and enforceable after *Fulton* (on remand) and attempted to classify retroactively those taxpayers who will not be liable for the tax. By virtue of Chapter 17, all of the taxpayers who benefited from the unconstitutional deduction provision and who obviously gave no notice of any challenge to the validity of the taxing scheme are relieved of tax liability. By virtue of Chapter 318, those Class A taxpayers who paid the valid tax but gave timely notice of a challenge to its validity under N.C.G.S. § 105-267 are relieved of tax liability. Only Class B plaintiffs in this appeal are thus left with no relief. Like their fellow taxpayers in Class A, they paid the intangibles tax; like their fellow taxpayers who took the deduction, they filed no notice contesting the statute's validity. However, unlike these other two classes of taxpayers, plaintiffs in Class B are still liable under Chapter 318 for the taxes they have paid. Such a scheme violates the uniformity provision of the North Carolina Constitution and therefore must fail.

The decision of the trial court dismissing plaintiffs' claim is reversed, and the case is remanded for entry of a judgment consistent with this opinion and the U.S. Supreme Court's decision in *Fulton v. Faulkner*.

REVERSED.

Justice WYNN did not participate in the consideration or decision of this case.

Justice FRYE concurring in result.

In two cases, *Bailey v. State*, 330 N.C. 227, 412 S.E.2d 295 (1991) (*Bailey I*), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992), and *Swanson v. State*, 335 N.C. 674, 441 S.E.2d 537, *cert. denied*, 513 U.S. 1056, 130 L. Ed. 2d 598 (1994), this Court held that the protest requirements of N.C.G.S. § 105-267 were valid and enforceable. In *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998) (*Bailey II*), we held that certain taxpayers were entitled to refunds notwithstanding their failure to comply with the protest requirements of N.C.G.S. § 105-267. This was so, the majority there said, because "the purpose underlying the requirements of section 105-267 is to put the State on *notice* that a tax, or a particular application thereof, is being challenged as improper so that the State might properly budget or plan for the potential that certain revenues derived from such tax have to be refunded." *Bailey II*, 348 N.C. at 166, 500 S.E.2d at 75.

Likewise, in the instant case, the State was put on notice by the filing of a lawsuit challenging the constitutionality of the intangibles tax levied on corporate stock and by the refund demands made pursuant to N.C.G.S. § 105-267 by the plaintiffs designated as Class A. Thus, in this case, as in *Bailey II*, the State had notice of the possibility that the tax, or a portion thereof, would be declared unconstitutional and had the opportunity to plan and budget for potential refunds. In fact, the United States Supreme Court held that "North Carolina's intangibles tax facially discriminates against interstate commerce," *Fulton Corp. v. Faulkner*, 516 U.S. 325, 346, 133 L. Ed. 2d 796, 814 (1996), and this Court, on remand, held that "the unconstitutional part of N.C.G.S. § 105-203 must be severed," *Fulton Corp. v. Faulkner*, 345 N.C. 419, 424, 481 S.E.2d 8, 11 (1997). Therefore, I would hold that the reasoning of *Bailey II* applies to the Class B plaintiffs in this case, entitling them to a refund of the taxes paid under the unconstitutional intangibles tax scheme, notwithstanding their failure to follow the protest requirements of N.C.G.S. § 105-267.

Accordingly, for the reasons stated herein and not for the reasons stated in the majority opinion, I concur in the result reached by the Court.

Justice WHICHARD joins in this concurring opinion.

BETHUNE v. COUNTY OF HARNETT

[349 N.C. 343 (1998)]

WILLIAM AND HILDA BETHUNE, EVELYN BYRD, LOIS BYRD, SIRENA BYRD, EDNA BAGGETT CROOK, JIM DAVIDSON, DAN DENNING, BEVERLY AND GLENN GREGORY, BOB GOULD, MARGARET GOURLAY, DR. SARAH HAGLER, FRANKIE AND TRUDY HAMILTON, HELEN HOFFMAN, GLENN JOHNSON, WILLIAM A. JOHNSON, ED MENNINGER, SENATOR ROBERT MORGAN, LIDA O'QUINN, CHARLOTTE RENN, W.K. (BILLY) SEXTON, LAMAR SIMMONS, W.T. SIMMONS, JEFFREY SURLES, STAMEY TAYLOR, DONALD RAY AND DONNA TURLINGTON, MARTHA LAYTON WINSTON, BOBBY WOMBLE, DR. J.W. BAGGETT, RUSSELL W. BRADLEY v. COUNTY OF HARNETT, AND DAN ANDREWS, JOE BOWDEN, TEDDY BYRD, BEATRICE HILL, AND WALT TITCHENER, INDIVIDUALLY AND AS HARNETT COUNTY COMMISSIONERS

No. 174PA98

(Filed 4 December 1998)

Counties §§ 49; 56 (NCI4th)— Harnett County courthouse—change of location—1855 local act—authority of current commissioners

The trial court erred by granting summary judgment for plaintiffs in an action to enjoin defendant Harnett County commissioners from moving the location of the Harnett County courthouse from its present site. Although plaintiffs contend that local acts of 1855 and 1859 conclusively established the boundaries of the county seat and mandate that the courthouse be located within those boundaries, N.C.G.S. § 153A-169 provides that a county's board of commissioners may designate and redesignate the site for any county building, including the courthouse. The local acts are superseded by N.C.G.S. § 153A-169 to the extent that the 1855 and 1859 special local acts omit or limit the authority of the elected Board to designate or redesignate the location of the county courthouse; N.C.G.S. § 153A-3(d) contains the necessary expression of legislative intent for a subsequent general law to supersede an earlier local act.

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 11 December 1997 by Manning, J., in Superior Court, Harnett County, granting plaintiffs' motion for summary judgment. Heard in the Supreme Court 18 November 1998.

Robert B. Morgan, pro se, Glenn Johnson, pro se, William A. Johnson, pro se, and James P. Davidson, pro se, for plaintiff-appellees.

Law Offices of Dwight W. Snow, by Dwight W. Snow; and Tharrington Smith, L.L.P., by Wade M. Smith, for defendant-appellants.

FRYE, Justice.

The sole issue in this case is whether defendants, Harnett County commissioners, have the power to relocate the Harnett County courthouse outside of the original boundaries of the Town of Lillington as they were established by legislative enactment in the 1858-1859 session of the North Carolina General Assembly. For the reasons stated in this opinion, we hold that they do.

In 1855, the General Assembly enacted special legislation establishing Harnett County. Act of Feb. 7, 1855, ch. 8, 1854-55 N.C. Sess. Laws 22; Act of Feb. 15, 1855, ch. 9, 1854-55 N.C. Sess. Laws 23. The local act provided, *inter alia*, that: the county seat was to be located on a tract of land at or within three miles of the geographical center of the county; such town was to be called Toomer; and within the limits of Toomer, the courthouse and other public buildings were to be erected. Ch. 9, sec. 7, 1854-55 N.C. Sess. Laws at 24.

In 1859, the General Assembly enacted additional special legislation pertaining to Harnett County. Act of Feb. 16, 1859, ch. 5, 1858-59 N.C. Sess Laws. 12. This local act provided for the election of county commissioners who were authorized to purchase one hundred acres of land, suitable for a town (Lillington), not more than three miles from the center of the county. Ch. 5, secs. 1, 3, 1858-59 N.C. Sess. Laws at 12,13. The act also provided for a vote of the county's citizens to choose between Toomer and Lillington as the location of the county seat. Ch. 5, sec. 4, 1858-59 N.C. Sess. Laws at 13. The sheriff of Harnett County was to hold an election and "all those voting for the county site at Toomer, shall vote a ballot with the name 'Toomer,' written or printed thereon, and those voting for the county seat at the place selected by the commissioners aforesaid, shall vote a similar ballot, with the name 'Lillington' written or printed thereon." *Id.* Following certification of the election results, the Governor was to announce by proclamation which place had been selected as the site of the county seat, and "such place shall thereafter be, and is hereby declared to be established as the county seat of said county." Ch. 5,

sec. 5, 1858-59 N.C. Sess. Laws at 14. On 31 October 1859, Governor Ellis proclaimed that "624 votes were cast for the town of Lillington and 140 votes for the town of Toomer," and thus declared that Lillington had been selected as the "future seat of justice" for Harnett County by a majority of the voters of the county. The Harnett County courthouse has occupied its present location in Lillington since its original construction, having been rebuilt twice following fire.

In June 1991, the Harnett County Board of Commissioners (Board) appointed an Architectural Committee (Committee) to gather information concerning the needs of Harnett County in the location and construction of various county buildings, including a courthouse. The Committee concluded that a new courthouse was necessary to adequately serve the current and future needs of the citizens of Harnett County and recommended that a new county courthouse be located at the Harnett County Governmental Complex (Complex). On 21 July 1997, the Board formally adopted a resolution to relocate the county courthouse to the Complex site. We note that while the Complex is north of Lillington's town center and the present location of the county courthouse, the proposed site for the new courthouse is within the present municipal boundaries of Lillington. We take judicial notice that the Town of Lillington remains the county seat of Harnett County.

On 23 May 1997, plaintiffs brought suit to enjoin defendants from moving the location of the Harnett County courthouse from its present site. On 11 December 1997, defendants' motion for summary judgment was denied, plaintiffs' motion for summary judgment was granted, and defendants were enjoined from "moving the location of the Harnett County Courthouse . . . outside of the boundaries of the Town of Lillington as they were established pursuant to the legislative enactments of the North Carolina General Assembly in its 1854-1855 and 1858-1859 sessions." Defendants gave notice of appeal to the Court of Appeals on 5 January 1998. Defendants' petition for discretionary review prior to a determination by the Court of Appeals was allowed by this Court on 29 July 1998. On 21 October 1998, this Court allowed plaintiffs' motion to supplement the record.

Plaintiffs contend that the local acts enacted by the General Assembly in 1855 and 1859 conclusively established the boundaries of the county seat of Harnett County and therefore mandate that the Harnett County courthouse must be located within the original one hundred acres of land acquired and delineated pursuant to the local

act of 1859. Plaintiffs thus contend that the location of the county courthouse may not be moved beyond the original one hundred acres without further legislative action by the General Assembly.

For the purpose of resolving the instant case, we will assume, without deciding, that the local acts did affirmatively establish the location of the county courthouse as plaintiffs contend. Even so, we hold that defendants have the express authority, pursuant to N.C.G.S. § 153A-169, to redesignate the location of the Harnett County courthouse.

In 1973, the General Assembly enacted N.C.G.S. § 153A-169, which continues to govern designation and redesignation of county courthouse sites. The statute provides, in relevant part, that a county's board of commissioners "may designate and redesignate the site for any county building, *including the courthouse.*" N.C.G.S. § 153A-169 (1991) (emphasis added). Plaintiffs contend that this general statute, enacted after the special local acts, does not empower defendants to redesignate the location of the Harnett County courthouse because of the well-established rule that a subsequent general law cannot repeal or supersede an earlier local act without a clear expression of intent by the legislature. *See, e.g., City of Durham v. Manson*, 285 N.C. 741, 208 S.E.2d 662 (1974). However, we conclude that N.C.G.S. § 153A-3(d) contains the necessary expression of legislative intent.

Pursuant to N.C.G.S. § 153A-3(d),

> [i]f a power, right, duty, function, privilege, or immunity is conferred on counties by this Chapter [153A], and a local act enacted earlier than this Chapter omits or expressly denies or limits the same power, right, duty, function, privilege, or immunity, this Chapter supersedes the local act.

N.C.G.S. § 153A-3(d) (1991). We note that a county exercises its powers, rights, and duties through the actions of its elected board of commissioners. N.C.G.S. § 153A-12 (1991); *see also Board of Comm'rs of McDowell County v. Hanchett Bond Co.*, 194 N.C. 137, 138 S.E. 614 (1927).

By enacting N.C.G.S. § 153A-169, the General Assembly conferred upon county boards of commissioners the power or right to "designate and redesignate the site of any county building, including the courthouse." However, plaintiffs' construction of the 1855 and 1859 local acts omits or limits the power to redesignate the location of the

county courthouse, which is a power or right conferred by chapter 153A of the General Statutes. Therefore, to the extent that the 1855 and 1859 special local acts concerning Harnett County omit or limit the authority of the elected Board to designate or redesignate the location of the county courthouse, the local acts are superseded by N.C.G.S. § 153A-169.

Because defendants exercised a power expressly conferred upon them in their official capacity as county commissioners, we hold that the trial court erred in granting summary judgment for plaintiffs. For the foregoing reasons, the judgment of the trial court is reversed and the case remanded for entry of summary judgment in favor of defendants.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. THADDEUS SWINDLER

No. 161A98

(Filed 4 December 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, 129 N.C. App. 1, 497 S.E.2d 318 (1998), finding no error in defendant's new trial, following remand by this Court, 339 N.C. 469, 450 S.E.2d 907 (1994), resulting in a judgment of life imprisonment entered by Eagles, J., on 7 June 1996 in Superior Court, Guilford County. Heard in the Supreme Court 18 November 1998.

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

Margaret Creasy Ciardella for defendant-appellant.

PER CURIAM.

AFFIRMED.

WILLIAM AND ALICE BALL, PETITIONERS v. RANDOLPH COUNTY BOARD OF ADJUSTMENT, RESPONDENT

No. 172PA98

(Filed 4 December 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 300, 498 S.E.2d 833 (1998), affirming a judgment entered 30 April 1997 by Martin (Lester P., Jr.), J., in Superior Court, Randolph County. Heard in the Supreme Court 17 November 1998.

Wyatt Early Harris & Wheeler, L.L.P., by Thomas E. Terrell, Jr., for petitioner-appellees.

Gavin, Cox, Pugh, Gavin and Etheridge, by Alan V. Pugh, for respondent-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

RYAN v. U.N.C. HOSPITALS

[349 N.C. 349 (1998)]

IN THE MATTER OF: CHRISTOPHER PATRICK RYAN, M.D. v. UNIVERSITY OF NORTH CAROLINA HOSPITALS, KENNETH G. REEB, M.D., WARREN P. NEWTON, M.D., BRON D. SKINNER, PH.D., SAMUEL WEIR, M.D., AND PETER CURTIS, M.D.

No. 48PA98

(Filed 4 December 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 300, 494 S.E.2d 789 (1998), reversing an order dismissing plaintiff's complaint against defendant University of North Carolina Hospitals for failure to state a claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6) entered by Battle, J., on 4 May 1995 in Superior Court, Orange County. Heard in the Supreme Court 16 November 1998.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers, for defendant-appellant UNC Hospitals.

Silva & Silva, P.A., by Lawrence H. Brenner, for plaintiff-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

THE NEWS AND OBSERVER PUBLISHING COMPANY, INC.; CAPITAL BROADCASTING COMPANY, INC.; ABC, INC.; NATIONAL BROADCASTING COMPANY; WLFL, INC.; NORTH CAROLINA PRESS ASSOCIATION; AND NORTH CAROLINA ASSOCIATION OF BROADCASTERS, INC. V. PAUL COBLE; TOM FETZER; MARC SCRUGGS, JR.; AND KIERAN SHANAHAN

No. 53PA98

(Filed 4 December 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 307, 494 S.E.2d 784 (1998), reversing a judgment entered on 7 February 1997 which dismissed plaintiffs' complaint, and reversing an order entered on 11 February 1997 which taxed attorneys' fees against plaintiffs, by Farmer, J., in Superior Court, Wake County. Heard in the Supreme Court 29 September 1998.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak and David Kushner; and Everett, Gaskins, Hancock & Stevens, by Hugh Stevens and C. Amanda Martin, for plaintiff-appellees.

Eugene Boyce and Philip Isley for defendant-appellants.

PER CURIAM.

AFFIRMED.

Justice WYNN did not participate in the consideration or decision of this case.

BAREFOOT v. FINANCIAL SERVICES OF RALEIGH, INC.

No. 303P98

Case below: 129 N.C.App. 646

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

BEAVER v. CITY OF SALISBURY

No. 394PA98

Case below: 130 N.C.App. 417

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

BLACKWELL v. CITY OF REIDSVILLE

No. 276P98

Case below: 129 N.C.App. 759

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

BUNCOMBE COUNTY DSS v. HARDIN

No. 429P98

Case below: 130 N.C.App. 610

Petition by petitioner for discretionary review pursuant to G.S. 7A-31f denied 3 December 1998.

BURNS v. STONE

No. 308P98

Case below: 130 N.C.App. 340

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

CAROLINA BEVERAGE CORP. v. COCA-COLA BOTTLING CO.

No. 335P98

Case below: 130 N.C.App. 149

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 December 1998.

CAUDILL v. DELLINGER

No. 270A98

Case below: 129 N.C.App. 649

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rules 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 November 1998.

CHILTON v. CITY OF EDEN

No. 423P98

Case below: 130 N.C.App. 610

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

CITY OF GREENVILLE v. HAYWOOD

No. 407P98

Case below: 130 N.C.App. 271

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

CONDELLONE v. CONDELLONE

No. 344P98

Case below: 129 N.C.App. 675

Petition by defendant (Peter Condellone) for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

CONLEY v. EMERALD ISLE REALTY, INC.

No. 358PA98

Case below: 130 N.C.App. 309

Petition by defendants (Ingrams) for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998. Petition by defendant (Emerald Isle) for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

COX v. CUDMORE

No. 288P98

Case below: 129 N.C.App. 843

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

COX v. DINE-A-MATE, INC.

No. 284P98

Case below: 129 N.C.App.773

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

CROKER v. YADKIN, INC.

No. 386P98

Case below: 130 N.C.App. 64

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

CUMMINGS v. BURROUGHS WELLCOME CO.

No. 313P98

Case below: 130 N.C.App. 88

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

CURRY v. BAKER

No. 359P98

Case below: 130 N.C.App. 182

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

DAVIS v. HUNEYCUTT

No. 289P98

Case below: 129 N.C.App. 843

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

DEPT. OF TRANSPORTATION v. IRVING

No. 454PA98

Case below: 130 N.C.App. 759

Petition by defendant (Wayne Braswell Manufacturing Homes Corporation) for discretionary review pursuant to G.S. 7A-31 allowed 3 December 1998.

ELLISON v. RAMOS

No. 397P98

Case below: 130 N.C.App. 389

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 5 November 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

GATHINGS v. CROOM

No. 297P98

Case below: 129 N.C.App. 843

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

GBYE v. GBYE

No. 409P98

Case below: 130 N.C.App. 585

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

HAYES v. TOWN OF FAIRMONT

No. 338PA98

Case below: 130 N.C.App. 125

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

HEARNE v. SHERMAN

No. 309A98

Case below: 130 N.C.App. 340

Motion by respondent (Sherman et al) to dismiss appeal allowed 3 December 1998. 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 3 December 1998. Justice Wynn recused.

HILL v. BRADY

No. 455P98

Case below: 131 N.C.App. 152

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

IN RE APPEAL OF MITSUBISHI SEMICONDUCTOR AM., INC.

No. 292P98

Case below: 130 N.C.App. 150

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

IN RE APPEAL OF PHILLIP MORRIS

No. 427P98

Case below: 130 N.C.App. 529

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

ISBELL v. TOWER MILL, INC.

No. 299P98

Case below: 130 N.C.App. 340

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

ISENHOUR v. HUTTO

No. 305PA98

Case below: 129 N.C.App. 596

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998. Petition by defendants (Morrison and City of Charlotte) for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

JACKSON v. A WOMAN'S CHOICE, INC.

No. 391P98

Case below: 130 N.C.App. 590

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

MACON v. MACON

No. 334P98

Case below: 130 N.C.App. 150

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

MUSE v. BRITT

No. 381P98

Case below: 123 N.C.App. 357

Petition by petitioner for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 December 1998.

N.C. DEP'T OF CORRECTION v. WELLS

No. 426P98

Case below: 130 N.C.App. 612

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

ONSLOW COUNTY v. MOORE

No. 223P98

Case below: 129 N.C.App. 376

Petition by defendant (Gene Moore) for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Petition by defendant (Onslow County) for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Petition by plaintiff (Onslow County) for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Petition by plaintiffs (McKillop and Treants) for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

ORTIZ v. CASE FARMS OF N.C.

No. 456PA98

Case below: 130 N.C.App. 759

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 3 December 1998. Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 3 December 1998.

PACK v. RANDOLPH OIL CO.

No. 343P98

Case below: 130 N.C.App. 335

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

PARISH v. HILL

No. 368PA98

Case below: 130 N.C.App. 195

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

PARKER v. BAREFOOT

No. 408A98

Case below: 130 N.C.App.18

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Justice Wynn recused.

PENLAND v. PRIMEAU

No. 239P98-2

Case below: 129 N.C.App. 647

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 December 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

PROGRESSIVE AMERICAN INS. CO. v. VASQUEZ

No. 286PA98

Case below: 129 N.C.App. 742

Petition by defendant (Travelers Casualty) for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998. Petition by defendants (Johnson and Parker) for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998. Petition by defendants (Faison and Lassiter) for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

PUTNAM v. FERGUSON

No. 354A98

Case below: 130 N.C.App. 95

Motion by defendant to dismiss appeal allowed 5 November 1998.

SHARP v. GAW

No. 464P98

Case below: 130 N.C.App. 759

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 December 1998.

SHAW v. SMITH & JENNINGS, INC.

No. 398P98

Case below: 130 N.C.App. 442

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. ALLEN

No. 70A86-5

Case below: Halifax County Superior Court

Defendant's petition for a writ of certiorari was allowed for the limited purpose of remanding for a hearing for reconsideration, in light of *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998), of the trial court's prior order on defendant's motion for discovery. The hearing having now been conducted and the order of remand fully executed, the petition for writ of certiorari is hereby denied 5 November 1998.

STATE v. ARTIS

No. 316P98

Case below: 129 N.C.App. 648

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. BABB

No. 438P98

Case below: 130 N.C.App. 757

Motion by Attorney General to dismiss appeal allowed 3 December 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

STATE v. BARRETT

No. 467P98

Case below: 131 N.C.App. 154

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

STATE v. BASDEN

No. 159A93-3

Case below: Duplin County Superior Court

Motion by Attorney General to dismiss defendant's petition denied 5 November 1998. Defendant's petition for writ of certiorari is allowed 5 November 1998 for the limited purpose of entering the following order. The parties shall file written briefs with the Court on the following issue: Does N.C.G.S. § 15A-1415(f) apply to defendants who have been convicted of a capital offense and sentenced to death who had a post-conviction motion for appropriate relief denied prior to 21 June 1996, the effective date of the statute?

STATE v. BEARDEN

No. 405P98

Case below: 130 N.C.App. 612

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. BEST

No. 300A93-2

Case below: Bladen County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Bladen County denied 5 November 1998.

STATE v. BISHOP

No. 420P98

Case below: Guilford County Superior Court

Motion by defendant (Bishop) to waive all rights to appeal the sentence of death denied 5 November 1998.

STATE v. BRIGHT

No. 440PA98

Case below: 131 N.C.App. 57

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998. Motion by Attorney General for temporary stay dismissed 5 November 1998. Petition by Attorney General for writ of supersedeas allowed 5 November 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

STATE v. CHANCE

No. 319P98

Case below: 130 N.C.App. 107

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 November 1998.

STATE v. CONWAY

No. 389A92-2

Case below: Richmond County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Richmond County denied 5 November 1998.

STATE v. GEIGER

No. 419P98

Case below: 130 N.C.App. 758

Motion by Attorney General to dismiss notice of appeal allowed 5 November 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 November 1998.

STATE v. GOYENS

No. 461P98

Case below: 130 N.C.App. 486

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 December 1998.

STATE v. GREEN

No. 385A84-5

Case below: Pitt County Superior Court

Defendant's petition for writ of certiorari is allowed 5 November 1998 for the limited purpose of entering the following order. The parties shall file written briefs with the court on the following issue: Does N.C.G.S. § 15A-1415(f) apply to defendants who have been convicted of a capital offense and sentenced to death who had a post-conviction motion for appropriate relief denied prior to 21 June 1996, the effective date of the statute?

STATE v. HALL

No. 384P98

Case below: 129 N.C.App. 429

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 November 1998.

STATE v. HARBISON

No. 379P98

Case below: 130 N.C.App. 342

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

STATE v. HARRIS

No. 390A98

Case below: 130 N.C.App. 486

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 November 1998.

STATE v. HINSON

No. 346P98

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 November 1998.

STATE v. HOLMAN

No. 388PA98

Case below: 130 N.C.App. 486

Motion by Attorney General to dismiss appeal denied 5 November 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. HUNTER

No. 273P98

Case below: 129 N.C.App. 845

Motion by Attorney General to dismiss appeal allowed 5 November 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. JACKSON

No. 481P98

Case below: 131 N.C.App. 154

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Motion by Attorney General to dismiss appeal allowed 3 December 1998.

STATE v. JOHNSON

No. 374P98

Case below: 130 N.C.App. 613

Petition by defendant for representation of indigent defendant and for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. JONES

No. 436A98

Case below: 130 N.C.App. 758

Motion by Attorney General to dismiss appeal allowed 3 December 1998.

STATE v. KANDIES

No. 197A94-2

Case below: Randolph County Superior Court

Defendant's petition for writ of certiorari is allowed 5 November 1998 for the limited purpose of remanding this case to the Superior court, Randolph County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254, — S.E.2d —.

STATE v. KING

No. 328P98

Case below: 123 N.C.App. 788

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 November 1998.

STATE v. LANE

No. 413P98

Case below: 127 N.C.App. 554

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 December 1998. Justice Wynn recused.

STATE v. McBRIDE

No. 367A98

Case below: 130 N.C.App. 342

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 November 1998.

STATE v. MOSELEY

No. 385A92-2

Case below: Stokes County Superior Court

Defendant's petition for writ of certiorari is allowed 5 November 1998 for the limited purpose of remanding this case to the Superior Court, Stokes County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254, — S.E.2d — (May 8, 1998) (No. 14891) and *State v. Bates*, 348 N.C. 29, — S.E.2d — (3 April 1998) (No. 145A91-3); in all other respects, the petition is denied.

No. 385A92-3

Case below: Forsyth County Superior Court

Defendant's petition for writ of certiorari is allowed 5 November 1998 for the limited purpose of remanding this case to the Superior Court, Forsyth County, for (1) the Superior Court's reconsideration of defendant's motion for appointment of counsel pursuant to N.C.G.S. § 7A-451(c)(3) (1996), and for (2) reconsideration of defendant's motion for appropriate relief in light of this court's opinion in *State v. Bass*, 348 N.C. 29, — S.E.2d — (3 April 1998) (No. 145A91-3).

STATE v. OWEN

No. 422P98

Case below: 130 N.C.App. 505

Motion by Attorney General to dismiss appeal allowed 5 November 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. PATTON

No. 347P98

Case below: 130 N.C.App. 487

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 5 November 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. PULLIAM

No. 463P98

Case below: 131 N.C.App. 155

Motion by Attorney General for temporary stay allowed 23 October 1998. Petition by Attorney General for writ of supersedeas denied 3 December 1998. Petition by Attorney general for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

STATE v. REID

No. 290P98

Case below: 129 N.C.App. 845

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 November 1998.

STATE v. RICE

No. 272P98

Case below: 129 N.C.App. 715

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. ROBINSON

No. 345P98

Case below: 129 N.C.App. 430

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 November 1998.

STATE v. ROOPE

No. 403P98

Case below: 130 N.C.App. 356

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

STATE v. ROTH

No. 369P98

Case below: 130 N.C.App. 614

Petition by Attorney General for writ of supersedeas denied, stay dissolved 3 December 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 3 December 1998.

STATE v. THAGGARD

No. 430P98

Case below: 130 N.C.App. 761

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998. Motion by Attorney General to dismiss notice of appeal allowed 5 November 1998.

STATE v. VAUGHN

No. 332PA98

Case below: 130 N.C.App. 456

Petition by Attorney General for writ of supersedeas allowed 5 November 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1998.

STATE v. VICK

No. 349P98

Case below: 130 N.C.App. 207

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998. Motion by Attorney General to dismiss appeal allowed 3 December 1998.

STATE v. WARD

No. 291P98

Case below: 130 N.C.App. 153

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 8 October 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 October 1998.

STATE ex rel. COMM'R OF INS. v. N.C. RATE BUREAU

No. 307A98

Case below: 129 N.C.App. 662

Petition by petitioner (NC Rate Bureau) 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 November 1998.

STATE ex rel. UTIL. COMM'N v.
CAROLINA INDUS. GROUP

No. 437P98

Case below: 130 N.C.App. 636

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

STATE FARM MUT. AUTO. INS. CO. v. FORTIN

No. 296PA98

Case below: 129 N.C.App. 839

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 5 November 1998.

STATION ASSOC., INC. v. DARE COUNTY

No. 337PA98

Case below: 130 N.C.App. 56

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 December 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 December 1998.

STERR v. TROUTMAN ENTERS. OF CONCORD, INC.

No. 281P98

Case below: 129 N.C.App. 845

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1998.

T. L. HERRING & CO. v. BD. OF ADJUST. OF WILSON

No. 35A98

Case below: 128 N.C.App. 532

Motion by plaintiffs to withdraw appeal allowed 3 December 1998.

TRIVETTE v. N.C. BAPTIST HOSP., INC.

No. 448A98

Case below: 131 N.C.App. 73

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the court of appeals allowed 3 December 1998. Justice Wynn recused.

TYSON v. DUKE UNIVERSITY

No. 340P98

Case below: 130 N.C.App. 153

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

UNION CENTRAL LIFE INS. CO. v. SENTER-SANDERS TRACTOR CORP.

No. 457P98

Case below: 130 N.C.App. 758

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

UNITED TEACHER ASSOC. INS. CO. v. MACKEEN & BAILEY, INC.

No. 439P98

Case below: 130 N.C.App. 759

Petition by defendants (MacKeen & Bailey and W. Duncan MacKeen) for discretionary review pursuant to G.S. 7A-31 denied 3 December 1998.

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

PETITION TO REHEAR

MARTIAL v. SIZEMORE

No. 570A97

Case below: 349 N.C. 221

Petition by defendant to rehear pursuant to Rule 31 denied 3 December 1998.

PETITION TO REHEAR

SHACKELFORD v. CITY OF WILMINGTON

No. 561PA97

Case below: 349 N.C. 222

Petition by petitioners to rehear pursuant to Rule 31 denied 3 December 1998.

STATE OF NORTH CAROLINA v. ERIC LAWRENCE CALL

No. 341A96

(Filed 31 December 1998)

1. **Indigent Persons § 26 (NCI4th)— capital trial—jury selection—questions by only one attorney**

The trial court may properly allow only one of a capital defendant's attorneys to question jurors during *voir dire* where the court does not preclude the attorneys from consulting or communicating with one another.

2. **Jury § 92 (NCI4th)— jury selection—two prospects in box—questioning of alternate alone—absence of prejudice**

In this capital trial in which prospective jurors were called two at a time to the box during *voir dire* to speed up the selection process, defendant was not prejudiced when the trial court required defense counsel to question and determine whether to challenge the first prospective alternate juror, who remained in the box after the twelfth juror was seated, without putting a second juror in the box where defendant expressed satisfaction about the choice of this juror as an alternate, and this alternate juror did not deliberate defendant's guilt or his sentence.

3. **Criminal Law § 418 (NCI4th Rev.)— opening statements—limit in guilt phase—not allowed at capital sentencing**

The trial court did not abuse its discretion by imposing a five-minute limit on opening statements at the guilt-innocence phase of a capital trial and by forbidding any opening statement at defendant's separate capital sentencing proceeding.

4. **Constitutional Law § 343 (NCI4th)— pretrial unrecorded bench conference—absence of defendant—no constitutional violation**

Defendant's right to be present at all stages of his capital trial was not violated by pretrial unrecorded bench conferences held outside his presence prior to the trial court's ruling upon a Rule 24 pretrial conference motion in a capital case. A Rule 24 conference is not a stage of the trial, the record shows that defendant was present in the courtroom for the entire Rule 24 conference, and defendant failed to establish that his presence at the unrecorded bench conferences would have been useful.

Rule 24 of the General Rules of Practice for the Superior and District Courts.

5. Constitutional Law § 343 (NCI4th)— unrecorded bench conference—capital trial—second counsel—absence of defendant—not constitutional violation

Defendant's constitutional rights were not violated by an unrecorded bench conference in his absence held after a hearing on his motion to appoint second counsel to represent him in his capital trial where defendant was present at the entire hearing which was recorded, and second counsel was ultimately appointed.

6. Constitutional Law § 344.1 (NCI4th)— unrecorded bench conference—absence of defendant—interpreted testimony—not error

The trial court did not err in holding an unrecorded bench conference outside defendant's presence before ruling on the admissibility of a witness's interpreted testimony where defendant was present in the courtroom and his counsel was at the bench, the trial court reconstructed the bench conference for the record, and the subject matter of the bench conference was not the translation of the testimony but the factual foundation for the evidence.

7. Constitutional Law § 344.1 (NCI4th)— in-chambers conference—absence of defendant—capital sentencing—mitigating circumstances—harmless error

Although the trial court erred by conducting an unrecorded in-chambers conference without defendant's presence concerning the mitigating circumstances to be submitted to the jury in defendant's capital sentencing proceeding, this error was rendered harmless beyond a reasonable doubt by the trial court's action causing the record to show what had transpired at that conference.

8. Constitutional Law § 343 (NCI4th)— preliminary handling of prospective jurors—absence of defendant—not constitutional violation

Defendant's constitutional right to presence in his capital trial was not violated when the trial court permitted several prospective jurors to be excused, deferred, or disqualified prior to the first day of jury selection without the participation of

either defendant or his counsel, or when the trial court presided over the removal of nine individuals from defendant's trial venire for service on a grand jury. A defendant's constitutional right to presence does not extend to the preliminary handling of prospective jurors before his own case has been called.

9. Constitutional Law § 248 (NCI4th)— discovery—pretrial witness statements—immateriality—no Brady violation

The trial court did not improperly permit prosecutors to withhold pretrial statements made to law officers by two witnesses in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), where neither statement was material within the purview of *Brady*. Even if the statements were discoverable, the prosecution satisfied the requirements of *Brady* by providing the defense with the statements at trial in time for defendant to make effective use of them.

10. Evidence and Witnesses § 2479 (NCI4th)— sequestration of witnesses—motion denied—not abuse of discretion

The trial court did not abuse its discretion in the denial of defendant's motion to sequester prosecution witnesses in this capital trial. There was no merit to defendant's contention that the court's ruling was based upon an "entirely arbitrary" reason that the courthouse could not accommodate sequestration of witnesses.

11. Jury § 65 (NCI4th)— jury pool—instructions to grand jurors—absence of prejudice

Defendant was not prejudiced by the trial court's instruction of new grand jurors on the function of the grand jury in the presence of the members of defendant's jury pool, five of whom eventually served on the jury that heard his case, where no mention was ever made of the indictments returned against defendant, and defendant has shown no bias on the part of the five jurors who heard the grand jury instruction.

12. Jury § 153 (NCI4th)— capital trial—jury selection—ability to write and announce death—questions not improper

The prosecutor in a capital case was not improperly permitted to ask prospective jurors whether they could write the word "death" on the recommendation form and could announce their verdict of death in open court, although only the jury foreperson would be required to sign the verdict form and announce the

verdict, since the questions legitimately sought to determine the jurors' ability to carry out their duties in defendant's capital trial.

13. Jury § 226 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause—denial of rehabilitation

The trial court properly refused to permit defendant to attempt to rehabilitate fifteen prospective jurors excused for cause for their death penalty views based upon the jurors' answers to *voir dire* questions. Furthermore, defendant cannot show prejudice from the rulings on rehabilitation where defendant requested an opportunity to rehabilitate only three of the jurors, and defendant failed to exhaust his peremptory challenges.

14. Jury § 190 (NCI4th)— denial of challenges for cause—failure to exhaust peremptory challenges

Defendant failed to show prejudice in the denial of his challenges for cause of three prospective jurors where the record does not show that defendant exhausted his peremptory challenges, made a renewed challenge for cause which was denied, and requested and was denied an additional peremptory challenge.

15. Jury § 197 (NCI4th)— excusal for cause—mental disability

The trial court did not abuse its discretion by excusing a prospective juror for cause based upon her psychological disabilities where the juror stated that she was bipolar manic-depressive, had been under mental health care since 1982, had been hospitalized, and sees a counselor regularly, and she expressed concern about her ability to serve on the jury and the impact her service might have on her mental health.

16. Criminal Law § 490 (NCI4th Rev.)— investigating officers—contact with jury venire—not error

The trial court did not err by permitting the two chief investigating officers in this capital case to assist the trial court by passing out Bibles to the jury venire and telling the venire which hand to raise and which hand to place on the Bible where the record does not indicate that the officers ever had custody or control of the jury or were ever with the jurors out of the presence of the trial court. This brief contact with the prospective jurors was legally insignificant.

17. Jury § 257.1 (NCI4th)— peremptory challenges—gender discrimination—failure to make prima facie showing

Defendant failed to establish a *prima facie* showing of intentional gender discrimination in the prosecutor's use of peremptory challenges in this capital trial where defendant made the bare assertion that the prosecutor improperly used eight of the eleven peremptory challenges he exercised to strike women from the jury panel, but the record does not reveal the gender of the jurors who heard defendant's case or the overall percentage of prospective female jurors in the venire.

18. Evidence and Witnesses § 2618 (NCI4th)— handwritten note by defendant—exoneration of wife—spousal privilege inapplicable

A handwritten note left by defendant at a friend's house stating that defendant's wife had no knowledge "of what might have taken place" was not a confidential communication protected by spousal privilege where defendant's wife did not testify and her statements to the police were not presented as evidence at trial; defendant did not claim the privilege at trial but attempted to show that he was not the author; and it is clear from the language in the note that defendant did not leave the note for his wife but for anyone who might suspect his wife of wrongdoing. Furthermore, the spousal privilege did not prohibit the friend from testifying that defendant told him about the note and that the note was found in the friend's home.

19. Constitutional Law § 164 (NCI4th)— no knowing use of false testimony by State

The record did not show that the contents of a note purportedly handwritten by defendant, and thus the inferences raised by those contents, were false or that the prosecutor knowingly used false evidence to convict defendant.

20. Appeal and Error § 147 (NCI4th)— legality of search warrant—issue not preserved for appeal

Defendant waived appellate review of issues as to the legality of a search warrant used to obtain handwriting exemplars where defendant failed to challenge the legality of the search warrant either before or at trial, and defendant did not object to the admission of the handwriting exemplars into evidence or make a motion to suppress a handwritten note to which the exemplars were compared.

21. Evidence and Witnesses § 2399 (NCI4th)— interpreter—qualification

There was plenary evidence to support the trial court's conclusion that an interpreter was qualified to interpret the testimony of a Spanish-speaking witness where the interpreter was originally from Venezuela and his native tongue was Spanish; he taught Spanish at Wilkes Community College and has been translating in the North Carolina court system for the past eight years; and he has lived in both South and Central America and is familiar with several Hispanic dialects.

22. Evidence and Witnesses § 2511 (NCI4th)— witness not fluent in English—competency to testify about conversation

A witness who was not fluent in English was not incompetent to testify that defendant offered a murder victim $25.00 to help him move some furniture on the night of the murder where the record shows that the witness was able to understand a few English words and phrases; defendant spoke a mixture of English and Spanish on the night of the murder; and this was a short, simple conversation, the gist of which defendant repeated to the witness in a manner he could understand a few hours later.

23. Criminal Law § 514 (NCI4th Rev.)— tape recording of prosecution testimony by defendant—denial of request

The trial court did not err by denying defendant's request to tape record the testimony of prosecution witnesses in order to assist defense counsel in preparing for cross-examination where the court chose to rely upon the court reporter's recordation of the proceedings and the court provided a complete and accurate record of defendant's trial. Superior and District Court Rule 15(b)(1).

24. Appeal and Error § 439 (NCI4th)— submission of transcript—admission of evidence—absence of appendix or reproduction in brief—waiver of appellate review

Defendant's assignments of error that the trial court erred by permitting several witnesses to testify about out-of-court statements in violation of the hearsay rule were deemed waived for failure to comply with Appellate Rule 28(d) where the transcript of the proceedings was filed pursuant to Rule 9(c)(2); defendant cites several pages of the transcript but has not identified the specific questions or answers which he wants the appellate court to review for error; and defendant has failed to attach the pertinent

portions of the transcript containing the examinations complained of as an appendix to his brief or to include a verbatim reproduction of those questions or answers in his brief.

25. Evidence and Witnesses § 873 (NCI4th)— telephone conversation—explanation of subsequent actions—not hearsay evidence

Testimony by a witness regarding a telephone conversation he had with his mother about a person who showed up at her home the morning after he was assaulted by defendant was properly admitted as nonhearsay evidence where it was admitted for the limited purposes of showing what the witness did after having the conversation with his mother and why he went to her home and of corroborating the assault victim's testimony.

26. Evidence and Witnesses § 887 (NCI4th)— statements by witness to officer—incrimination of defendant—admissible for corroboration

The trial court did not err by allowing an officer to testify regarding out-of-court statements a witness made to him that incriminated defendant where the testimony was offered only for corroborative, nonhearsay purposes, and the trial court instructed the jury on the permissible use of this evidence.

27. Evidence and Witnesses § 2917 (NCI4th)— impeachment—cross-examination not unduly restricted

The trial court did not unduly restrict defendant's cross-examination of witnesses by sustaining the prosecutor's objections (1) to questions regarding inconsistencies in a witness's testimony and his prior statements to officers where officers had reduced the prior statements to a narrative which attributed the substance of statements to the witness but did not use his actual words, and (2) to questions about whether the witness had a history of domestic violence for which he had not been convicted, since such evidence had no bearing on his truthfulness or untruthfulness in this case and was not proper for impeachment.

28. Evidence and Witnesses §§ 263, 3121 (NCI4th)— cigarette rolling paper and beer cans at murder scene—not character evidence—crime scene and corroboration

Testimony in a murder prosecution that cigarette rolling paper and beer cans were found at the edge of a cornfield near

the spot at which the murder victim's body was discovered was not improper character evidence but was properly admitted to show a portion of what officers found at the crime scene and to corroborate an assault victim's testimony where the State's evidence tended to show that defendant lured the assault victim to the same location and tried to kill him; defendant offered the assault victim a beer and smoked cigarettes while at the cornfield; and the jury could reasonably infer from this evidence that defendant also offered the murder victim a beer and smoked cigarettes around the time of the killing.

29. Evidence and Witnesses § 716 (NCI4th)— prosecutor's questions—objections sustained—absence of prejudice

Defendant can show no prejudice from the prosecutor's questions where his objections to the questions were sustained.

30. Evidence and Witnesses § 1685 (NCI4th)— autopsy photographs—no abuse of discretion—waiver of appellate review

The trial court did not abuse its discretion in admitting six autopsy photographs of a murder victim for the purpose of illustrating the testimony of the pathologist. Furthermore, defendant waived appellate review of this issue by failing to object to the court's ruling at trial and failing to argue plain error. N.C. R. App. P. 10(c)(4).

31. Criminal Law § 474 (NCI4th Rev.)— prosecutor's closing arguments—autopsy photographs—trial and capital sentencing

It was not grossly improper for the prosecutor to use autopsy photographs, which had been properly introduced as evidence, during closing arguments in both the first-degree murder trial and the subsequent capital sentencing proceeding.

32. Evidence and Witnesses § 2750.1 (NCI4th)— opening door to testimony

Defendant opened the door to testimony by a murder victim's employer about the good qualities of the victim, including that he sent money home to his family, when he solicited similar information, including what the victim did with his money, during cross-examination of the victim's nephew.

33. Appeal and Error § 155 (NCI4th)— admission of testimony—waiver of appellate review

Defendant waived appellate review of the admission of testimony where defendant failed to object to the testimony at trial and to argue plain error. N.C. R. App. P. 10(b)(1), 10(c)(4).

34. Appeal and Error § 341 (NCI4th)— authentication issue—not presented by assignment of error—failure to object

The issue of the authentication of a baseball bat introduced at trial was not presented for appellate review where defendant's assignment of error does not present authentication of the bat as an issue for appellate review, and defendant made no objection to the introduction or authentication of the bat at trial. N.C. R. App. P. 10(a).

35. Homicide § 266 (NCI4th)— felony murder—armed robbery—taking element—sufficiency of evidence

There was sufficient evidence of the taking element of armed robbery to support defendant's conviction of felony murder where the State's evidence tended to show that defendant told a friend about his plan to rob the victim and later told him about what happened at the time of the murder; defendant suddenly had enough money to give his friend $210.00 and to pay for a hotel room in Monroe in cash; and the victim, who was known to carry a large sum of money, was found dead with only $9.00 in his possession.

36. Kidnapping and Felonious Restraint § 16 (NCI4th)—removal element—fraudulent means

Evidence tending to show that defendant lured a murder victim away from his home under the false pretense of earning money by moving furniture constituted sufficient evidence of a removal to sustain defendant's kidnapping conviction.

37. Criminal Law § 467 (NCI4th Rev.)— prosecutor's closing argument—no misstatement of facts—inferences from evidence

The prosecutor's closing arguments in a capital trial concerning a tire impression at the crime scene, blood spattering, an explanation of the absence of a significant amount of blood, and the number of blows suffered by the victim were proper arguments of the facts in evidence or reasonable inferences taken therefrom.

38. Criminal Law § 472 (NCI4th Rev.)— prosecutor's closing argument—flight of defendant—appellate decision

The prosecutor did not improperly argue that the jury could rely on biblical authority to weigh defendant's flight as evidence of his guilt; rather, the prosecutor was quoting from and relying on a decision of the N.C. Supreme Court to explain the significance of flight to the jury.

39. Criminal Law § 432 (NCI4th Rev.)— prosecutor's closing argument—rebuttal of defendant's theory—not comment on post-arrest silence

The prosecutor was attempting to rebut defendant's theory of the case that the victim was killed by defendant's friend rather than by defendant and did not improperly comment on defendant's post-arrest silence by arguing that defendant's friend did not change his appearance and his name and leave town, although defendant did all those things, and that the friend gave the police a complete statement, contrary to what a guilty person might do.

40. Criminal Law § 431 (NCI4th Rev.)— prosecutor's closing argument—failure to present promised evidence

The prosecutor's comments during closing argument on defendant's failure to produce evidence promised in defense counsel's opening statement were not so grossly improper as to require the trial court to intervene on its own motion.

41. Criminal Law § 452 (NCI4th Rev.)— prosecutor's closing argument—not request for conviction based on worth and impact

The prosecutor did not improperly ask the jury to convict defendant of first-degree murder based upon the victim's worth as a person and the impact of his death on his friends; rather, the prosecutor properly urged the jurors to remember that the victim had been brutally beaten to death, that he was not simply a corpse, and that both defendant and the State were entitled to a fair trial.

42. Criminal Law § 474 (NCI4th Rev.)— prosecutor's closing argument—use of introduced items—showing of premeditation and deliberation

The prosecutor's use in his closing argument in a first-degree murder trial of items that had been introduced into evidence,

including pieces of a shovel handle, a metal rod, and a baseball bat, in an attempt to show premeditation and deliberation was not so grossly improper that the trial court was required to intervene on its own motion.

43. Appeal and Error § 150 (NCI4th)— instructions—constitutional errors—waiver of appellate review

Defendant waived appellate review of alleged constitutional errors in the trial court's instructions to the jury in this prosecution for first-degree murder and other crimes where defendant failed to raise any constitutional claims at trial and is barred from raising them for the first time on appeal; defendant failed to object to the instructions either during the charge conference or before the jury retired; and defendant failed to specifically and distinctly argue plain error. N.C. R. App. P. 10(b)(2), 10(c)(4).

44. Indictment, Information, and Criminal Pleadings § 54 (NCI4th)— name of victim—fatal variance

There was a fatal variance where the indictment charged assault with a deadly weapon with intent to kill inflicting serious injury upon Gabriel Hernandez Gervacio and the evidence at trial revealed the assault victim's correct name as Gabriel Gonzalez.

45. Criminal Law § 432 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—absence of confession and lack of remorse—violation of right to silence

The trial court erred in a capital sentencing proceeding by allowing the prosecution to argue that defendant should be sentenced to death based upon improperly elicited testimony from four of defendant's jailers that he had not confessed or expressed remorse. The testimony by the jailers violated the rule in *Doyle v. Ohio*, 426 U.S. 610, and should have been excluded because it resulted in an unconstitutional use of defendant's exercise of his right to silence where the judge at defendant's first appearance informed him of his right to remain silent; defendant never waived that right; defendant made no statement of any kind to any officer who arrested him or investigated his case; defendant did not testify at either the guilt phase or the capital sentencing proceeding; and defendant did not present any evidence or argument regarding statements made by defendant relating to the crimes or his feelings or attitude toward the victim.

46. Criminal Law § 1346 (NCI4th Rev.)— capital sentencing—aggravating circumstances—kidnapping and pecuniary gain—not improper double counting

The trial court did not permit the jury to engage in improper "double counting" by submitting to the jury both the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a kidnapping and the (e)(6) aggravating circumstance that the murder was committed for pecuniary gain where it is clear from the record that the trial court did not allow the jury to find both aggravating circumstances using exactly the same evidence, and both circumstances were supported by sufficient, independent evidence apart from that which overlapped. N.C.G.S. § 15A-2000(e)(5), (e)(6).

Justice WYNN did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Rousseau, J., on 23 July 1996 in Superior Court, Ashe County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments was allowed by the Supreme Court on 2 September 1997. Heard in the Supreme Court 28 May 1998.

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

Barry J. Fisher for defendant-appellant.

MITCHELL, Chief Justice.

On 9 October 1995, defendant was indicted for first-degree murder. On 18 March 1996, he was also indicted for robbery with a dangerous weapon, first-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was tried capitally at the 15 July 1996 Criminal Session of Superior Court, Ashe County. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury also found defendant guilty of robbery with a dangerous weapon, first-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. Following a separate capital sentencing proceeding, the jury recommended a sentence

of death for the first-degree murder conviction. On 23 July 1996, the trial court sentenced defendant to death. The trial court also sentenced defendant to a concurrent sentence of sixty-three to eighty-five months imprisonment for the kidnapping conviction and to consecutive sentences of fifty-five to seventy-five months imprisonment for the robbery conviction and twenty-five to thirty-nine months imprisonment for the assault conviction. Defendant appealed his conviction for first-degree murder and death sentence to this Court as of right. On 2 September 1997, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the remaining convictions.

On 15 May 1997, defendant filed a petition for writ of certiorari in this Court seeking review of the trial court's order denying his request to supplement the trial transcript with the instructions given to newly selected grand jurors by the trial court. This Court entered an order on 23 July 1997 denying defendant's petition. On 25 August 1997, defendant filed a motion for reconsideration of his first petition, as well as a second petition for writ of certiorari seeking review of the trial court's order settling the record on appeal. On 9 October 1997, this Court entered an order dismissing defendant's motion for reconsideration of his first petition for writ of certiorari, but allowing his second petition for the limited purpose of expanding the record on appeal to include the statements of Gabriel Gervacio, Alan Varden, and Virginia Call.

The State's evidence tended to show, *inter alia*, that around 9:30 p.m. on 24 August 1995, defendant offered the victim, Macedonio Hernandez Gervacio,[1] $25.00 to help him move some things. Macedonio left the trailer he shared with his nephew, Gabriel Gervacio, and went with defendant. Defendant took Macedonio to a nearby cornfield with the intention of robbing him. While there, defendant beat Macedonio to death with a shovel handle and a tire iron, tied his right foot up around his head, and tied his hands behind his back. Later that same evening, defendant lured Gabriel Gervacio using the same ruse to the same cornfield to kill him because Gabriel

1. Defendant was indicted for the kidnapping, robbery, and murder of Macedonio Hernandez Gervacio. However, there was testimony presented at trial that the murder victim's full name was Macedonio Gervacio Gonzalez Hernandez. The transcript and the record clearly demonstrate that the victim was Macedonio Hernandez Gervacio. The confusion at trial with respect to the proper order of the murder victim's name arose from the custom in some Spanish-speaking countries of placing surnames so that they do not appear as what are often referred to as "last names" in English-speaking countries.

could place defendant with the victim. Defendant struck Gabriel in the head with a baseball bat, but was unable to subdue him. Gabriel escaped into the cornfield, where he hid all night. The next morning, Gabriel showed up at the house of Mrs. Clyde Reeves seeking assistance. Eventually, law enforcement officials were called in, and an investigation uncovered Macedonio's body.

In the weeks prior to 24 August, defendant discussed robbing Macedonio with his friend Alan Varden in an effort to recruit Varden's help. After killing Macedonio, defendant again made an attempt to obtain Varden's assistance, this time in murdering Gabriel. Although he refused to help defendant commit either crime, the baseball bat defendant used to assault Gabriel belonged to Varden. Following the assault of Gabriel, defendant returned home; told his wife, Virginia "Jennie" Call, and Varden what had happened; and packed some clothes. The three of them then went to Varden's trailer, where defendant shaved off his beard and mustache. Defendant told his wife and Varden that he was going to Monroe or Charlotte. He also returned the bat to Varden, who wiped it off. Subsequently, defendant checked into the Knight's Inn Motel in Monroe, under the name "Richard Finley," where he was later arrested.

PRETRIAL AND JURY-SELECTION PHASE

[1] By an assignment of error, defendant contends that the trial court erred by allowing only one of his two attorneys to participate in *voir dire*. We find no error. The trial court may properly allow only one of a capital defendant's attorneys to question jurors during *voir dire* where the court does not preclude the attorneys from consulting or communicating with one another. *State v. Fullwood*, 343 N.C. 725, 472 S.E.2d 883 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997). In this case, the record reveals that defendant's attorneys were free to confer with one another, and the only limitation placed upon his second counsel was in the actual questioning of the prospective jurors. Furthermore, defendant does not argue, and the record fails to show, that the trial court's ruling compelled defendant to accept any juror to which he had valid objections.

[2] By this same assignment of error, defendant argues that the trial court imposed unreasonable procedural requirements upon defense counsel throughout the trial. Defendant first complains about the jury-selection process. The trial court proposed that prospective jurors be called two at a time to the box during *voir dire* to speed up the selection process. Defendant agreed to this procedure, and this

method was used to pick the jury that heard his case. After the twelfth juror was seated, there was one remaining juror in the box. Defendant contends that the trial court improperly required defense counsel to question and determine whether to challenge this remaining juror—the first prospective alternate juror—without putting a second juror in the box. This contention is without merit.

This Court has consistently held that the trial court has broad discretion to regulate jury *voir dire*. *State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998). In order to establish reversible error, defendant must show that the trial court abused its discretion and that defendant was prejudiced thereby. *Id.* In this case, defendant expressed satisfaction with the juror about whom he now complains, as this juror became the first alternate juror. Furthermore, this particular juror, as an alternate, did not deliberate either defendant's guilt or his sentence. Thus, defendant cannot show prejudice.

[3] Defendant further contends that it was error for the trial court to impose a five-minute time limit on opening statements at the guilt-innocence phase and to forbid any opening statement whatsoever at defendant's separate capital sentencing proceeding. In addition, defendant complains that the trial court did not provide adequate time to review Gabriel's statement prior to cross-examination. These contentions are also without merit.

Control over opening statements rests within the sound discretion of the trial court. *State v. Speller*, 345 N.C. 600, 481 S.E.2d 284 (1997). Similarly, whenever a witness statement is delivered to a defendant as provided by the rules of discovery, the trial court may, upon request of the defendant, "recess proceedings in the trial for a period of time that it determines is reasonably required for the examination of the statement by the defendant and his preparation for its use in the trial." N.C.G.S. § 15A-903(f)(3) (1997). Here, defendant does not argue, and the record fails to show, any abuse of discretion in either ruling by the trial court. Finally, defendant fails to cite, and we do not find, any authority that he is entitled to an additional opening statement during the sentencing phase. For the foregoing reasons, this assignment of error is overruled.

[4] By another assignment of error, defendant contends that the trial court erred by conducting numerous bench conferences and pretrial proceedings off the record and without his presence, sometimes to the exclusion of defense counsel. Specifically, defendant complains

of bench conferences which were held outside his presence prior to the trial court's ruling upon, among other things, a pretrial Rule 24 motion, defendant's motion for appointment of additional counsel, the admissibility of Gabriel's interpreted testimony, and corrections and additions to the capital sentencing Issues and Recommendation form.

Even though the Confrontation Clause in Article I, Section 23 of the North Carolina Constitution guarantees a criminal defendant the right to be present in person at every stage of his capital trial, this right does not arise prior to the commencement of trial. *State v. Chapman*, 342 N.C. 330, 464 S.E.2d 661 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996). A Rule 24 conference, which takes place prior to the selection and swearing-in of the jury panel, is not a stage of the trial. *Id.* We note that the record shows defendant was present in the courtroom for the entire Rule 24 conference. Moreover, the burden is on defendant to establish that his presence at the unrecorded bench conferences would have been useful, which he has failed to show. *Speller*, 345 N.C. 600, 481 S.E.2d 284.

[5] Similarly, defendant can show no violation of his constitutional rights based upon the hearing on his motion to appoint second counsel. The record shows defendant was present for the entire hearing, which was recorded. Moreover, second counsel was ultimately appointed, even though defendant was already represented by retained counsel. Defendant has not demonstrated that the unrecorded bench conference, which took place after the hearing was concluded, implicated either his right to presence or his right to complete recordation.

[6] We now turn to defendant's complaint of an unrecorded bench conference held during Gabriel's testimony. Defendant makes a bare assertion that the trial court erroneously admitted the improperly interpreted testimony of Gabriel pursuant to rulings made during this conference. However, defendant does not argue, and the record fails to show, that the interpreter was not qualified or that Gabriel's testimony was incorrectly translated. We note, furthermore, that the trial court reconstructed the bench conference for the record, *sua sponte*. The subject matter of the bench conference was not the translation of Gabriel's testimony, but the factual foundation for the evidence. Accordingly, we find no error.

[7] Defendant next contends that the trial court improperly held an unrecorded bench conference regarding corrections and additions to

the capital sentencing Issues and Recommendation form. During the sentencing charge conference, defendant offered all of his proposed mitigating circumstances in court and on the record. The trial court then held a conference in chambers regarding the circumstances. Defendant argues that the trial court erred by following this procedure. We agree.

"It is well settled that Article I, Section 23 of the Constitution of North Carolina guarantees a criminal defendant the right to be present at every stage of his trial." *State v. Boyd*, 343 N.C. 699, 718, 473 S.E.2d 327, 337 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 722 (1997). This Court has recognized that the right to presence cannot be waived in capital cases and includes chambers conferences with counsel. *Id.* Accordingly, we have found error where the trial court conducted in-chambers conferences in defendant's absence even though counsel for both the State and defendant were present. *State v. Exum*, 343 N.C. 291, 470 S.E.2d 333 (1996). However, this kind of error may not always warrant a new trial. The State carries the burden of showing that the error was harmless beyond a reasonable doubt. *Id.* We conclude that the State has met this burden in the present case.

In this case, the entire in-chambers conference was reconstructed for the record, at defendant's request and in his presence, providing him ample opportunity to make any objections or comments to his attorneys. We have reviewed the record and conclude that although the trial court erred by conducting the conference in defendant's absence, this error was rendered harmless beyond a reasonable doubt by the trial court's action causing the record to show what had transpired at that conference.

Defendant also lists several transcript citations to numerous other bench conferences; however, he makes no argument in support of his contention that those conferences violated his right to presence. We have thoroughly reviewed the record and find no error. Defendant was present in the courtroom, and his counsel was at the bench for each conference. This Court has previously held that "a defendant's constitutional right 'to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties.' " *Speller*, 345 N.C. at 605, 481 S.E.2d at 286 (quoting *State v. Buchanan*, 330 N.C. 202, 223, 410 S.E.2d 832, 845 (1991)).

[8] Defendant further argues under this assignment of error that the trial court erred by permitting several prospective jurors to be excused, deferred, or disqualified prior to the first day of jury selection without either defendant's participation or that of his counsel. He also complains that the trial court discussed the qualification process, heard and ruled on requests to be excused, and presided over the removal of nine individuals from defendant's trial venire for service on a grand jury. However, defendant's constitutional right to presence does not extend to the preliminary handling of prospective jurors before his own case has been called. *State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996). Accordingly, we overrule this assignment of error.

[9] By another assignment of error, defendant complains that the trial court improperly allowed prosecutors to withhold pretrial statements made to law enforcement officers by prosecution witnesses Alan Varden and Virginia Call. Defendant contends that the statements contain favorable evidence that the prosecution was obligated to turn over to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). We disagree.

In *Brady*, the United States Supreme Court held that the prosecution may not suppress favorable evidence which is material to the guilt or punishment of a defendant without violating due process. *Id.* Evidence is considered material only if there is a "reasonable probability" of a different result had the evidence been disclosed to the defense. *Kyles v. Whitley*, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 496 (1995). After thoroughly reviewing the statements in the amended record, we do not believe that either statement was material within the Supreme Court's meaning under *Brady*. At most, Virginia Call's statement suggested that defendant did not have the courage to murder Macedonio. However, both statements still tended to establish defendant's guilt. Even assuming, *arguendo*, that the statements were discoverable, the prosecution satisfied the requirements under *Brady* by providing the defense with the statements at trial in time for defendant to make effective use of them. Virginia Call was not called as a witness, and Alan Varden was cross-examined about his statement. Thus, defendant cannot show that he was prejudiced. This assignment of error is overruled.

[10] By another assignment of error, defendant contends that the trial court erred by denying his motion to sequester prosecution witnesses, including Alan Varden. More specifically, defendant argues

that the trial court's ruling was based upon an "entirely arbitrary" reason: that the courthouse could not accommodate sequestration of the witnesses. We do not agree.

A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Ball*, 344 N.C. 290, 474 S.E.2d 345 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 561 (1997). In this case, defendant has shown no abuse of discretion. Moreover, although defendant claims that the denial of his motion to sequester violated a number of his state and federal constitutional rights, he made no constitutional claim at trial. Constitutional questions not raised and ruled upon at trial shall not ordinarily be considered on appeal. *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Accordingly, this assignment of error is overruled.

[11] By his next assignment of error, defendant contends that the trial court erroneously instructed new grand jurors on the function of the grand jury in the presence of the members of his jury pool, five of whom eventually served on the jury that heard his case. Specifically, defendant argues that those five aforementioned venire members may have been induced into giving undue weight to the fact that defendant was indicted when they decided his guilt. We disagree.

No mention was ever made of the indictments returned against defendant. Nor has defendant shown any bias on the part of the five jurors who heard the grand jury instruction. We have previously stated that "mere observation by the jury of other lawful courtroom processes will not be presumed to result in prejudice to defendant." *State v. Sparks*, 297 N.C. 314, 255 S.E.2d 373 (1979). This assignment of error is overruled.

[12] By another assignment of error, defendant contends that the prosecutor improperly asked prospective jurors if they could write the word "death" on the recommendation form and if they could announce their verdict of death in open court. He argues that this "improper extraction of promises" erroneously informed the jurors that they would each be required to sign the verdict form and announce the verdict when only the foreperson would be required to do so. We find no error.

This issue was addressed by this Court in *State v. White*, 343 N.C. 378, 471 S.E.2d 593, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 229 (1996). The defendant in *White* argued that the prosecutor improperly asked a prospective juror whether he could "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. We concluded that although the question exaggerated "the juror's actual role in the sentencing process, [it] 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. In this case, we conclude that the prosecutor's questions legitimately sought to determine the jurors' ability to carry out their duties in defendant's capital trial. Therefore, this assignment of error is overruled.

[13] Defendant next contends that the trial court improperly refused to permit him to question fifteen prospective jurors before excusing them for cause based upon their opposition to the death penalty. In a number of instances, defendant argues, the venire members' responses to questioning were ambiguous and required further interrogation. Defendant's contentions are without merit.

The decision whether to allow a defendant an opportunity to rehabilitate a prospective juror challenged for cause rests within the sound discretion of the trial court. *State v. Stephens*, 347 N.C. 352, 493 S.E.2d 435 (1997), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 67 U.S.L.W. 3231 (1998). In this case, defendant cannot show an abuse of that discretion. The trial court properly denied any attempt to rehabilitate based upon the fifteen prospective jurors' answers to *voir dire* questions. Thus, defendant can show no error.

Even assuming defendant could show error, the record shows that he requested an opportunity to rehabilitate only three of the fifteen prospective jurors. The record further reveals that defendant did not exhaust his peremptory challenges. This demonstrates defendant's satisfaction with the jury which was empaneled, and he cannot show prejudice from the trial court's rulings on rehabilitation. *State v. Miller*, 339 N.C. 663, 455 S.E.2d 137, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995). This assignment of error is overruled.

[14] By another assignment of error, defendant contends that the trial court improperly failed to remove prospective jurors Fore, Faw, and Fairchild for cause. Defendant argues that these three prospective jurors were biased against defendant by virtue of their opinions

about his guilt, exposure to pretrial publicity, or affiliations with prosecution witnesses.

In order to show prejudice by the denial of his challenge for cause, defendant must show that he exhausted his peremptory challenges, made a renewed challenge for cause which was denied, and requested and was denied an additional peremptory challenge. *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994). An examination of the record reveals defendant did not satisfy any of the foregoing requirements for appellate review. Thus, defendant has waived this assignment of error.

[15] Defendant next contends that the trial court erroneously removed prospective juror Nancy Cooper for cause based upon her psychological disabilities. More specifically, defendant argues that the record does not establish that Ms. Cooper's mental-health problems would have prevented her from serving as a juror. We disagree.

Before *voir dire* began, the trial court welcomed the venire and explained the qualifications for service as a juror, which included a requirement that each juror be "physically and mentally competent." When the trial court asked if all of the prospective jurors met those requirements, Ms. Cooper asked to approach the bench to discuss her personal health. Later, when the trial court asked if there were any claims of undue hardship, Ms. Cooper again raised her hand. She explained that she was bipolar manic-depressive, had been under the care of New River Mental Health since 1982, had been hospitalized, and sees a counselor regularly. The trial court excused her from jury service.

Decisions concerning the excusal of prospective jurors are matters ordinarily left to the sound discretion of the trial court. *State v. Neal*, 346 N.C. 608, 487 S.E.2d 734 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 131 (1998). In this case, the trial court did not abuse its discretion by excusing prospective juror Cooper. It is apparent from the record that Ms. Cooper was herself concerned about her ability to serve on the jury and the impact which service might have on her mental health. Moreover, as we noted above, defendant expressed his satisfaction with each of the jurors who decided his case. Accordingly, this assignment of error is overruled.

[16] By another assignment of error, defendant contends that the trial court erred by authorizing two law enforcement officers who were potential prosecution witnesses at trial to have *ex parte* contact

with prospective jurors and failed to take corrective action when it learned of such contact. Specifically, defendant complains that on the morning his trial began, the two chief investigating officers in this case, Captain Steve Houck and Detective Peyton Colvard, assisted the trial court by passing out Bibles to the venire. Although the trial court instructed the officers not to have further contact with prospective jurors, defendant argues that the court erred by not questioning the venire members about the nature and extent of the contact and whether it would affect their ability to be fair and impartial. This argument is without merit.

This Court has held that in cases where witness contact with the jury occurs, "prejudice will be conclusively presumed only 'where a witness for the State acts as custodian or officer in charge of the jury.' " *State v. Flowers*, 347 N.C. 1, 20, 489 S.E.2d 391, 402 (1997) (quoting *State v. Jeune*, 332 N.C. 424, 431, 420 S.E.2d 406, 410 (1992)), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 150 (1998). In order for this Court to determine whether the witness acted in such capacity, we must look to the facts and circumstances surrounding the case and not just to the actual lawful authority of the witness. *Id.* In the case at bar, the record does not indicate that Captain Houck and Detective Colvard ever had custody or control of the jury or were ever with the jurors out of the presence of the trial court. Their contact with the jurors merely consisted of passing out Bibles and telling the venire members which hand to raise and which hand to place on the Bible. We conclude that this brief contact was legally insignificant.

[17] By another assignment of error, defendant contends that the prosecutor improperly discriminated on the basis of gender by using eight of the eleven peremptory challenges he exercised to strike women from the jury panel. Defendant argues that this "highly disproportionate striking pattern" establishes a *prima facie* case of gender discrimination. We disagree.

"As with race-based *Batson* claims, a party alleging gender discrimination must make a *prima facie* showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 144-45, 128 L. Ed. 2d 89, 106-07 (1994). This Court has held that the same type of factors which may be relevant in determining whether a *Batson* violation has occurred are relevant in resolving whether a defendant has established a *prima facie* showing of intentional gender discrimination. *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997). These

factors include the gender of the defendant, the victim and any key witnesses; questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of gender discrimination; the frequent exercise of peremptory challenges to prospective jurors of one gender that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members of one gender; whether the State exercised all of its peremptory challenges; and the ultimate gender makeup of the jury. *Id.* at 671, 483 S.E.2d at 410.

In the case *sub judice*, defendant does not raise any of the aforementioned factors other than his bare assertion that the prosecution utilized eight peremptory challenges in an improper fashion. We note that the record does not reveal the gender of the jurors that heard defendant's case or the overall percentage of prospective female jurors in the venire. Based upon this record, we cannot conclude that defendant established a *prima facie* showing of gender discrimination in the jury selection process in this case. Thus, this assignment of error is overruled.

GUILT-INNOCENCE DETERMINATION

By another assignment of error, defendant makes several arguments regarding the admission into evidence at his trial of a handwritten note and handwriting exemplars. First, defendant contends that the note was inadmissible because it was protected by spousal privilege. Second, defendant argues that the prosecution allowed a witness to perjure himself through his testimony regarding the note. Defendant also claims that the warrant for handwriting exemplars was improperly issued because the application for it relied on privileged communications and because the magistrate applied the wrong standard for determining probable cause. These contentions are without merit.

[18] The note at issue read: "I Eric Call hearby [sic] declare that my wife Virginia Cox Call had absulutly [sic] no knolede [sic] of what might have taken place," and was signed "Eric L Call." At trial, Alan Varden testified that he found the note in his residence and turned it over to police. Notwithstanding this testimony, defendant complains that the affidavit in support of the application for the writing exemplars stated that Virginia Call gave the note to investigators. Based on the foregoing, defendant argues that the note was a confidential communication protected by spousal privilege and was thus inadmissible against him. We disagree.

A witness-spouse may not voluntarily testify regarding confidential communications over the objection of the defendant-spouse who asserts the privilege. *State v. Holmes*, 330 N.C. 826, 412 S.E.2d 660 (1992). In this case, however, Mrs. Call did not testify, nor were her statements to police presented as evidence at trial. We note, significantly, that defendant did not claim the privilege at trial. Rather, he contested the evidence presented by attempting to show he was not the author.

Furthermore, spousal privilege does not bar those nonconfidential, out-of-court statements introduced against a defendant-spouse for the State through a third party. *State v. Rush*, 340 N.C. 174, 456 S.E.2d 819 (1995). The trial court in this case properly allowed Varden to testify that defendant told him about the note and that the note was found in Varden's home. In addition, it is clear from the language of the note that defendant did not leave the note for Mrs. Call, but for anyone who might suspect his wife of wrongdoing. We conclude that the note was not a confidential communication protected by the spousal privilege.

[19] Similarly, we conclude that the prosecution did not knowingly present perjured testimony. The United States Supreme Court has established the " 'standard of materiality' under which the knowing use of perjured testimony requires a conviction to be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-50 (1976)), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). Accordingly, "[w]hen a defendant shows that 'testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction,' he is entitled to a new trial." *Id.* at 336, 395 S.E.2d at 423 (quoting *State v. Robbins*, 319 N.C. 465, 514, 356 S.E.2d 279, 308, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987)).

In the case at bar, it is not clear from the record who gave investigators the note at issue. However, the identity of this person is not determinative because it was not likely to have affected the jury's decision to convict defendant. Both Varden and Virginia Call knew about the existence and the contents of the note. As discussed above, Varden was free to testify about that knowledge. The record does not show that the contents of the note, and thus the inferences raised by those contents, were false or that the prosecution knowingly used false evidence to convict defendant. Therefore, we find no error.

[20] Defendant next challenges, on two bases, the legality of the search warrant used to obtain handwriting exemplars. First, defendant argues that the warrant was improperly issued because the application for it relied on communications protected by spousal privilege. More specifically, defendant claims that the application improperly recounted the confession he made to his wife, the contents of the handwritten note, and information that he had registered in a hotel in another county. Second, defendant contends that the magistrate applied the wrong standard for determining probable cause.

At the outset, we note that by failing to challenge the legality of the search warrant either before trial or at trial, defendant did not properly preserve either issue for our review. Defendant did file a "Notice Motion," which requested the trial court to preclude the prosecution from making reference to any statements made by defendant's wife until the court could determine whether the statements were privileged. However, Mrs. Call never testified, and the trial court did not find the note defendant left to be a privileged communication. Furthermore, defendant did not object to the admission of the handwriting exemplars into evidence or make a motion to suppress the handwritten note. By failing to properly preserve these issues, defendant has waived his right to appellate review of them. N.C. R. App. P. 10(b)(1); *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991). This assignment of error is overruled.

By another assignment of error, defendant raises several arguments in support of his contention that the trial court erred by allowing Henry Drain to interpret Gabriel's testimony. First, defendant contends that Drain was not qualified, was biased because he had worked as an interpreter for local law enforcement, and did not accurately interpret Gabriel's testimony. Defendant also argues that Gabriel did not need an interpreter because he could speak and understand some English. In the alternative, defendant claims that if Gabriel was not fluent in English, then he was not competent to testify as to conversations he heard in English. These contentions are without merit.

[21] "The decision to appoint an interpreter rests within the sound discretion of the trial court. Any person who is competent to perform the duty assumed may be appointed as an interpreter." *State v. Torres*, 322 N.C. 440, 443-44, 368 S.E.2d 609, 611 (1988). The trial court's selection of an interpreter will not be overturned on appeal absent a showing of abuse of discretion. *Id.* at 444, 368 S.E.2d at 611. Here, the trial court did not abuse its discretion. Drain explained to

the court that he was originally from Venezuela and that his native tongue was Spanish. He further revealed that he taught Spanish at Wilkes Community College and had been translating in the North Carolina court system for the past eight years. Finally, Drain had lived in both South and Central America and was familiar with several Hispanic dialects. There was plenary evidence before the trial court from which it could reasonably conclude that Drain was qualified.

[22] We now turn to defendant's contention that Gabriel was not competent to testify. The basis of defendant's argument is that if Gabriel indeed cannot speak or understand English, he could not have understood the conversation between defendant and Macedonio the night the victim was killed. Therefore, Gabriel could not testify that defendant offered the victim $25.00 to help him move some furniture. However, the record shows Gabriel was able to understand a few English words and phrases and that defendant spoke a mixture of English and Spanish on the night of the murder. Moreover, this was a short, simple conversation, the gist of which defendant repeated to Gabriel in a manner he could understand, a few hours later. We conclude that Gabriel was competent to testify to his observations.

With regard to the remainder of defendant's arguments which focus on the appointment of interpreter Drain, defendant objected to the appointment on only one ground: that Drain was not qualified. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *Eason*, 328 N.C. at 420, 402 S.E.2d at 814. Thus, defendant has failed to preserve the additional grounds presented on appeal. He also waived appellate review of those arguments by failing specifically and distinctly to argue plain error. N.C. R. App. P. 10(c)(4). Accordingly, this assignment of error is overruled.

[23] Defendant next contends that the trial court erred by denying his requests to tape record the testimony of prosecution witnesses in order to assist defense counsel in preparing for cross-examination. Specifically, he complains that these rulings were especially damaging with regard to Gabriel's testimony because, without an interpreter of his own, defendant had no way to check the accuracy of the interpretation or to challenge it on appeal. In support of this contention, defendant cites Rule 15 of the General Rules of Practice for the Superior and District Courts, which permits the use of electronic

media, including tape recorders, in criminal trials. However, defendant's reliance on Rule 15 is misplaced.

Although the rule does permit tape recorders to be present in the courtroom, it also expressly provides that "[t]he presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings." Gen. R. Pract. Super. and Dist. Ct. 15(b)(1), 1998 Ann. R. 11. Here, the trial court denied defendant's motion and chose to rely on the court reporter's recordation of the proceedings. Defendant does not argue that the trial court abused its discretion in ruling upon his motion. We note that the record shows that the trial court heard arguments on the motion before making its ruling and inquired whether defendant needed an interpreter prior to the *voir dire* to qualify Drain as an expert. Defendant declined this assistance. The trial court provided a complete and accurate record of defendant's trial. Accordingly, this assignment of error is overruled.

[24] By other assignments of error, defendant complains that the trial court permitted State Highway Patrol Trooper Chuck Olive; Captain Steve Houck of the Ashe County Sheriff's Department; and the victims' employer, David Shatley, to testify regarding several out-of-court statements that did not fit within any exception to the rule against hearsay. These assignments of error are deemed waived for failure to comply with Rule 28(d) of the Rules of Appellate Procedure.

Under Rule 28(d)(1), when the transcript of proceedings is filed pursuant to Rule 9(c)(2), the appellant must attach as an appendix to its brief either a verbatim reproduction of those portions of the transcript necessary to understand the question presented or those portions of the transcript showing the questions and answers complained of when an assignment of error involves the admission or exclusion of evidence. N.C. R. App. P. 28(d)(1)(a), (d)(1)(b). Alternatively, Rule 28(d)(2)(a) provides that when the portion of the transcript necessary to understand the question presented is reproduced verbatim in the body of the brief, appendices to the brief are not required. N.C. R. App. P. 28(d)(2)(a).

In this case, defendant cites several pages of the transcript, but has not identified the specific questions or answers which he wants this Court to review for error. Moreover, defendant has failed to attach the pertinent portions of the transcripts containing the examinations complained of as an appendix to his brief, and he has not

included a verbatim reproduction of those questions or answers in his brief. Accordingly, these assignments of error have been waived and are overruled.

[25] Defendant next argues that the trial court erred by allowing the hearsay testimony of Thomas Reeves and SBI Agent Steven Cabe. More specifically, defendant contends that Reeves should not have been allowed to testify regarding a telephone conversation he had with his mother about Gabriel, who showed up at her home the morning after he was attacked. Similarly, defendant complains that the trial court erroneously allowed Agent Cabe to testify regarding out-of-court statements Varden made to him that incriminated defendant. We find no error.

The North Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1988). However, out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. This Court has held that statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

In the case at bar, the following exchange occurred during the prosecution's direct examination of Reeves:

> Q. Now, as a result of the telephone call from your mother, what did you do?
>
> A. I went down to her house. She said ....
>
> MR. LYNCH: . . . . OBJECTION.
>
> THE COURT: OVERRULED. You can consider what she said for the purpose of showing what he did after talking to her.
>
> Q. Go ahead.
>
> A. She said there was a Mexican there and she couldn't figure out where he wanted to go, and asked, thought he wanted to go to town. And, so I, I was on my way to work . . . .
>
> MR. LYNCH: . . . . MOVE TO STRIKE the answer.
>
> THE COURT: MOTION DENIED.

Q. Continue, please?

A. So I drove down to the house for that purpose.

The trial court allowed the testimony for the limited purposes of showing what Reeves did after having the telephone conversation with his mother and why he went to her house. Moreover, this evidence was offered to corroborate Gabriel's testimony. We conclude that Reeves' testimony was proper nonhearsay evidence and that the trial court did not commit error.

[26] Defendant further contends that the trial court erred by allowing Agent Cabe to testify regarding the statement Varden gave to law enforcement officers. We disagree. The trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes. *State v. Levan*, 326 N.C. 155, 388 S.E.2d 429 (1990). In this case, Varden testified that he gave a statement to the police at trial, and he was cross-examined by defendant. Also, the record shows that Agent Cabe's testimony was offered only for corroborative, nonhearsay purposes, and the trial court clearly and correctly instructed the jury on the permissible use of this evidence. Defendant cannot show that the trial court abused its discretion by allowing Agent Cabe's testimony. This assignment of error is overruled.

By this same assignment of error, defendant contends that several rulings by the trial court improperly restricted his examinations of Varden and Captain Houck. On cross-examination, defendant questioned Varden about discrepancies between the narrative prepared by law enforcement officers and his pretrial statement. He also attempted to find out whether Varden was in dire financial trouble and was the subject of domestic-violence complaints by Virginia Call. The record shows that the trial court sustained the prosecution's objections to these lines of inquiry. Similarly, the trial court sustained an objection when defendant asked Captain Houck about the availability of forensic testing for the victim's blood. These rulings, defendant argues, resulted in a violation of a bevy of constitutional guarantees, most notably his right to confrontation. This argument is without merit.

At the outset, we note that defendant's arguments of constitutional error were not raised at trial and, thus, are deemed waived on appeal. *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996); *see* N.C. R. App. P. 10(b)(1). Although defendant cites several pages of the transcript

that report the testimony of both Varden and Captain Houck, he specifically draws our attention only to those portions of the cross-examinations noted above. Because defendant has failed to identify the specific questions or answers which he wants this Court to review, contrary to Rule 28(d) of the Rules of Appellate Procedure, we review only the four aforementioned rulings for error.

A witness may properly be cross-examined on any matter relevant to any issue in the case, including credibility. N.C.G.S. § 8C-1, Rule 611(b) (1997). Moreover, a witness may be impeached on cross-examination by, among other things, evidence of prior convictions, opinion testimony as to reputation, and evidence of specific instances of conduct if probative of truthfulness or untruthfulness. N.C.G.S. § 8C-1, Rules 404, 405, 608, 609 (1997). However, the trial court has broad discretion over the scope of cross-examination. *State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998).

[27] In this case, the trial court did not abuse its discretion. The record shows that the prosecution's objection to defendant's question regarding inconsistencies in Varden's testimony and his prior statements to law enforcement officers was sustained because the police reduced the statements to a narrative. Even though the substance of the statements was attributed to Varden, the actual words used were not. Accordingly, the trial court properly sustained the objection. The record further reveals that the trial court allowed Varden to testify in response to defendant's question that he was indeed in financial trouble and sustained only the prosecution's objection to repetitious questioning on the subject. Thus, the trial court did not err in this regard. Finally, even assuming Varden had a history of domestic violence for which he had not been convicted, such evidence had no bearing on his truthfulness or untruthfulness in this case and was not proper impeachment evidence. N.C.G.S. § 8C-1, Rule 608(b).

Moreover, we find no error in the trial court's ruling on the prosecution's objection to defendant's question to Captain Houck about the availability of forensic testing for the victim's blood. The record shows that the trial court sustained the objection because it found that Captain Houck was not qualified to answer the question. This notwithstanding, the trial court allowed defendant to make an offer of proof through a *voir dire* of Captain Houck, where defendant ultimately acknowledged that the witness was not competent to answer the question. We conclude that the trial court's rulings were proper. Thus, this assignment of error is overruled.

Defendant's next assignment of error relates to the introduction of evidence that he contends improperly suggested that Macedonio's murder was drug or alcohol related. Defendant further complains that the prosecution introduced inadmissible character and hearsay evidence that defendant was fired from his job, that defendant destroyed evidence, and that additional inculpatory evidence existed but was not discovered by law enforcement officials. According to defendant, these errors violated several rules of evidence including N.C.G.S. § 8C-1, Rule 404(b), as well as numerous state and federal constitutional rights. However, defendant did not raise any constitutional issues at trial and, thus, is precluded from raising them on appeal. N.C. R. App. P. 10(b)(1); *Jaynes*, 342 N.C. 249, 464 S.E.2d 448. With regard to the substantive evidentiary issues, we find no error.

[28] Defendant filed a motion *in limine* to exclude the introduction of cigarette rolling paper and beer cans recovered at the edge of the cornfield near the spot where the victim's body was discovered. The trial court deferred ruling on the motion, and at trial, defendant again objected to the admission of the evidence. Defendant contends that such evidence was irrelevant to his guilt and that the trial court erroneously admitted a photograph of and testimony about the items in violation of Rule 404(b). We reject this contention.

Initially, we note that the trial court sustained defendant's objection to the introduction of the actual items; thus, defendant has no grounds upon which to except. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991). This notwithstanding, we find no error in the admission of the testimony regarding the foregoing items.

" 'An individual piece of evidence need not conclusively establish a fact to be of some probative value. It need only support a logical inference of the fact's existence.' " *State v. Goode*, 341 N.C. 513, 537, 461 S.E.2d 631, 645 (1995) (quoting *State v. Payne*, 328 N.C. 377, 401, 402 S.E.2d 582, 596 (1991)). In this case, the State's evidence tended to show that defendant lured Gabriel to the same location where he had taken Macedonio and then tried to kill Gabriel. Gabriel testified that defendant offered him a beer and smoked cigarettes while at the cornfield. The jury could reasonably infer from this testimony that defendant also offered Macedonio a beer and smoked around the time of the killing. We conclude that the foregoing testimony was offered to show a portion of what law enforcement officers found at the crime scene and to corroborate Gabriel's testimony, not as improper character evidence. Moreover, defendant failed to move to

strike the testimony of which he now complains, thereby waiving his right to assert error on appeal. *Id.*

We note further that the record does not show that the photograph of which defendant now complains was actually introduced into evidence. Even assuming the photograph was introduced, photographs of the crime scene are admissible in evidence to illustrate the testimony of a witness. *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985).

By this same assignment of error, defendant argues that the prosecution improperly insinuated inadmissible character and hearsay evidence that defendant was fired from his job, that defendant destroyed evidence, and that additional inculpatory evidence existed but was not discovered by law enforcement officials. These contentions are also without merit.

[29] The record shows that the trial court sustained several of defendant's objections to such evidence. The trial court sustained defendant's objection when the prosecution asked Trooper Olive what he knew about defendant's being fired from his job with Shatley. The trial court also sustained defendant's objection when Agent Cabe was asked about the possibility of defendant's removing evidence from his truck. Finally, defendant's objection to SBI Agent J.A. Gregory's testimony regarding the possibility of unidentifiable fragments of fiber being from the victim was sustained. Defendant can show no prejudice where his objections are sustained. *Quick*, 329 N.C. 1, 405 S.E.2d 179.

The trial court also properly overruled defendant's objection to testimony from SBI Agents J.S. Taub and Gregory, the prosecution's experts in serology and hair and fiber evidence, respectively, regarding the effects of rain on blood testing and the collection of evidence from the victim's body. The record reveals that Agent Cabe had previously testified that it rained heavily the night Macedonio's body was found. Defendant also cites a portion of the transcript regarding defendant's cross-examination of Agent Taub about testing drag marks for blood. Because the trial court overruled the prosecutor's objection to defendant's inquiry, we cannot find that defendant was prejudiced thereby. Accordingly, this assignment of error is overruled.

[30] By another assignment of error, defendant complains that the trial court erroneously admitted six autopsy photographs of the victim and other irrelevant evidence designed to prompt a verdict based

upon sympathy for the victim. Defendant contends that the photographs were gruesome and inflammatory and had no probative value. In support of this contention, defendant relies on our opinion in *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988).

In *Hennis*, this Court concluded that the admission into evidence of photographs which have no probative value beyond that of previously introduced photos constitutes reversible error where their content is gory, they are redundant and repeatedly shown to the jury, and there is a lack of overwhelming evidence of an accused's guilt. *Id.* at 286-87, 372 S.E.2d at 528. However, we continue to recognize the long-standing rule that photographs of a murder victim, though gory or gruesome, may be introduced for illustrative purposes so long as they are not used in an excessive or repetitious manner aimed exclusively at arousing the passions of the jury. *Id.* at 283, 372 S.E.2d at 526. Moreover, the trial court must still balance the prejudicial effect of relevant evidence, including photographs, against its probative value before that evidence can be introduced or excluded. N.C.G.S. § 8C-1, Rule 403 (1997). Finally, what constitutes an excessive number of photos, given the illustrative value of each, is a matter that falls within the trial court's discretion. *Hennis*, 323 N.C. 279, 372 S.E.2d 523. In light of the foregoing principles, we now review defendant's argument.

Prior to trial, defendant filed a motion *in limine* to have the trial court review the autopsy photographs *in camera* to determine their admissibility. The prosecution attempted to introduce eight autopsy photographs to illustrate the testimony of the pathologist, Dr. Robert Thompson. The trial court deferred ruling upon defendant's motion until Dr. Thompson testified. When Dr. Thompson took the stand, defendant renewed his motion, and the trial court heard arguments out of the presence of the jury. Defendant asked the trial court to review the photographs and cull them so that no repetitive pictures would be introduced. The trial court reviewed the photographs and excluded two of them as repetitious, but allowed the prosecution to introduce the other six for illustrative purposes during Dr. Thompson's testimony.

We note that defendant does not argue that the trial court abused its discretion. Even assuming defendant had raised the issue, we could not conclude, based on the foregoing, that the trial court abused its discretion. We note further that defendant did not object to the trial court's ruling or the subsequent admission of the six

remaining photographs. Therefore, defendant may not raise the issue on appeal. N.C. R. App. P. 10(b)(1). By failing to properly preserve this issue, defendant is entitled to review only for plain error. However, defendant fails to argue plain error, thereby waiving appellate review. N.C. R. App. P. 10(c)(4).

[31] Defendant also argues that the prosecutor made improper use of the autopsy photographs during closing arguments in both the trial and the subsequent capital sentencing proceeding. However, defendant made no objection to argument either at trial or during the capital sentencing proceeding. Therefore, we review only to determine whether the prosecutor's arguments were so improper that the trial court erred by failing to intervene *ex mero motu*. *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994).

In the instant case, the record reveals that the prosecutor merely reminded the jury about the crime-scene photographs during the closing arguments at the conclusion of the trial, and did not present any photographs to the jury. Although the record is unclear whether the jury viewed a crime-scene photograph or an autopsy photograph during closing arguments in the separate capital sentencing proceeding, that fact is of no legal consequence. It was not grossly improper for the prosecution to use photographs, which had been properly introduced as evidence, during closing arguments at trial or during the subsequent capital sentencing proceeding. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

[32] Finally, in support of this assignment, defendant contends that the trial court improperly allowed Shatley, the victim's employer, to testify about the good qualities of the victim, including that he sent money home to his family. This contention has no merit. Defendant opened the door to such testimony by soliciting similar information, including what Macedonio Gervacio did with his money, during the cross-examination of Gabriel. Accordingly, this assignment of error is overruled.

[33] By his next assignment of error, defendant contends that the trial court improperly allowed Agent Cabe to testify that tire prints found near the victim's body matched the tread on the tires of defendant's truck. Defendant also claims that the trial court erroneously allowed Dr. Thompson to testify that he was able to determine that the victim suffered eleven blows to the head and that the weapon used was an iron rod found in defendant's truck, without first demon-

strating that forensic pathologists are qualified to render such opinions. Again, these issues were not properly preserved for appellate review because defendant did not object to the testimony at trial. N.C. R. App. P. 10(b)(1); *Eason*, 328 N.C. 409, 402 S.E.2d 809. Therefore, defendant is entitled to review only for plain error. However, defendant has failed to argue plain error, thereby waiving appellate review. N.C. R. App. P. 10(c)(4). Thus, this assignment of error is waived.

Defendant next contends that the prosecution failed to lay a proper foundation for the admission of various items of evidence. However, for the following reasons, defendant has not properly preserved or presented these assignments of error for appellate review.

Initially, we note that although defendant raises five questions by this argument, numbered assignments of error 39, 46, 57, 58, and 59, he only presents arguments for numbers 39, 58, and 59 in his brief. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(5). Accordingly, assignments of error numbered 46 and 57 are deemed abandoned.

[34] Defendant first argues that State's exhibit 4, a baseball bat, was not properly authenticated. However, defendant's assignment of error set out in the record on appeal does not present authentication of the bat as an issue for this Court to review. "Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a). Moreover, defendant made no objection to the introduction or authentication of the baseball bat at trial. "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. York*, 347 N.C. 79, 87, 489 S.E.2d 380, 385 (1997). Accordingly, this assignment of error is dismissed.

Defendant next argues that the prosecution introduced State's exhibit 40, a handwriting exemplar made by defendant, without proving that it was actually taken from defendant. Similarly, defendant complains that the trial court improperly permitted the State's handwriting expert, SBI Agent Thomas Currin, to testify that he had determined that defendant's handwriting was on a pawn-shop receipt by comparing it to handwriting exemplars, even though the receipt was never offered into evidence. Again, defendant failed to object at

trial, thereby waiving appellate review. N.C. R. App. P. 10(b)(1); *Eason*, 328 N.C. 409, 402 S.E.2d 809. Defendant also has failed to preserve this issue for review pursuant to the plain error rule by failing to specifically and distinctly argue plain error. N.C. R. App. P. 10(c)(4).

Finally, defendant contends that the prosecution improperly presented the testimony of Lanny Jones, a local resident, that he saw a truck that resembled defendant's travel at an unusually high rate of speed around the time and near the place that Macedonio was killed. However, this argument does not correspond to any of the assignments of error defendant set out under the question presented. Moreover, this argument does not relate to the question presented. Under the question presented, defendant complains about the foundation and authentication of direct physical evidence. The foregoing argument pertains to the proper identification of defendant's truck—circumstantial evidence that placed defendant in the vicinity of the crime scene at the time the murder was committed. Rule 28 of the Rules of Appellate Procedure requires defendant to argue each of his contentions with respect to each of the questions he presents. N.C. R. App. P. 28(b)(5). Defendant has failed to comply with this rule. Accordingly, this issue is deemed abandoned, and this assignment of error is dismissed.

Defendant's next assignment of error relates to the sufficiency of the evidence presented in support of his armed robbery, kidnapping, and felony murder convictions. In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. *Sexton*, 336 N.C. 321, 444 S.E.2d 879. The trial court must examine the evidence in the light most favorable to the State, granting the State every reasonable inference to be drawn from the evidence. *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998). We review defendant's contentions in light of the foregoing principles.

[35] Defendant first argues that his felony murder conviction should be vacated because the State presented insufficient evidence that he committed armed robbery. Defendant was indicted for robbery with a dangerous weapon under N.C.G.S. § 14-87. The elements of this offense are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened. N.C.G.S. § 14-87 (1994); *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). Defendant

argues that, other than Varden's testimony that defendant said he was going to rob the victim prior to the killing and had more money than usual afterwards, the prosecution presented no evidence that defendant took money or anything else from Macedonio. Thus, defendant argues that the prosecution did not carry its burden of proving all the elements of the offense charged. We conclude that the prosecution met its burden.

The evidence presented at trial tended to show that defendant not only told Varden about his plan to rob Macedonio, he also told Varden what happened in the cornfield. In addition, defendant suddenly had enough money to give Varden $210.00 and to pay for a hotel room in Monroe in cash. Finally, the victim, who was known to carry a large sum of money, was found dead with only $9.00 in his possession. Viewed in the light most favorable to the State, we conclude that there was sufficient evidence in this case to support the taking element of armed robbery.

[36] By this same assignment of error, defendant contends that the trial court erred by not granting his motion to dismiss the kidnapping charge because the prosecution failed to produce sufficient evidence of the element of restraint to establish the crime of kidnapping. We disagree.

Defendant was charged with and convicted of first-degree kidnapping pursuant to N.C.G.S. § 14-39, which provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

N.C.G.S. § 14-39(a)(2) (1994). Defendant argues that although the victim was found with his hands bound, the prosecution offered no evidence that this restraint occurred prior to or apart from the killing. In support of this contention, defendant relies on this Court's reasoning in *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986). However, the present case is distinguishable from *Prevette*.

In *Prevette*, this Court held that a criminal defendant could not be convicted of both kidnapping and murder where the "restraint essential to the kidnapping conviction was an inherent and inevitable feature of [the] particular murder." *Id.* at 157, 345 S.E.2d at 165. That holding was based upon an erroneous jury charge which allowed the trier of fact to consider the restraint of the victim in an improper manner. Even assuming no additional evidence of restraint was presented in this case, defendant still cannot demonstrate that the trial court erred. The jury in this case did not rely upon the victim's restraint because the trial court's kidnapping charge was based upon the removal of the victim from one place to another, and the underlying felony in support of the felony murder charge was robbery. Moreover, the removal necessary to support a kidnapping conviction can be accomplished by fraudulent means as well as by the use of force, threats, or intimidation. *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981). Viewed in the light most favorable to the State, the evidence permitted a rational trier of fact to find that defendant lured Macedonio away from his home under the pretense of earning money by moving furniture. We conclude that evidence of this ruse constituted sufficient evidence of a removal to sustain defendant's kidnapping conviction. This assignment of error is overruled.

Defendant next complains that the prosecutor engaged in prejudicial misconduct during closing arguments at the guilt phase, in violation of several of his rights under numerous state and federal constitutional provisions, thus entitling him to a new trial. Although defendant raises eleven assignments of error by this argument, he makes no argument as to assignments of error numbered 69 and 78 in his brief. Those two assignments of error are thus deemed abandoned. N.C. R. App. P. 28(b)(5). Defendant also failed to raise any constitutional claims at trial and is precluded from raising them now on appeal. N.C. R. App. P. 10(b)(1); *Jaynes*, 342 N.C. 249, 464 S.E.2d 448.

The scope of jury arguments is left largely to the control and discretion of the trial court, and trial counsel will be granted wide latitude in the argument of hotly contested cases. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). Counsel are permitted to argue the evidence presented and all reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). Where, as here, defendant failed to object to any of the closing remarks of which he now complains, he must show that the remarks were so grossly improper that the trial court erred by failing

to intervene *ex mero motu*. *State v. Lemons*, 348 N.C. 335, 356, 501 S.E.2d 309, 322 (1998). In order to carry this burden, defendant must show that the prosecutor's comments so infected the trial that they rendered his conviction fundamentally unfair. *Id.* Moreover, the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred. *Flowers*, 347 N.C. 1, 489 S.E.2d 391. In light of the foregoing principles, we now address defendant's contentions.

[37] Defendant first claims that several of the prosecutors' closing arguments either misstated the evidence or were based upon facts not in evidence. Specifically, defendant contends that the following arguments were improper: (1) the comment that the tire impression at the crime scene and the tire tread from defendant's truck matched perfectly, when Agent Cabe actually testified to a seven-centimeter difference between the two; (2) the remark that Dr. Thompson testified there would not have been much blood splattering if the victim had been killed according to the State's theory, contrary to the witness' actual testimony; (3) the comment that Dr. Thompson testified that the presence of sand and bacteria under the body could explain the absence of a significant amount of blood, when that explanation was part of Agent Taub's testimony; and (4) the argument that the victim suffered nineteen blows to the head, when Dr. Thompson testified that the victim had suffered at least eleven blows. We have thoroughly reviewed the arguments in context and believe that the prosecutors properly argued either the facts that were in evidence or the reasonable inferences taken therefrom, and did not misstate the facts. Moreover, the trial court properly instructed the jurors that they were the finders of fact in the case and should be guided by their own recollection of the evidence, not counsel's arguments. We presume that the jury followed the court's instructions. *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

[38] By this same assignment of error, defendant contends that still more improper arguments by the prosecution urged the jury to rely on erroneous legal principles. Defendant first argues that it was improper for the prosecutor to comment that the jury could rely on biblical authority to weigh defendant's flight as evidence of his guilt. When viewed in context, the record reveals that the prosecutor was quoting from and relying upon a decision rendered by this Court to explain the significance of flight to the jury. *See State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842-43 (1977) (" 'The wicked flee when

no man pursueth, but the righteous are bold as a lion.' Proverbs 28, the first verse."). This argument was not improper.

[39] Defendant next complains that it was error for the prosecution to contrast his post-arrest silence with the willingness of Varden to speak with law enforcement officers. "A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent." *State v. Randolph*, 312 N.C. 198, 205, 321 S.E.2d 864, 869 (1984). Here, throughout the trial, the defense attempted to show that someone else, either Varden or Gabriel, killed Macedonio Gervacio. During his summation, the prosecutor tried to rebut this theory by arguing that Varden did not change his appearance and his name and leave town, although defendant found it necessary to do all of those things. The prosecutor further remarked that Varden gave the police a complete statement, contrary to what a guilty person might do. At no point did the prosecutor make any reference to defendant's silence. When this argument is viewed in context, it is clear that the prosecutor was properly attempting to rebut defendant's theory of the case. We do not find this argument to be improper.

[40] Defendant further claims that it was error for the prosecutor to argue that the jury should consider defendant's lack of evidence after defense counsel promised in opening statements to present evidence of Varden's violent past and criminal abuse of Virginia Call. We disagree.

During his summation, the prosecutor argued:

> Mr. Lynch told you that there would be evidence that Alan Varden has a violent past. There would be evidence that Jennie is a convicted criminal. Where was that evidence? There was no evidence to support any of that.
>
> . . . .
>
> Mr. Lynch promised you that he was going to prove that, that Jennie and Alan's relationship ended with violence that was initiated by Alan Varden. Well where was that evidence? That's something else that we didn't hear any evidence about.

Defendant did not object. This Court has repeatedly held that a prosecutor may properly comment on a defendant's failure to produce witnesses or evidence that contradicts or refutes evidence presented

by the State. *Fletcher*, 348 N.C. 292, 500 S.E.2d 668. We conclude that the comments of the prosecutor, when viewed in context, were not so grossly improper as to require the trial court to intervene on its own motion.

[41] Finally, defendant contends that the prosecutor improperly asked the jury to convict defendant based upon the victim's worth as a person and the impact of his death on his friends. Again, defendant did not object. We have reviewed the record and find this contention to be without merit. Here, the prosecutor merely urged the jurors to remember that Macedonio had been brutally beaten to death, that he was not simply a corpse, and that both the State and defendant were entitled to a fair trial. This argument was proper and therefore could not be "gross impropriety" requiring the trial court to intervene *ex mero motu*.

[42] By this same assignment of error, defendant contends that Assistant District Attorney Garland Baker improperly attempted to reenact the crime during his closing argument by repeatedly swinging objects through the air to simulate the force of an attack and by dropping heavy items on counsel table to simulate each blow. Again, defendant did not object and must show that the prosecutor's argument was so grossly improper that the trial court was required to intervene *ex mero motu*.

In the case *sub judice*, two pieces of a shovel handle, a metal rod, and a baseball bat were introduced into evidence at trial. Dr. Thompson testified that any one of these items could have been used to inflict the blunt-force injuries that caused the victim's death. Defendant challenges the prosecutor's use of the physical evidence during his summation:

> The reason that's important is because of the elements of premeditation and deliberation, because I want you all to think about, think about the mechanics involved in killing somebody.
>
> And, you pick up an instrument such as this mental [sic] rod (Picks up metal rod from counsel table), put your hand, and wrap your hand around it, that is a conscious act of will and volition.
>
> I picked up that rod because I wanted to. When this Defendant wrapped his hand around this rod, and picked it up, that was one conscious, willful act.

> And, to hit Macedonio over the head with it or with any other instrument, what does it, what do you have, what do you have to do? What did this Defendant have to do?
>
> He had to draw back with it (Illustrating). That's two willful, conscious acts. And, then, what did he have to do? He had to swing it (Illustrating) forward. That's three voluntary, willful, deliberate and premeditated acts.

Prosecutors may properly display items during closing argument where the item was actually introduced into evidence and is not used in an improper manner. *See State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981) (a revolver); *see also State v. Holbrook*, 232 N.C. 503, 61 S.E.2d 361 (1950) (a rifle). Here, all of the items were properly introduced into evidence. The prosecutor did not attempt to infer that a particular item was the murder weapon. Rather, the prosecutor attempted to show the premeditation and deliberation necessary to commit the crime. We conclude that this argument was not so grossly improper that the trial court erred or abused its discretion by failing to intervene *ex mero motu*. Accordingly, this assignment of error is overruled.

[43] Defendant next argues that the trial court's jury charge at trial was gravely flawed in a number of crucial respects, in violation of numerous state and federal constitutional rights. First, defendant contends that the trial court erred by declining to instruct the jury on second-degree murder because the evidence of robbery and premeditation and deliberation was not conclusive. Thus, a reasonable juror could have found defendant guilty of only second-degree murder. Second, defendant argues that the trial court erroneously instructed the jury, as part of its first-degree murder charge, that a deadly weapon is one likely to cause "serious injury," rather than "great bodily harm"; failed to define the term "serious injury"; and failed to determine on its own that the object used to kill Macedonio was not a deadly weapon. Defendant also contends that the trial court materially amended the indictment by instructing the jury on the charge of first-degree murder based upon robbery and premeditation although the indictment did not allege either theory as elements of the crime. By way of a footnote, defendant further contends that the trial court also failed to instruct the jury on: (1) the victim's age as an element of first-degree kidnapping; (2) that defendant could not be convicted unless the victim's removal was a separate, complete act, independent of the murder; and (3) that the charge of assault with a deadly weapon with intent to kill inflicting serious injury involved a

different victim than the murder charge. This assignment of error is without merit.

Initially, we note that defendant failed to raise any constitutional claims at trial, and thus, is barred from raising them for the first time on appeal to this Court. *State v. Billings*, 348 N.C. 169, 500 S.E.2d 423, *cert. denied*, — U.S. —, — L. Ed. 2d —, 67 U.S.L.W. 3336 (1998). Defendant also failed to properly preserve this issue for our consideration by not objecting to the instructions either during the charge conference or before the jury retired. Rule 10(b)(2) of our Rules of Appellate Procedure requires a party challenging any portion of a jury charge, or omission therefrom, to object to the charge before the jury retires. N.C. R. App. P. 10(b)(2); *State v. Fennell*, 307 N.C. 258, 297 S.E.2d 393 (1982). Therefore, defendant is entitled only to review pursuant to the plain error rule. N.C. R. App. P. 10(c)(4). However, defendant failed to specifically and distinctly argue plain error, thereby waiving appellate review. *Id.* This assignment of error is deemed waived.

For the foregoing reasons, we conclude that the trial at which defendant was found guilty of first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon was free of prejudicial error.

[44] Finally, defendant raises no arguments with respect to his assault conviction. Nevertheless, where it appears from the face of the indictment that the conviction and sentence are void, this Court will, of its own motion, arrest judgment. *State v. Brower*, 272 N.C. 740, 158 S.E.2d 822; *State v. Lucas*, 244 N.C. 53, 92 S.E.2d 401 (1956). Here, the indictment charged defendant with assault with a deadly weapon with intent to kill inflicting serious injury upon Gabriel Hernandez Gervacio. However, the evidence presented at trial revealed the assault victim's correct name as Gabriel Gonzalez. "Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal." *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994). In such a case, "the trial court should dismiss the charge stemming from the flawed indictment and grant the State leave to secure a proper bill of indictment." *Id.* at 341, 451 S.E.2d at 144. Therefore, we arrest judgment as to defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury committed against Gabriel Hernandez Gervacio, 96-CRS-487, and remand this matter to the trial court for further proceedings consistent with our holding in *Abraham*.

CAPITAL SENTENCING PROCEEDING

[45] By another assignment of error, defendant contends that the trial court erred in the separate capital sentencing proceeding by allowing the prosecution to argue that defendant should be sentenced to death based upon improperly elicited testimony that he had not confessed or expressed remorse to his jailers, in violation of his right to due process and privilege against self-incrimination. We agree.

When defendant was brought before the District Court, Ashe County, for his first appearance, the judge informed defendant of his constitutional right to remain silent, as required by statute. Defendant, who was incarcerated in the Ashe County jail between the time of his arrest and his trial, never waived that privilege. He made no statement of any kind to any law enforcement officer who arrested him or investigated this case. Defendant did not testify at either the guilt phase or the separate capital sentencing proceeding. Finally, the defense did not present any evidence or argument, either at defendant's trial or the separate capital sentencing proceeding, regarding statements made by defendant relating to the crimes or his feelings or attitude toward the victims.

At the capital sentencing proceeding, defendant called four jailers to testify that he had been a model prisoner during his pretrial incarceration. The prosecution then elicited testimony, over defendant's objections, from each of these jailers that defendant had neither confessed nor shown remorse for the crimes he was accused of committing. This testimony was improperly allowed.

In *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989), we stated:

> The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976), that when a person under arrest has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), which includes the right to remain silent, there is an implicit promise that the silence will not be used against that person.

Hoyle, 325 N.C. at 236, 382 S.E.2d at 754. The United States Supreme Court has stated that the rule in *Doyle* "is not simply a further extension of the *Miranda* prophylactic rule," but "is rooted in fundamental fairness and due process concerns." *Brecht v. Abrahamson*, 507 U.S. 619, 629, 123 L. Ed. 2d 353, 367 (1993). Accordingly, "[u]nder the

rationale of *Doyle*, due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence." *Id.* We hold that the testimony from the jailers, in this case, violated the rule in *Doyle* and should have been excluded because it resulted in an unconstitutional use of defendant's exercise of his right to silence.

A prosecutor may bring a criminal defendant's lack of any demonstration of remorse to the attention of the jury, so long as the prosecutor does not urge the jury to consider lack of remorse as an aggravating circumstance. *Billings*, 348 N.C. 169, 500 S.E.2d 423. However, the prosecutor's questions in this case clearly emphasized to the jury that defendant had not denied the accusations and encouraged the jury to use his exercise of his right to silence against him when considering whether to recommend life or death. Accordingly, we must vacate defendant's death sentence and remand this case for a new capital sentencing proceeding.

[46] Defendant next contends that in instructing the jury as to how it should determine whether aggravating circumstances existed, the trial court improperly allowed the jury to consider whether Macedonio's murder was "committed while [defendant] was engaged in the commission of a kidnapping," N.C.G.S. § 15A-2000(e)(5) (1997), and whether the murder "[w]as . . . committed for pecuniary gain," N.C.G.S. § 15A-2000(e)(6). Defendant argues that the jury was thereby permitted to improperly engage in "double-counting." The jury answered "yes" to both aggravators. Because we are granting a new capital sentencing proceeding on other grounds, we need not address this argument. However, due to the likelihood of this issue arising at a new capital sentencing proceeding, we choose to address defendant's argument at this time.

"Double-counting" occurs when two aggravating circumstances based upon the same evidence are submitted to the jury. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134 (1997), and *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 473 (1998). However, some overlap in the evidence supporting each aggravating circumstance is permissible so long as there is not a complete overlap of evidence. *Id.* Defendant argues that the submission of both the (e)(5) and (e)(6) aggravating circumstances in this case constitutes impermissible double-counting. We disagree.

The trial court instructed the jury on the (e)(5) aggravating circumstance as follows:

> Now, if you find from the evidence beyond a reasonable doubt that when the Defendant killed the victim, the Defendant was removing the victim from one place to another without the victim's consent, to facilitate robbery, and did not release the victim in a safe place, if all twelve of you so find and find beyond a reasonable doubt, you would find this aggravating circumstance, and would so indicate by having your foreman write space, in the space, write "Yes" in the space after the aggravating circumstances on the form.

The trial judge then instructed the jury on the (e)(6) circumstance:

> A murder is committed for pecuniary gain if the Defendant, when he commits it, has obtained or intends to, or expects to obtain, obtain money or some other thing which can be valued in money as a result of the death of the victim.
>
> If you find from the evidence beyond a reasonable doubt that when the Defendant killed the victim, the Defendant took money from the victim, you would find this aggravating circumstance and would so indicate by having your foreman write "Yes" in this space.

Even though the jury would necessarily have to consider evidence of the robbery to find each aggravating circumstance, it is clear from the record that the trial court did not allow the jury to find both aggravating circumstances using the exact same evidence. Further, both circumstances were supported by sufficient, independent evidence, apart from that which overlapped, upon which the jury could rely.

For the foregoing reasons, we find no error in defendant's trial and conviction, but we vacate the sentence of death entered at the conclusion of the separate capital sentencing proceeding following the trial and remand this case to Superior Court, Ashe County, for a new capital sentencing proceeding. We arrest judgment on defendant's assault conviction in case 96-CRS-487 and remand that case for further proceedings.

FIRST-DEGREE MURDER: NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

ROBBERY WITH A DANGEROUS WEAPON: NO ERROR.

FIRST-DEGREE KIDNAPPING: NO ERROR.

ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY: JUDGMENT ARRESTED; REMANDED.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. GARY ALLEN TRULL

No. 205A97

(Filed 31 December 1998)

1. **Criminal Law § 75 (NCI4th Rev.)— motion for change of venue—calendering—denial of continuance—constitutional rights not violated**

Defendant's constitutional rights were not violated by the district attorney's calendaring of defendant's change-of-venue motion in a capital case and the trial court's denial of defendant's motion to continue where defendant was given notice of the district attorney's intention to call the change-of-venue motion, and defendant argued only that the preparation efforts of one of his attorneys had been focused on another case that week and that his private investigator was not available to testify, but defendant was represented by two attorneys at the hearing, and the district attorney agreed to stipulate to the investigator's surveys.

2. **Constitutional Law § 343 (NCI4th)— pretrial unrecorded bench conference—absence of defendant—constitutional rights not violated**

Defendant's state constitutional right to be present at all stages of his capital trial was not violated by an unrecorded bench conference held outside his presence at the conclusion of a hearing on defendant's motion for change of venue since the constitutional right does not arise before the trial begins, and the hearing had been completed and the trial court had made its ruling at the time of the unrecorded conference.

3. Criminal Law § 76 (NCI4th Rev.)— denial of venue change—pretrial publicity—inability to receive fair trial

The trial court did not err by denying defendant's motion for a change of venue where only three of the twelve seated jurors indicated that they had read or heard about defendant's case; all three stated unequivocally that they had not formed an opinion about the case, could set aside any information, and could be fair and impartial jurors; the only seated juror to whom defendant objected had had no pretrial exposure to the case; and in light of the totality of the circumstances, a reasonable likelihood did not exist that pretrial publicity prevented defendant from receiving a fair trial in the county.

4. Jury § 111 (NCI4th)— jury selection—denial of individual voir dire

The trial court did not err in denying defendant's motion for individual *voir dire* of prospective jurors on the ground that the collective *voir dire* exposed jurors who sat on defendant's jury to statements of other prospective jurors that they could not be fair and impartial as the result of pretrial publicity where defendant failed to show in what manner collective *voir dire* tainted the jurors who were seated; the parties were careful not to elicit specific information or opinions in the presence of other prospective jurors; and on several occasions, the trial court did in fact permit both sides to conduct individual *voir dire* to protect against the prejudice defendant now claims occurred in his case.

5. Jury § 206 (NCI4th)— friendship with sheriff—denial of challenge for cause

The trial court did not err in the denial of defendant's challenge for cause of a prospective juror in this capital trial based on her friendship with the sheriff where the sheriff was not a witness in the case; the sheriff and the prospective juror had discussed a personal problem of the juror, but the sheriff had never mentioned anything about defendant's case to the juror, and the juror had not heard anything concerning the sheriff's interest in or opinion about the case from other people; and the juror's responses indicated that she could remain a fair and impartial juror, could follow the law concerning the burden of proof and the presumption of innocence, and could consider both sentencing options.

6. Jury § 202 (NCI4th)— challenge for cause—pretrial publicity—ability to render fair verdict

The trial court did not err by denying defendant's challenge for cause of a prospective juror when defense counsel asked "based on what you may have heard, do you feel like you could put all that behind you and not be influenced in your first duty to render a verdict of guilt or innocence, and the second, if necessary, to go on and return a sentence recommendation?" and the juror responded, "I don't feel like it would bother me." Defendant did not ask any follow-up questions to clarify what the juror meant by "feel," and defendant cannot now complain that the juror, following a common speech pattern in the English language, responded using the same verb used in the question.

7. Jury § 203 (NCI4th)— challenge for cause—burden of proof—ability to vote for life imprisonment—opinion about defendant's guilt—ability to be fair and impartial

The trial court did not err in denying defendant's challenge for cause of a prospective juror because, when read in its entirety, the *voir dire* of the prospective juror does not demonstrate that she was unable to give defendant a fair and impartial trial where (1) her negative response to a double question constituted an unequivocal statement that she would not require defendant to prove anything and that she would require the State to carry its burden; (2) her response of "I don't really know about that" to a question as to whether it would be difficult for her to vote for life imprisonment for a person convicted of first-degree murder was not an expression of her inability to recommend a life sentence; and (3) although she stated that she had read about and heard opinions expressed about defendant's case, she also stated that she had not formed any opinions herself.

8. Evidence and Witnesses § 1695 (NCI4th)— photographs of murder victim's body—decomposition and maggots

The trial court did not err by admitting eight photographs that show a murder victim's body in an advanced state of decomposition with maggot infestation where the photographs assisted in illustrating the testimony of the forensic entomologist, an SBI agent, and the forensic pathologist. Nor did the trial court abuse its discretion under N.C.G.S. § 15A-1233(a) by permitting the jurors to reexamine the photographs in the courtroom during their deliberations.

9. Evidence and Witnesses §§ 672, 716, 2873 (NCI4th)— prosecutor's questions—objection sustained—similar testimony—no injection of personal opinions

Defendant was not prejudiced by the prosecutor's examination of a witness about "suspicious activity" by defendant where his first objection to an improper question was sustained, and defendant lost the benefit of his second objection to a question concerning other incidents of "suspicious activity" by defendant where the witness testified about such activity both before and after this objection. Further, the prosecutor's characterization of defendant's activities as "suspicious" did not impermissibly inject his personal opinions.

10. Homicide § 225 (NCI4th)— first-degree murder—defendant as perpetrator—sufficiency of evidence

The State's evidence was sufficient to permit the jury to find that defendant was the perpetrator of a first-degree murder where it tended to show that on the morning of the victim's disappearance, defendant was the only other person in the apartment complex where the victim lived; defendant's sperm was found inside the victim's vagina; a nylon strap identical to the piece of one found by the victim's body was discovered in defendant's truck; defendant is left-handed and the fatal wounds on the victim's neck indicate that they were inflicted by a left-handed person; and, according to expert testimony, the perpetrator tied the victim to a tree in the woods, had sexual intercourse with her in the woods, and the fatal wounds were inflicted where the body was found.

11. Homicide § 253 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

The State's evidence in this first-degree murder prosecution was sufficient for the jury to find that defendant acted with premeditation and deliberation where it tended to show that there was no provocation by the victim; defendant abducted the victim from her apartment, took her to the woods, tied her to a tree, raped her, and inflicted three neck wounds that severed her carotid artery and caused her death; defendant then left the victim in the woods, where her body decomposed and became infected with maggots; and upon hearing others in the victim's apartment, defendant went in, asked some questions, and proceeded to place his fingerprints throughout her apartment, potentially destroying evidence.

12. Homicide § 282 (NCI4th)— felony murder—intercourse against victim's will—rape and killing as continuous transaction

There was sufficient evidence that defendant and the victim had intercourse against the victim's will and that the rape and killing occurred pursuant to a continuous transaction so as to support defendant's conviction of felony murder where it tended to show that defendant abducted the victim from her apartment, took her to the woods, and tied her to a tree; the intercourse occurred in the woods where the victim's body was found; defendant's sperm was found inside the victim's vagina; and defendant failed to present any evidence that the sex was consensual.

13. Homicide § 552 (NCI4th)— first-degree murder—second-degree instruction not required

The State presented positive and uncontroverted evidence of premeditation and deliberation in this prosecution for first-degree murder so that the trial court was not required to instruct the jury on the lesser-included offense of second-degree murder where the State's evidence tended to show that defendant abducted the victim from her apartment, took her to the woods, tied her to a tree, stabbed the victim while she was tied to the tree, and later returned to the victim's apartment where he feigned ignorance and attempted to destroy evidence.

14. Kidnapping and Felonious Restraint § 20 (NCI4th)— first-degree kidnapping—unlawful removal—purpose of rape—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant unlawfully removed the victim from one place to another without her consent for the purpose of committing first-degree rape so as to support his conviction of first-degree kidnapping where it tended to show that the victim was a responsible, dedicated employee who was scheduled to teach a computer class at 9:00 a.m. but did not show up for work; when the victim's mother and a friend went to the victim's apartment, the victim's car was where it had been parked earlier in the day; the door casing around a closet behind the front door to the apartment was damaged as though the door had been banged against the casing; when the victim's body was thereafter found in the woods, the victim's clothing was not the type she would wear

to work and she was not wearing any undergarments; and in his statements to officers, defendant said he did not know the victim, he had seen her leaving and entering her apartment, and he had spoken to her in passing one or two times, but defendant's semen was found in the victim's vagina. This evidence supports the inference that defendant forced his way into the victim's apartment, forced her to dress hurriedly, forced her out of the apartment and into his truck, and then drove to the woods where he raped and murdered her.

15. Rape and Allied Offenses § 90 (NCI4th)— first-degree rape—nonconsensual intercourse—serious bodily injury—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant had vaginal intercourse with the victim without her consent and that he inflicted serious personal injury upon her so as to support his conviction of first-degree rape where the evidence tended to show that defendant abducted the victim from her apartment and took her to the woods; defendant had vaginal intercourse with the victim in the woods; and defendant inflicted three neck wounds on the victim with a knife that caused her death.

16. Criminal Law § 472 (NCI4th Rev.)— first-degree murder—prosecutor's closing argument—misstatements of law—absence of prejudice—error cured by instructions

Even if the prosecutor's closing argument in this first-degree murder case concerning the presumption of malice and intent to kill included misstatements of law, defendant was not prejudiced since he offered no evidence of self-defense or of a killing in the heat of passion that would negate malice, and he offered no evidence that would tend to negate the element of intent to kill. Further, any prejudice to defendant from the alleged misstatements of law was cured by the trial court's proper instructions to the jury regarding the elements of first-degree murder, including malice and intent.

17. Criminal Law § 433 (NCI4th Rev.)— prosecutor's closing argument—not comment on defendant's failure to testify

The prosecutor's comment during closing argument in a capital trial concerning defendant's attacks on the victim and the State's witnesses, "It's the shotgun approach. Hide your defendant, hide all the evidence that incriminates him and the sinister

spin," was not an improper comment on defendant's decision not to testify but was simply a response to and rebuttal of defense counsel's claims made during closing argument.

18. Criminal Law § 1366 (NCI4th Rev.)— capital sentencing—(e)(5) aggravating circumstance—submission for rape and kidnapping

The trial court did not err in submitting the (e)(5) aggravating circumstance to the jury twice in a capital sentencing proceeding, once for rape and once for kidnapping, where the State presented distinct evidence that defendant committed both rape and kidnapping against the victim during the course of the capital felony. N.C.G.S. § 15A-2000(e)(5).

19. Criminal Law § 439 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—reference to defendant as predator

The prosecutor's reference to defendant as a "predator" during closing argument in a capital sentencing proceeding was not so grossly improper as to require the trial court to intervene *ex mero motu*.

20. Criminal Law § 449 (NCI4th Rev.)— capital sentencing—prosecutor's closing argument—cry by victim and State for death penalty

It was not grossly improper for the prosecutor in a capital sentencing proceeding to speak for the victim by arguing that the victim and the State cry from her body in the woods, "death, death, death for [defendant]." The prosecutor's argument merely reminded the jurors that he was advocating for both the State and the victim.

21. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing—multiple nonstatutory mitigating circumstances—shorthand instruction—single peremptory instruction

The trial court did not commit plain error in a capital sentencing proceeding by tendering a shorthand instruction for twenty-four nonstatutory mitigating circumstances and by tendering a single peremptory instruction for all of these nonstatutory mitigating circumstances.

22. Criminal Law § 1336 (NCI4th Rev.)— capital sentencing—inadmissible character evidence—not plain error

Assuming *arguendo* that evidence presented by the State in a capital sentencing proceeding that defendant had been incarcerated prior to a 1975 rape used by the State in support of the (e)(3) aggravating circumstance constituted inadmissible character evidence, the admission of this evidence did not rise to the level of plain error where the victim of the 1975 rape had previously referred to defendant in her testimony as a "convict" without objection, and defendant did not assign error on appeal to the admission of this testimony.

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

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant was convicted under theories of both premeditation and deliberation and felony murder; defendant was also convicted of first-degree rape and first-degree kidnapping; the jury found as aggravating circumstances that defendant had previously been convicted of a felony involving the use or threat of violence to the person, that this murder was committed while defendant was engaged in the commission of a rape, and that this murder was committed while defendant was engaged in the commission of a kidnapping; and the evidence tended to show that defendant abducted the victim from her apartment, took her into the woods, tied her to a tree, had intercourse with her, and inflicted three neck wounds with a knife that severed her carotid artery and caused her death.

Justice WYNN did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Lamm, J., on 19 November 1996 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 additional judgments for first-degree kidnapping and first-degree rape was allowed by the Supreme Court on 25 February 1998. Heard in the Supreme Court 1 October 1998.

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

Stanley F. Hammer and John Bryson for defendant-appellant.

PARKER, Justice.

Defendant Gary Allen Trull was indicted on 17 June 1994 for first-degree murder, first-degree kidnapping, and first-degree rape. He was tried capitally and found guilty of first-degree murder on the bases of premeditation and deliberation and felony murder. He was also found guilty of first-degree kidnapping and first-degree rape. Following a capital-sentencing proceeding, the jury recommended a sentence of death for the murder; and the trial court entered judgment accordingly. The trial court sentenced defendant to a consecutive sentence of forty years' imprisonment for the first-degree kidnapping conviction and to a consecutive sentence of life imprisonment for the first-degree rape conviction.

The State's evidence tended to show that defendant kidnapped, raped, and murdered Vanessa Dawn Dixon ("victim"). The victim was last seen at approximately 3:00 a.m. on the morning of 17 November 1993. Upon learning that the victim did not report to work at Randolph Hospital, the victim's mother and a friend went to her apartment. They noticed that some items were out of place in her apartment. The front door had been swung open hard enough to break off pieces of wood from the molding around the closet door. The bed was unmade; and clothes, including pantyhose, were lying on the bed. A table had been moved, and some items in the entertainment center had been knocked over.

While they were looking around the apartment, defendant, who lived in the same apartment complex, appeared. Defendant said he had heard some noise and wanted to know what was happening. Defendant then called the apartment owner. The owner commented about not touching things, but defendant replied that it was too late. The police were subsequently called, and a search for the victim was initiated.

On 23 November 1993 the victim's body was found in the woods, about five hundred feet from Hardin-Ellison Road. Her body was clothed in a shirt and pants but no undergarments, which was uncharacteristic of the victim. Her body was lying at the base of a tree, and a piece of a blue nylon strap lay partially under her left shoulder. This strap matched a blue nylon tie-down strap taken from defendant's truck. Fibers from the strap were also found on the victim's right hand. Other evidence suggested that the body was deposited in the woods sometime after 5:00 a.m. on 17 November 1993. A DNA analysis of semen and spermatozoa samples taken from the victim's body

matched the DNA profile for defendant. No semen was found on the victim's pants.

An autopsy revealed that the victim's death was the result of three neck wounds which severed the left carotid artery. The wounds were consistent with someone slicing the victim's neck from behind with a knife held in the left hand. Defendant was left-handed. Moreover, defendant collected knives; and his then-wife noticed three days after the victim's disappearance that one particular knife was missing. This knife had sentimental value to defendant. Defendant told his then-wife that he broke the knife and threw it away; however, she did not see it in the trash.

Additional facts will be presented as needed to discuss specific issues.

PRETRIAL ISSUES

[1] By his first assignment of error, defendant contends that the trial court erred by denying his motion to continue a hearing on defendant's motion for change of venue. Defendant argues that the district attorney's calendaring of the change-of-venue motion and the trial court's denial of the motion to continue violated his constitutional rights.

At the hearing on the motion to continue, one of defendant's attorneys, Mr. Richard Roose, stated, "[U]ntil about fifteen minutes ago I was involved in the trial of another matter with this Court, and my preparation efforts have been directed entirely towards that matter this week." He also informed the trial court that his private investigator was not available to testify. The district attorney responded that the State was willing to stipulate to the surveys of defendant's private investigator. Mr. Roose again argued for a continuance, at which point the trial court denied the continuance motion.

Normally, our review of a denial of a motion for continuance is restricted to whether the trial court abused its discretion; and the denial will not be disturbed absent a showing of abuse of that discretion. *State v. Barnard*, 346 N.C. 95, 104, 484 S.E.2d 382, 387 (1997). However, when the motion is based on a constitutional issue, the issue is a reviewable question of law. *Id.* "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result

of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

We find no merit in defendant's unfairness and due-process arguments regarding the district attorney's scheduling of the hearing on this motion. Defendant does not argue that he was not given adequate notice of the district attorney's intention to call the change-of-venue motion. In fact, Mr. Roose conceded at the hearing that the district attorney gave defendant such notice. Further, in support of his motion for continuance, Mr. Roose argued only that his preparation efforts had been focused on another case. He did not contend that the trial court's ruling on defendant's motion for a change of venue would deprive defendant of his constitutional right to effective assistance of counsel or deprive him of a fair opportunity to prepare and present his defense. Defendant was represented by two attorneys at the hearing, and no evidence suggests that Mr. Pierre Oldham's preparation efforts were directed toward other matters. Moreover, Mr. Roose stated that the only evidence or testimony unavailable at the hearing was that of the private investigator; but the district attorney agreed to stipulate to the investigator's surveys. Thus, defendant made no showing to the trial court of prejudice to his case if the continuance was not granted. Accordingly, we find no error in the denial of the motion for a continuance.

[2] Defendant next contends that the trial court violated his constitutional rights by holding an unrecorded bench conference outside his presence. At the conclusion of the hearing on defendant's motion for change of venue, the trial court remanded defendant to the sheriff's custody. The trial court then called the district attorney and defense counsel to the bench, and at some point defendant was escorted out of the courtroom by the sheriff. Defendant argues that his absence from the courtroom during this bench conference violated his state and federal constitutional rights to be present at every stage of the proceedings. Although defendant argues that his rights under the United States Constitution have been violated, defendant's assignments of error do not include this contention as required by the Rules of Appellate Procedure. *See* N.C.R. App. P. 10(a) ("Except as otherwise provided herein, the scope of review on appeal is confined to consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10."). Accordingly, defendant has failed to preserve this issue for appellate review.

As to the state constitutional issue, in *State v. Rannels*, 333 N.C. 644, 653, 430 S.E.2d 254, 259 (1993), this Court held that "[d]e-

fendant's constitutional right to be present at all stages of the trial is by definition a right pertaining to the trial itself. It does not arise before the trial begins." In this case the challenged bench conference occurred prior to the commencement of defendant's trial. *See State v. Bonnett*, 348 N.C. 417, 431, 502 S.E.2d 563, 573 (1998) (finding no error when a bench conference in which defendant was not present took place prior to the start of trial). Further, at the time of the complained-of conference, the trial court had made its ruling; and defendant's hearing was completed. Therefore, this assignment of error is overruled.

[3] Next, defendant contends that the trial court erred by denying his motion to change venue. He argues that pretrial publicity and the response of prospective jurors demonstrate that it was impossible for him to receive a fair trial by a Randolph County jury.

N.C.G.S. § 15A-957 provides that if "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" transfer the proceeding to another county or order a special venire. N.C.G.S. § 15A-957 (1997). Defendant bears the burden of establishing 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. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983). A defendant must "establish specific and identifiable prejudice against him as a result of pretrial publicity . . . [by demonstrating] *inter alia* that jurors with prior knowledge decided the case, that he exhausted his peremptory challenges, and that a juror objectionable to him sat on the jury." *State v. Billings*, 348 N.C. 169, 177, 500 S.E.2d 423, 428 (emphasis omitted). The determination of whether defendant has carried his burden rests within the sound discretion of the trial court. *State v. Barnes*, 345 N.C. 184, 204, 481 S.E.2d 44, 54, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134 (1997), *and cert. denied*, —— U.S. ——, 140 L. Ed. 2d 473 (1998).

Our review of the record reveals that the trial court did not err by denying defendant's motion for change of venue. Only three of the twelve seated jurors indicated that they had read or heard about defendant's case; and all three stated unequivocally that they had not formed an opinion about the case, could set aside any information, and could be fair and impartial jurors. Furthermore, the only seated

juror to whom defendant objected had had no pretrial exposure to the case.

Our examination of this issue in the present case, however, must go further. As indicated in *Jerrett*, where the totality of the circumstances reveals that an entire county's population was "infected" with prejudice against a defendant, the defendant has met his burden of showing that he could not receive a fair trial in that county. *State v. Jerrett*, 309 N.C. at 258, 307 S.E.2d at 349. In *Jerrett* we noted that "the crime occurred in a small, rural and closely-knit county where the entire county was, in effect, a neighborhood." *Id.* at 256, 307 S.E.2d at 348. Alleghany County, where Jerrett was tried, had a population at that time of 9,587 people, *id.* at 252 n.1, 307 S.E.2d at 346 n.1; the *voir dire* revealed that one-third of the prospective jurors knew the victim or some member of the victim's family, and that many jurors knew potential State's witnesses, *id.* at 257, 307 S.E.2d at 348-49. Furthermore, *voir dire* was done collectively, thus allowing prospective jurors to hear that other prospective jurors knew the victim's family, that some had formed opinions, and that some would be unable to give the defendant a fair trial. *Id.* at 257-58, 307 S.E.2d at 349.

Defendant's case is distinguishable from *Jerrett*. Randolph County's population at the time of this murder was over 106,000. *North Carolina Manual 1993-1994*, at 883 (Lisa A. Marcus ed.). Further, the level of familiarity that the jurors in *Jerrett* had with the victim, the victim's family, and witnesses does not exist in this case. Although a number of prospective jurors had read or heard about the case, we conclude that, in light of the totality of the circumstances, a reasonable likelihood does not exist that pretrial publicity prevented defendant from receiving a fair trial in Randolph County.

Defendant further argues that jurors were exposed to prejudicial information as a result of collective *voir dire* of prospective jurors. However, a careful examination of jury selection reveals no harm to defendant resulting from collective, rather than individual, *voir dire*. In fact, the trial judge repeatedly permitted both sides to conduct individual *voir dire* of prospective jurors when necessary to prevent other prospective jurors from being exposed to prejudicial pretrial publicity and opinions. We conclude that the trial court did not err by refusing to grant defendant's motion for change of venue, and this assignment of error is overruled.

JURY SELECTION ISSUES

[4] Defendant also argues that the trial court erred in denying his motion for individual *voir dire* of prospective jurors. Defendant contends that collective *voir dire* exposed those jurors who sat on defendant's jury to statements of other prospective jurors who stated that they could not be fair and impartial as the result of pretrial publicity.

N.C.G.S. § 15A-1214(j) authorizes the trial court for good cause shown in a capital case to direct individual selection of jurors. However, the decision whether to allow or deny individual *voir dire* of prospective jurors lies in the sound discretion of the trial court; and absent a showing of abuse of discretion, its ruling will not be disturbed on appeal. *State v. Bonnett*, 348 N.C. 417, 429, 502 S.E.2d 563, 572. The burden is on defendant to show the possible particular harm to him which resulted from his being required to question jurors collectively. *State v. Barnes*, 345 N.C. at 208, 481 S.E.2d at 56-57. In the present case defendant has failed to show in what manner collective *voir dire* tainted the jurors who were seated. Heeding the admonition from the trial court, the parties were careful not to elicit specific information or opinions in the presence of other prospective jurors. On several occasions the trial court did in fact permit both sides to conduct individual *voir dire* to protect against the prejudice defendant now claims occurred in his case. On this record we are not persuaded that the trial court abused its discretion. Thus, this assignment of error is overruled.

Next, defendant contends that the trial court erred in denying his challenges for cause of prospective jurors Mize and Gardner and juror Morton on the basis of their inability to render a fair and impartial verdict. N.C.G.S. § 15A-1212 sets forth the grounds for challenging a juror, including the ground that the juror, for any other cause, is unable to render a fair and impartial verdict. N.C.G.S. § 15A-1212(9) (1997). N.C.G.S. § 15A-1214(h) provides that a defendant may seek reversal of the trial judge's refusal to allow a challenge for cause provided the defendant has exhausted his peremptory challenges, has renewed his challenge, and has had his renewal motion denied.

We agree with defendant that he has complied with the requirements of N.C.G.S. § 15A-1214 and has thus properly preserved this assignment of error for appellate review. However, the determination of whether to grant a challenge for cause rests in the sound discretion

of the trial court and will not be disturbed absent a showing of abuse of that discretion. *State v. Hartman*, 344 N.C. 445, 458, 476 S.E.2d 328, 335 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). In addition to abuse of discretion, defendant must show prejudice to establish reversible error concerning *voir dire*. *Id.* at 459, 476 S.E.2d at 335.

[5] First, defendant maintains that the trial court should have excused juror Rhonda Morton based on "her close relationship with Sheriff [of Randolph County, Litchard] Hurley." The transcript discloses that Sheriff Hurley was not a witness in this case, that Sheriff Hurley and Ms. Morton were friends, that they had discussed a personal problem of Ms. Morton's, that Sheriff Hurley never mentioned anything about defendant's case to Ms. Morton, and that Ms. Morton had not heard anything concerning the Sheriff's interest in or opinion about the case from other people. Furthermore, juror Morton's responses indicated that she could remain a fair and impartial juror, could follow the law concerning the burden of proof and the presumption of innocence, and could consider both sentencing options. On this record defendant has failed to demonstrate an abuse of the court's discretion in denying the challenge for cause as to Ms. Morton.

[6] Next, defendant argues that the trial court erred in failing to remove prospective juror Earl Gardner for cause based on pretrial publicity and his inability to render a fair and impartial verdict. Gardner stated that he had read and heard about defendant's case and that someone at his place of work was soliciting signatures on a petition for a speedy trial. Defense counsel then asked Gardner "based on what you may have heard, do you feel like you could put all that behind you and not be influenced in your first duty to render a verdict of guilt or innocence, and the second, if necessary, to go on and return a sentence recommendation?" Gardner responded, "I don't feel like it would bother me."

Defendant now maintains that Gardner's response was equivocal and that, based on *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992), this Court should find reversible error in the denial of his challenge for cause. In *Hightower* we found error in the trial court's failure to allow the challenge for cause on the grounds that the prospective juror stated that the defendant's failure to testify would "stick in the back of my mind," and gave other responses which suggested his inability to give the defendant a fair and impartial trial. *Id.*

at 641, 417 S.E.2d at 240. In this case Gardner's responses do not demonstrate that he could not return a verdict in accordance with the law of North Carolina. Gardner had previously responded that he agreed with and could follow the applicable law concerning burden of proof and presumption of innocence and that he would require the State to prove every element of the offense beyond a reasonable doubt before rendering a verdict of guilty. Furthermore, defendant did not ask any follow-up questions to clarify what Gardner meant by "feel." Given this fact, defendant cannot now complain that the prospective juror, following a common speech pattern in the English language, responded using the same verb used in the question. The trial court heard Gardner's responses, observed his demeanor, assessed his credibility, and, in its discretion, made the decision to reject defendant's for-cause challenge. Again, defendant has failed to show an abuse of discretion.

[7] Finally, defendant contends that the trial court erred in denying his challenge for cause to prospective juror Jacklene Mize. Defendant's argument is threefold. First, defendant argues that Mize gave a negative answer concerning whether she would require the State to carry its burden of proof. In support of this contention, defendant cites Mize's response of "No" to the question, "And you would require the State to carry its burden and you would not require the defendant to prove anything to you in this case?" Read in the context of the double question asked, this response was an unequivocal statement that Mize would not require defendant to prove anything and that she would require the State to carry its burden.

Second, defense counsel inquired whether it would be difficult for Mize to vote for life imprisonment for a person convicted of first-degree murder, to which Mize replied, "I don't really know about that." Contrary to defendant's contention, this answer was not an expression of Mize's inability to recommend a life sentence; rather her response answered the question whether it would be difficult to do so. Based on the question asked, defendant's argument that this response requires that he be given relief under *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992), is without merit.

Third, defendant asserts that Mize never stated that she could set aside what she had read and heard about defendant and the case and base her decision on the evidence presented. Mize said that she had read about and heard opinions expressed about defendant's case but had not formed any opinions herself. We hold that the *voir dire* of

prospective juror Mize when read in its entirety does not demonstrate that she was unable to give defendant a fair and impartial trial. Thus, we find no merit to defendant's argument that the trial court abused its discretion in denying defendant's challenge for cause.

GUILT-INNOCENCE PHASE

[8] Defendant next contends that the trial court erred in denying his motion *in limine* and allowing the admission of eight photographs. Defendant argues that the photographs are gory and gruesome and show the victim's body in an advanced state of decomposition with maggot infestation. Since he did not place maggots on the victim and the decomposition was not the result of any of his alleged actions, defendant submits that the photographs were irrelevant, inflammatory, and unduly prejudicial. Defendant also argues that the trial court erred in allowing the jury to view the photographs during deliberations. We find no merit to these arguments.

Generally, gory or gruesome photographs are admissible so long as they are used for illustrative purposes and are not introduced solely to arouse the jurors' passions. *See State v. Skipper*, 337 N.C. 1, 35, 446 S.E.2d 252, 270 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995); *State v. Williams*, 334 N.C. 440, 460, 434 S.E.2d 588, 600 (1993), *sentence vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994).

The State introduced into evidence eight photographs of the victim. One photograph helped explain the forensic entomologist's testimony concerning his determination of the date and time of the victim's death. A second photograph was used during the testimony of a State Bureau of Investigation ("SBI") agent to illustrate evidence-gathering techniques, including placing bags over the victim's hands and using a stain to enhance blood found on the victim's body. The remaining six photographs were autopsy photographs which depicted different views of the victim's neck wounds, injured artery, and genitalia; they were used to illustrate the testimony of the forensic pathologist. We conclude that the photographs were relevant and had probative value.

Having determined that the photographs were relevant and probative, we now address defendant's argument that the unfairly prejudicial effect of the photographs outweighed their probative value. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion

of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). Whether to exclude evidence under Rule 403 of the North Carolina Rules of Evidence rests within the discretion of the trial court and will not be overturned absent an abuse of discretion. *See State v. Williams*, 334 N.C. at 460, 434 S.E.2d at 600; *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Having viewed the photographs and determined that they were relevant and probative and that they assisted in illustrating the testimony of the forensic entomologist, SBI agent, and forensic pathologist, we conclude that the trial court did not abuse its discretion in admitting the photographs. We further conclude that the trial court did not abuse its discretion under N.C.G.S. § 15A-1233(a) by permitting the jurors to reexamine the photographs in the courtroom during their deliberations. This assignment of error is overruled.

In defendant's next assignment of error, he argues that the trial court erred by admitting, over defendant's objections, evidence of defendant's character. Specifically, defendant challenges the testimony of witness Linda Hooker when during cross-examination the prosecutor questioned her concerning "suspicious activity" by defendant. During direct examination, Hooker testified that at approximately 3:00 a.m. on 17 November 1993, she saw a cream-colored truck do some "strange" things, including driving in the parking lot of the apartment complex without its lights on. On cross-examination, the prosecutor, without objection, asked the witness if she "thought that this type of activity was suspicious." The witness responded affirmatively. The prosecutor then asked, "Isn't it true that you told the news media that you also witnessed suspicious activity about [defendant]?" Defense counsel objected, and the trial court sustained the objection as to the form of the question. The prosecutor rephrased the question, defense counsel did not object, and the witness proceeded to describe an incident that occurred during the summer of 1993.

After she described that incident, she volunteered the fact that there were "a couple of other incidents, also." The prosecutor replied, "A couple of other incidents of suspicious activity?" The witness said, "Yes"; and defense counsel objected. The trial court overruled the

objection after the prosecutor explained that he was "getting ready to ask her if there were any other incidences." The witness described a second incident, and the prosecutor again inquired about another incident. Without objection, the witness described a third incident and told the prosecutor that there were no other incidents. Defendant contends that this testimony was inadmissible character evidence regarding defendant pursuant to N.C.G.S. § 8C-1, Rule 404(a)(1) since defendant had not placed his character in issue. Defendant further contends that this evidence was irrelevant under N.C.G.S. § 8C-1, Rule 402 (1992) and that the evidence did not come within the ambit of permissible purposes under N.C.G.S. § 8C-1, Rule 404(b). Finally, defendant argues that by characterizing defendant's activity as "suspicious," the prosecutor improperly injected his own opinions.

This Court has held that the scope of cross-examination rests within the sound discretion of the trial court and that the questions must be asked in good faith. *State v. Larry*, 345 N.C. 497, 523, 481 S.E.2d 907, 922, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 234 (1997). "A prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith." *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992). Abuse of discretion may be found when a prosecutor affirmatively places before the jury an incompetent and prejudicial matter by injecting, *inter alia*, his own personal opinions which are neither in evidence nor admissible. *Id.*

[9] First, we note that defendant's first objection was sustained. Generally, a defendant is not prejudiced when his objection to an improper question is sustained, *State v. Hunt*, 325 N.C. 187, 197, 381 S.E.2d 453, 459 (1989), and we perceive no prejudice to defendant in this instance. Defendant's second objection concerned other incidents of suspicious activity by defendant. The record reveals that the witness testified about such activity without objection both before and after this objection; therefore, defendant waived his right to raise this objection on appeal. As we stated in *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995), "[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." Further, we find no merit to defendant's argument that the prosecutor's characterization of defendant's activities as "suspicious" impermissibly injected his personal opinions. This assignment of error is overruled.

Next, defendant contends that the trial court erred in denying his motion to dismiss the first-degree murder charge. Defendant asserts

that the evidence was insufficient to prove premeditation and deliberation and felony murder.

When determining the sufficiency of the evidence to support a charged offense, we must view the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). A defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator. *See State v. Williams*, 334 N.C. at 447, 434 S.E.2d at 592.

Whether the evidence presented is direct or circumstantial or both, the test for sufficiency is the same. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991); *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then "it is for the [jurors] to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

Applying the foregoing rules to the evidence presented in this case, we conclude that the evidence was sufficient for a rational jury to find defendant guilty beyond a reasonable doubt of the murder of Vanessa Dixon under the theories of premeditation and deliberation and felony murder.

[10] Initially, defendant argues that the evidence is insufficient to prove that he perpetrated this offense. The evidence, viewed in the light most favorable to the State, shows that on the morning of the victim's disappearance, defendant was the only other person in the apartment complex, thus affording him the opportunity to commit the offense. Further, defendant's sperm was found inside the victim's vagina; a nylon strap identical to the piece of one found by the victim's body was discovered in defendant's truck; and the fatal wounds on the victim's neck indicate that they were inflicted by a left-handed person, which defendant is. The State's expert-witness testimony further tends to show that the perpetrator tied the victim to a tree in the woods, that he had sexual intercourse with her in the woods, and that

the fatal wounds were inflicted where the body was found. We hold that this evidence is sufficient to permit a rational jury to find that defendant was the perpetrator.

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994). Premeditation means that the act was thought over beforehand for some length of time; however, no particular amount of time is necessary for the mental process of premeditation. *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by legal provocation or lawful or just cause. *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, — U.S. —, 142 L. Ed. 2d 216 (1998). In *State v. Taylor* we held that want of provocation on the part of the deceased, the conduct of and statements of the defendant before and after the killing, the brutality of the murder, and attempts to cover up involvement in the crime are among other circumstances from which premeditation and deliberation can be inferred. *State v. Taylor*, 337 N.C. at 607-08, 447 S.E.2d at 367.

[11] In this case the State's evidence showed a lack of provocation by the victim, that defendant abducted the victim from her apartment, took her to the woods, tied her to a tree, raped her, and inflicted three neck wounds that severed her carotid artery and caused her death. Defendant then left the victim in the woods, where her body decomposed and became infested with maggots. Upon hearing others in the victim's apartment, defendant went in, asked some questions, and proceeded to place his fingerprints throughout her apartment, potentially destroying evidence. These facts permit the inference that defendant acted with premeditation and deliberation.

[12] Defendant further argues that the evidence was not sufficient to support a finding of rape, thus undermining his conviction for first-degree murder based on the felony-murder rule. Specifically, defendant asserts that the evidence was insufficient to show that he and the victim had intercourse against the victim's will. "A person is guilty of rape in the first degree if he engages in vaginal intercourse[] . . . [w]ith another person by force and against the will of the other person[] and[] . . . [i]nflicts serious personal injury upon the victim . . . ."

N.C.G.S. § 14-27.2(a)(2)(b) (1993). As stated above, defendant's sperm was found inside the victim's vagina. Also, the evidence tended to show that the sex occurred in the woods where the victim's body was found. While there was no evidence of genital trauma, there was evidence that the victim was abducted from her apartment. Defendant failed to present any evidence that the sex was consensual. Thus, viewing the evidence in the light most favorable to the State, a rational trier of fact could find that defendant raped the victim.

Finally, defendant argues that the evidence did not support a finding that the rape and murder were committed in one continuous transaction. This Court has stated that a murder is committed in the "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." *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981). All that is required to support convictions for a felony offense and related felony murder "is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction." *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991). We hold that the evidence supports the inference that the underlying felony of rape and the killing occurred pursuant to a continuous transaction. Thus, the trial court properly denied defendant's motion to dismiss the charge of first-degree murder.

[13] Defendant next contends that the trial court erred by denying his request to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder.

"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." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 150 (1998). In this assignment of error defendant argues that the State's evidence did not fully satisfy the elements of premeditation and deliberation in that the State's evidence was based upon inference drawn from the condition of the victim's body when it was discovered. However, as discussed in the previous assignment of error, the State presented positive and uncontroverted evidence of each element of first-degree murder. In particular the State's evidence

showed that defendant took the victim to the woods, tied her to a tree, stabbed the victim while she was tied to the tree, and later returned to the victim's apartment where he feigned ignorance and attempted to destroy evidence. Defendant's evidence did not negate or contradict this evidence of premeditation and deliberation. The trial court did not err in denying defendant's request to submit the lesser-included offense of second-degree murder.

[14] Next, defendant contends that the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping. The indictment for kidnapping alleged, *inter alia*, that defendant unlawfully removed the victim from one place to another without her consent, for the purpose of facilitating the commission of the felony of first-degree rape, doing serious bodily injury to her, and terrorizing her. N.C.G.S. § 14-39 (1993). Defendant argues that the evidence was insufficient to prove both that defendant raped the victim and that he unlawfully removed her from one place to another without her consent. We disagree. The State's evidence showed that the victim was a responsible, dedicated employee who was scheduled to teach a computer class at 9:00 a.m. but did not show up for work. When the victim's mother and a friend went to the victim's apartment, the victim's car was where it had been parked earlier in the day. The door casing around a closet behind the front door to the apartment was damaged as though the front door had been banged against the casing. When the victim's body was found, the victim was clothed in a pair of thin white slacks, a thin brown blouse, and a jacket, not the type clothing she would wear to work. The victim was not wearing any undergarments and had on lace-up shoes. In his statements to the investigating officers, defendant said that he did not know the victim, that he had seen her entering and leaving her apartment, and that he had spoken to her in passing one or two times. As noted earlier defendant's semen was found in the victim's vagina. This evidence supports the inference that defendant forced his way into the victim's apartment, forced her to dress hurriedly, forced her out of the apartment and into his truck, and then drove to the woods where he raped and murdered her. Therefore, we hold that there was sufficient evidence presented for a rational jury to find that defendant unlawfully removed her from one place to another without her consent for the purpose of committing first-degree rape. This assignment of error is meritless.

[15] Defendant also contends that the trial court erred by denying his motion to dismiss the first-degree rape charge. Defendant argues that there is no evidence that the intercourse was non-consensual or

that defendant displayed a weapon at the time or inflicted serious bodily injury. When the victim of rape has also been murdered, reliance on inferences to be drawn from circumstantial evidence is often necessary to determine if the intercourse was by force and against the will of the victim. As already discussed, and contrary to defendant's argument, we find that the evidence was sufficient for a rational jury to find that defendant had vaginal intercourse with the victim without her consent and that he inflicted serious personal injury upon her. N.C.G.S. § 14-27.2(a)(2)(b). This assignment of error is overruled.

[16] Next, defendant contends that the trial court should have intervened *ex mero motu* when the prosecutor made misstatements of law in his closing arguments. Although he failed to object, defendant contends that the prosecutor's argument erroneously informed the jury that it could presume the elements of malice and intent, thus entitling him to a new trial.

The standard of review when a defendant fails to object at trial is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)). In determining whether the statement was grossly improper, we must examine the context in which it was given and the circumstances to which it refers. *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 411 (1997); *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).

During his closing argument the prosecutor stated the following:

> If the defendant intentionally and with malice killed the victim with a deadly weapon, the Judge will charge him [sic] you can presume malice from the use of a deadly weapon. A knife is a deadly weapon. Causing such wounds is certainly evidence that it is a deadly weapon. . . . Third, the defendant intended to kill the victim, and we can presume an intent from the circumstances, the number of wounds, excessive wounds to the neck area.

Even assuming *arguendo* that the closing argument included misstatements of law, we detect no prejudice to the defendant. Defendant offered no evidence of self-defense or evidence of a killing in the heat of passion that would negate malice, and he offered no evidence that would tend to negate the element of intent to kill. *See State v. McCoy*, 320 N.C. 581, 587-88, 359 S.E.2d 764, 767-68 (1987) (finding no plain error in the court's charge instructing that malice is implied if the jury finds that defendant intentionally killed the victim with a deadly weapon).

Further, the trial court properly instructed the jury regarding the elements of first-degree murder, including malice and intent. We conclude that those instructions cured any prejudice to defendant which may have resulted from the alleged misstatements of law in the prosecutor's arguments. *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995) (holding that any prejudice resulting from alleged misrepresentations concerning mitigating circumstances made by the prosecutor was cured by the trial court's proper instructions on the applicable law), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996).

[17] Defendant next argues that the trial court erred by not intervening *ex mero motu* when the prosecutor, in his closing argument, allegedly commented on defendant's failure to testify. During closing argument the prosecutor argued:

> Even attacked—nothing's sacred in this case, attacked Vanessa. Attacked the State, attacked the SBI, attacked Ratcliff because he said he can't remember whether he or Owens took this sealed box of evidence down to the lab. Why all this attacking everybody else? It's the shotgun approach. Hide your defendant, hide all the evidence that incriminates him and the sinister spin.

Counsel are entitled to wide latitude during jury arguments; however, the scope of that latitude is within the discretion of the trial court. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Although a prosecutor in a capital trial may argue all the facts in evidence, the law, and all reasonable inferences drawn therefrom, *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 152 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994), "[a] criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent," *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). "[T]he error may be cured by a withdrawal of the remark or

by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975). If the trial court fails to give a curative instruction, then this Court must determine whether the error is harmless beyond a reasonable doubt. *State v. Larry*, 345 N.C. at 524, 481 S.E.2d at 923; *see also* N.C.G.S. § 15A-1443(b) (1997); *State v. Baymon*, 336 N.C. at 758, 446 S.E.2d at 6; *State v. Reid*, 334 N.C. 551, 557, 434 S.E.2d 193, 198 (1993).

The prosecutor may, however, appropriately respond to comments critical of the State's investigation and witnesses made by defense counsel in closing argument in order to restore the credibility of the State's witnesses, *e.g.*, *State v. Larrimore*, 340 N.C. 119, 165, 456 S.E.2d 789, 814 (1995), and to "defend [the prosecutor's] own tactics, as well as those of the investigating authorities, when challenged." *State v. Payne*, 312 N.C. 647, 665, 325 S.E.2d 205, 217 (1985) (citations omitted).

Upon reviewing the record, we conclude that the prosecutor in this case was not commenting on defendant's decision not to testify, but simply responding to and rebutting defense counsel's claims made during closing argument. Thus, the trial court did not err by failing to intervene on its own motion. *See State v. Gregory*, 348 N.C. 203, 211, 499 S.E.2d 753, 759 (holding that the prosecutor's argument simply refuted the defendant's claim and did not amount to gross impropriety), *cert. denied*, — U.S. —, 142 L. Ed. 2d 315 (1998). Defendant further argues that the above-quoted portion of the prosecutor's closing argument amounted to an unconstitutional disparagement of defendant's exercise of his right to a jury trial. We conclude that there was no such disparagement. This assignment of error is overruled.

SENTENCING PROCEEDING ISSUES

Defendant next assigns error to the trial court's submission of the (e)(5) aggravating circumstance that the murder was committed during the course of a rape or kidnapping. N.C.G.S. § 15A-2000(e)(5) (1997). The trial court submitted, and the jury found, this aggravating circumstance twice, once for rape and once for kidnapping. In support of his argument, defendant argues that the evidence was insufficient to support either the rape charge or the kidnapping charge; thus, it was error to submit either felony as an aggravating circumstance. Having previously determined that the evidence supported

the submission of both felonies, we find defendant's argument to be without merit.

[18] Next, defendant contends that the trial court erred in submitting two aggravating circumstances supported by the same evidence. As noted in defendant's previous assignment of error, the (e)(5) aggravating circumstance was submitted twice, once for rape and once for kidnapping.

"We have interpreted N.C.G.S. § 15A-2000(e) to permit the submission of separate aggravating circumstances pursuant to the same statutory subsection if the evidence supporting each is distinct and separate." *State v. Bond*, 345 N.C. 1, 34, 478 S.E.2d 163, 181 (1996), *cert. denied*, —— U.S. ——, 138 L. Ed. 2d 1022 (1997). Moreover, this Court has specifically held "that it is proper for a trial court to allow such multiple submission of the (e)(5) aggravating circumstance." *Id.* at 35, 478 S.E.2d at 181. Since the State presented distinct evidence that defendant committed both rape and kidnapping against the victim during the course of the capital felony, we hold that the trial court properly submitted the (e)(5) aggravating circumstance twice. Thus, this assignment of error is overruled.

[19] Next, defendant assigns error to the prosecutor's referring to him as a "predator" during closing argument. Defendant did not object to this reference during his trial. In *State v. Reeves* the prosecutor also referred to the defendant as a predator; and after examining other cases on this issue, this Court concluded that "it was not reversible error for the court not to intervene *ex mero motu*." *State v. Reeves*, 337 N.C. 700, 733, 448 S.E.2d 802, 817 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995). Similarly, after careful review of the transcript in the present case, we conclude that the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[20] Defendant further asserts that it was grossly improper for the prosecutor to speak for the victim and say that "Vanessa Dixon and the State cries [sic] from her body in the woods; death, death[,] death for Gary Trull." This Court has found no gross impropriety requiring intervention *ex mero motu* when a prosecutor has argued that he speaks for the victim. *State v. Elliott*, 344 N.C. 242, 275, 475 S.E.2d 202, 217 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997). Since the prosecutor's argument merely reminded the jurors that he was advocating for both the State and the victim, this assignment of error is overruled.

[21] Defendant next contends that the trial court erred by tendering a shorthand instruction for twenty-four nonstatutory mitigating circumstances and by tendering a single peremptory instruction for all of these nonstatutory mitigating circumstances.

Defendant argues that the jury instructions regarding these nonstatutory mitigating circumstances were erroneous in two respects: (i) the trial judge should have separately set forth each nonstatutory mitigating circumstance, and (ii) the trial judge should have given a separate peremptory instruction as to each nonstatutory mitigating circumstance. Defendant argues that, by failing to do so, the judge diminished the importance of these mitigating circumstances.

The trial judge instructed the jury as follows:

> It is your duty to consider the following circumstances arising from the evidence that you find that have mitigating value. If one or more of you find by a preponderance of the evidence that any of the following circumstances exists and also are deemed by you to have mitigating value, you will so indicate by having your foreperson write "Yes" in the space provided after that circumstance on the "Issues and Recommendation" form. If none of you find the circumstance to exist or if none of you deem it to have mitigating value you will so indicate by having your foreperson write "No" in that space.

The judge then listed nonstatutory mitigating circumstances one through twenty-four. He then gave a proper peremptory instruction as to these nonstatutory mitigating circumstances.

Defendant did not object to these instructions at trial; our review, therefore, is limited to review for plain error. N.C. R. App. P. 10(c)(4). "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. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 132 (1998).

This Court has repeatedly held that jurors are presumed to pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given. *State v. Moody*, 345 N.C. 563, 577, 481 S.E.2d 629, 636, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 125 (1997). Further, jury instructions should be as clear as practica-

ble, without needless repetition. *See State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994) (stating that jury instructions should be stripped of redundant and confusing matters). Moreover, this Court has repeatedly approved of trial judges issuing one peremptory instruction for multiple nonstatutory mitigating circumstances; and we see no compelling reason to depart from these holdings. *See, e.g., State v. Bonnett*, 348 N.C. at 447-48, 502 S.E.2d at 583 (finding no error when the judge gave a single peremptory instruction for fifty-eight nonstatutory mitigating circumstances). Defendant has failed to carry his burden of showing that had the judge repeated the same instructions regarding nonstatutory mitigating circumstances twenty-four times, the jury probably would have reached a different verdict; thus, this assignment of error is overruled.

[22] Next, defendant asserts that the trial court committed plain error in permitting the State without objection to put before the jury inadmissible character evidence that defendant had been previously incarcerated. The State presented evidence of defendant's prior conviction of rape in 1975 in support 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* N.C.G.S. § 15A-2000(e)(3). While testifying about this rape conviction, the investigating officer read statements that had been taken from both the victim and defendant. Each of these statements referred to the fact that at the time of the 1975 rape, defendant had previously served time in prison, but did not identify for what crime he had been incarcerated.

Assuming *arguendo* that this evidence was inadmissible character evidence, we hold that admission of the evidence did not rise to the level of plain error. The victim of the 1975 rape previously had testified without objection that after defendant raped her, he told her that that was the first time he had done something and worried about what he had done; and she thought, "oh, me, I've got a convict in my house and how am I going to get him out." On appeal defendant does not assign error to the admission of this testimony. The statements about which defendant now complains were admitted solely to corroborate the earlier testimony. Defendant can show no prejudice where evidence of a similar import has also been admitted without objection and has not been made the subject of an assignment of error on appeal. *Cf. State v. Alford*, 339 N.C. at 570, 453 S.E.2d at 516 (holding that the benefit of the objection is lost where evidence is admitted over objection and the same evidence has been previously

admitted or is later admitted without objection). This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises five additional issues which he concedes have been decided contrary to his position previously by this Court: (i) the trial court erred in denying defendant's motion for a list of aggravating circumstances prior to trial, (ii) the trial court erred in denying defendant's motion to question jurors on their understanding of parole eligibility, (iii) the trial court erred in denying his motion to distribute a questionnaire to jurors, (iv) the trial court erred in denying his motion to declare the death penalty unconstitutional, (v) the trial court erred in denying defendant's motion *in limine* to prohibit the admission of testimony and evidence in support of an aggravating circumstance, and (vi) the trial court committed plain error by failing to identify the victim or person alleged as the victim by name when charging the jury on first-degree kidnapping.

Defendant raises these issues for purposes of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY

[23] Having concluded that defendant's trial and separate sentencing proceeding were free from prejudicial error, it is now our duty to ascertain (i) whether the record supports the jury's finding of the aggravating circumstances on which the sentence of death was based; (ii) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

Defendant was convicted of first-degree murder under theories of both premeditation and deliberation and felony murder. He was also convicted of first-degree rape and first-degree kidnapping. Following a capital sentencing proceeding, the jury found the three submitted aggravating circumstances: (i) 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); (ii) that this murder was commit-

ted while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); and (iii) that this murder was committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5). The catchall statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9), was submitted to the jury; but it was not found. Of the twenty-five nonstatutory mitigating circumstances submitted, the jury found six to exist and have mitigating value.

After a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we are convinced that the jury's findings of the three aggravating circumstances submitted were supported by the evidence. 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 must turn then to our final statutory duty of proportionality review.

We begin our proportionality analysis by comparing this case to those cases in which this Court has determined the death penalty to be disproportionate. The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). This Court has determined the death sentence to be disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

This case has several features which distinguish it from the cases in which we have found the sentence to be disproportionate. First, in none of those cases were three aggravating circumstances found. Further, in none of the cases in which the death penalty was found to be disproportionate was the (e)(3) aggravating circumstance included. *State v. Lyons*, 343 N.C. 1, 27-28, 468 S.E.2d 204, 217, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996). "The jury's finding of the prior conviction of a violent felony aggravating circumstance is

significant in finding a death sentence proportionate." *Id.* at 27, 468 S.E.2d at 217. Moreover, the jury found defendant guilty of first-degree murder under theories of both premeditation and deliberation and felony murder. We have also noted the significance of a first-degree murder conviction based upon both premeditation and deliberation and felony murder theories. *See State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995).

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. While we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty, we have stated previously, and we reemphasize here, that we will not undertake to discuss or cite all of these cases each time we carry out that duty. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). It suffices to say we conclude that this 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.

Accordingly, we conclude that defendant received a fair trial and sentencing proceeding, free from prejudicial error, and that the judgment of death recommended by the jury and entered by the trial court is not disproportionate.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. TERRENCE DION BOWMAN A/K/A TERRENCE TAYLOR

No. 142A97

(Filed 31 December 1998)

1. Jury § 50 (NCI4th)— first-degree murder—jury venire—racial composition

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's pretrial motion to quash the jury venire based on an underrepresentation of African-

American citizens in the jury pool. The State does not dispute that the first prong of the test under *Duren v. Missouri*, 439 U.S. 357, for establishing a *prima facie* case of disproportionate representation has been satisfied; as to the second prong, it cannot be concluded that the disparity between the percentage of African-Americans in the county's population and those in the jury pool established a *prima facie* case of disproportionate representation because, under *Turner v. Fouche*, 396 U.S. 346, merely showing a disparity will not alone establish a *prima facie* case of disproportionate representation; and, under the third prong of the *Duren* analysis, defendant failed to present any evidence showing that the jury selection process was tainted by the systematic exclusion of African-Americans from the jury pool. Statistics concerning one jury pool, standing alone, are insufficient to meet the third prong of *Duren*.

2. Jury § 227 (NCI4th)— capital first-degree murder—jury selection—excusal of juror for cause—difficulty voting for death sentence

The trial court did not abuse its discretion during jury selection in a capital prosecution for first-degree murder by allowing the State's challenge for cause of a prospective juror who indicated that she might have difficulty voting in favor of a death sentence. The juror first indicated that she could not recommend a death sentence; after questioning by defendant, she replied that she could; and the trial court inquired further and allowed the prosecutor's for-cause challenge, finding that the prospective juror's views concerning the death penalty would prevent or substantially impair her performance as a juror. It has previously been noted that a prospective juror's bias for or against the death penalty cannot always be proven with clarity and, absent an abuse of discretion, it is the trial court's decision as to whether the prospective juror's beliefs would affect her performance as a juror. In light of the questioning and responses here, it cannot be concluded that the trial court abused its discretion by excusing this juror.

3. Criminal Law § 550 (NCI4th Rev.)— capital first-degree murder—prosecutor's leading questions—impermissible statements by witnesses—no mistrial

The trial court did not abuse its discretion in failing to declare a mistrial *ex mero motu* in a capital prosecution for first-degree murder where defendant contended that the prosecutor

repeatedly asked the State's witnesses leading questions and that the State's witnesses made impermissible and prejudicial statements. A review of the record reveals that the trial court sustained defendant's objections and issued curative instructions and it cannot be concluded that the questions or statements, or their cumulative effect, amounted to such serious impropriety that it was impossible for defendant to obtain a fair trial.

4. Criminal Law § 820 (NCI4th Rev.)— instructions—defendant's failure to testify—not required

The trial court did not err in a capital prosecution for first-degree murder by instructing the jury on defendant's right not to testify when defendant did not request such an instruction. It has been consistently held that, while it is the better practice not to give the instruction absent a request, giving such an instruction does not constitute prejudicial error.

5. Criminal Law § 473 (NCI4th Rev.)— first-degree murder—prosecutor's argument—comments regarding defense counsel

There was no misconduct so improper as to deprive defendant of his due process right to a fair trial in a capital prosecution for first-degree murder where the prosecutor argued that "reasonable doubt is not created or manufactured by lawyers getting up here and arguing to you and trying to do those lawyer trick things." The comment was not directed clearly and specifically toward the defense counsel in this case, the prosecutor did not use abusive, vituperative, or opprobrious language, and the statement was isolated and not a repeated attempt to diminish defense counsel before the jury.

6. Criminal Law § 472 (NCI4th Rev.)— first-degree murder—defense arguments—reasonable doubt definition

There was no prejudicial error in a capital prosecution for first-degree murder where the trial court sustained the prosecutor's objection to defense counsel's argument defining reasonable doubt with "moral certainty" language. After this argument was made during the guilt phase, the trial court recommended that, in their final argument, defense counsel clarify for the jurors that they must be convinced to an evidentiary certainty rather than to a moral certainty, but defense counsel then argued to the jury that reasonable doubt is an evidentiary standard and that a shorthand way of saying it would be "if you can look in the mirror after

you make a decision." Considered in context, defense counsel's statement served to reassert the concept of moral conscience and to disassociate this from the sufficiency of the evidence; since the trial court had previously instructed defense counsel not to define reasonable doubt with moral certainty language, the court did not err by sustaining the prosecutor's objection. However, assuming that the court erred in sustaining the objection, the error was cured because the court thereafter correctly instructed the jury as to reasonable doubt in accordance with the pattern jury instruction.

7. Criminal Law § 882 (NCI4th Rev.)— first-degree murder—jury deliberation—question by jury—interpretation by bailiff

The trial court did not err in a capital prosecution for first-degree murder where, during the guilt phase deliberations, the trial court received a written inquiry from the jury seeking an explanation of premeditation, the bailiff asked if he might address the court, the court gave the bailiff permission to speak and the bailiff indicated that what the jury wanted to know was if there is a time limit on premeditation, the court informed counsel that he would respond by repeating only the relevant portions of the jury charge, and the court repeated its previous instructions regarding premeditation and deliberation. The record reveals that the trial court did not rely exclusively on the bailiff's explanation, personally addressed the jury, and proceeded with its instructions only after it was satisfied that it correctly understood the jury's question. There is nothing in the record to indicate that the trial court addressed only the bailiff's interpretation and ignored the jurors' written inquiry.

8. Criminal Law § 1077 (NCI4th Rev.)— first-degree murder—penalty phase—evidence—victim impact statements

There was no plain error in a capital sentencing proceeding where the trial court admitted victim impact evidence. There is no evidence in the record which suggests that the jury based its decision for the death penalty on this evidence and nowhere in the closing argument did the prosecutor argue for the jury to impose the death penalty based on the impact the murders had on the victims' families. It cannot be concluded that this evidence served any purpose other than to remind the jury that the victims were sentient beings with close family ties before they were murdered by defendant.

9. Criminal Law § 1077 (NCI4th Rev.)— capital sentencing—victim impact evidence—victims' mothers' feelings toward death sentences—questioning not allowed

The trial court did not err in a capital sentencing proceeding by precluding defendant from questioning the victims' mothers about their feelings toward the death sentences in this case after they gave victim impact evidence. This evidence has no bearing as to defendant's character, prior record, or the circumstances of his offense.

10. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—cross-examination of defendant—parole from prior conviction

There was no plain error in a capital sentencing proceeding where the court allowed the prosecution to cross-examine defendant concerning the fact that he was on parole from a conviction in New York at the time he committed these murders. Defendant opened the door by testifying on direct examination about his prior convictions and his early release on parole; additionally, there is no evidence suggesting that the prosecutor attempted to connect defendant's prior record to improper parole considerations with respect to sentencing.

11. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not arbitrary

The record fully supported the aggravating circumstance found by a jury which sentenced defendant to death and there was no indication that the sentences were imposed under the influence of passion, prejudice or any other arbitrary factor.

12. Criminal Law § 1402 (NCI4th Rev.)— death sentence—proportionate

A sentence of death was not disproportionate where defendant was convicted of two counts of first-degree murder under the theory of premeditation and deliberation and the aggravating circumstance found by the jury is one of four statutory circumstances which have been held sufficient standing alone to support a sentence of death.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Meyer, J., at the 3 February 1997 Criminal Session of Superior Court, Lenoir County, upon jury verdicts finding defendant guilty of two

counts of first-degree murder. Heard in the Supreme Court 28 September 1998.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Marshall L. Dayan for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 20 May 1996 for two counts of first-degree murder. Defendant was tried capitally to a jury at the 3 February 1997 Criminal Session of Superior Court, Lenoir County, the Honorable Louis B. Meyer presiding. The jury found defendant guilty of both counts of first-degree murder on the basis of premeditation and deliberation. Following a capital sentencing proceeding, the jury recommended sentences of death as to each murder conviction. On 18 February 1997, the trial court sentenced defendant to two separate sentences of death, one for each of the two convictions for first-degree murder.

At trial, the State's evidence tended to show that Venice Taylor, a first cousin of defendant's, knew that Antoinette Gilchrist had been selling marijuana for defendant for approximately six months prior to the murders. Venice Taylor stated that he was at his uncle Charles Taylor's home in the Simon Bright Apartments about one week before the murders, which occurred on 13 January 1996. Defendant, who shared the apartment with Charles Taylor, was also in the apartment at this time. Venice Taylor overheard defendant talking on the phone with Gilchrist. Defendant was discussing how some "weed" was stolen from Gilchrist, and defendant told Gilchrist to show him who took it. Following this phone conversation, defendant stated that whoever had stolen his marijuana was going to get his "sh— pushed back." Venice Taylor (hereinafter "Taylor") testified that he understood this phrase to mean that defendant was going to shoot someone in the head. Defendant then left to go to Gilchrist's house.

The next morning, Taylor again saw defendant at his uncle's apartment. Defendant told Taylor that he was going to return to New York. Defendant frequently traveled back and forth between New York and Kinston, but he resided in New York. While in Kinston, defendant stayed with either Charles Taylor or with Crystal Jones, who lived nearby. Defendant also kept a lot of marijuana at Gilchrist's house.

On 12 January 1996, approximately one week after Taylor last saw defendant, Taylor was at his uncle's home with his cousins, Johnny James and Chris Kent, and a "dude" from Maryland whom he did not know. It was close to 10:30 p.m., and they were all watching a basketball game on television. At that time, defendant and Bobby Jennings entered the apartment and sat down. Taylor, Jennings and defendant left the apartment to obtain beer, returned and then drove to a local nightclub called "The Vibe" in James' Mercedes Benz. In the car, and before they arrived at The Vibe, defendant stated that "somebody's going to get it tonight."

Inside the club, Clarence Jones approached Taylor and asked him for a cigarette. Approximately thirty minutes after they arrived at the club, Michael Cannon entered the club to find Taylor. Cannon took Taylor outside The Vibe, where Taylor observed defendant holding one of the victims, Michael Smith, by his coat collar. Defendant told Smith, "I know you robbed me, so you'll pay for it." At the same time, defendant held a gun to Smith's back. Taylor grabbed defendant and pulled him away from Smith. Defendant then pointed the gun at the head of a man named Chad. Taylor and James grabbed defendant's hand because they thought he was going to shoot Chad. While this occurred, the two victims, Michael Smith and Clarence Jones, walked away from the club.

When the Vibe closed for the night, James, Kent, Taylor, defendant and the "dude" from Maryland got back into the Mercedes Benz and proceeded to get something to eat. They rode to a take-out restaurant located next to K-town Taxi. After thirty minutes at the restaurant, they all rode to an area of Kinston known as "Georgetown." Once in Georgetown, they stopped at a house because James wanted to see his girlfriend. She was not there, but the house was filled with people playing pool and drinking alcohol. A fight began inside the house, and defendant participated in this fight. Immediately after the fight, Taylor, James, Kent, defendant and the "dude" from Maryland got back into the Mercedes Benz and drove away.

After leaving the house in Georgetown, they drove to Crystal Jones' house for the second time that night. Taylor knew that defendant kept his cocaine and guns at Jones' house. Everyone waited inside the car while defendant entered Jones' house. After approximately ten minutes, defendant returned to the Mercedes Benz. They all rode in the car to Simon Bright Apartments. From the car, defend-

ant saw the two victims, Michael Smith and Clarence Jones. Defendant got out of the car and walked over to Smith and Jones. It appeared to Taylor that defendant was speaking to Smith, but Taylor could not hear anything because the car windows were up. Approximately one minute after defendant left the car, defendant shot Smith. Defendant then shot Jones.

Defendant got back into the car and told Taylor to "forget them country boys. They should not have robbed me." At defendant's request, James drove the Mercedes Benz to Yashica Miller's house located in the Richard Green Apartments. On the way to Miller's apartment, Taylor repeatedly asked defendant why he had to do it, and defendant answered that the victims should not have robbed him. Defendant also stated that Smith and Jones "got it flatbush style in the head."

Once they arrived at Miller's house, everyone stayed inside the car except the defendant. Defendant entered the house and stayed approximately five to ten minutes. Defendant then got back into the Mercedes Benz. Taylor, James, Kent and the "dude" from Maryland were still in the car. They all drove to the Sheraton Inn. On the way to the Sheraton Inn, they drove over a bridge where defendant threw bullet shells out the car window. Defendant and Taylor were still arguing about the murders while riding to the Sheraton Inn.

When they arrived at the Sheraton, everyone from the Mercedes Benz went inside. The five men shared two connecting rooms. Sometime after 12:00 p.m. the next day, defendant received a page on his beeper. Defendant called the Kinston Police Department and learned that the police had a warrant for him. When defendant told Taylor about the warrant, defendant laughed. Defendant then stated that since the police were coming, he needed to switch rooms. Defendant called the Comfort Inn, which was across the street from the Sheraton, and he inquired as to whether the Comfort Inn had any rooms available. Defendant sent the "dude" from Maryland over there and told James, Kent and Taylor not to say anything to the police. Approximately thirty minutes later, the police arrived.

Initially, defendant tried to hide under the mattress when the police knocked on his motel room door. Defendant then changed his mind, answered the door and told the police his name was Eric Fludd. Both Taylor and defendant were taken to the police station and placed in custody. At this point, Taylor told the police everything defendant had done.

At trial, Yashica Miller testified that she was dating defendant in January 1996. She stated that defendant came to her house early on the morning of 13 January 1996. Defendant asked if he could leave a gun at her place. Defendant left after five or ten minutes. Later that same morning, the police stopped by Miller's house. They were looking for defendant, and they told Miller that defendant had been involved in a shooting. Miller did not tell the police about the gun; rather, she hid the gun inside a paper bag and placed the bag under a bush in a nearby park. Later, she called the police, told them the gun was in the park, went with the police to the park and retrieved the gun from where she had left it.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his pretrial motion to quash the jury venire based on an underrepresentation of African-American citizens in the jury pool. Defendant submitted a certified copy of the 1990 census for Lenoir County in support of his motion. The census indicated that Caucasians constituted 59.9% of the county's population, while African-Americans represented 39.17% of the population. However, the venire summoned for jury service contained 75% Caucasians and 23% African-Americans. Defendant argues in his brief that this resulted in a 16.17% absolute disparity between the percentage of African-Americans in the general population and their percentage in the venire.

The State disagrees with defendant's calculations. The State points out that in his challenge to the jury panel, defendant states that "[t]he jurors summoned include 48 white males (37.5%), 49 white females (38.3%), 12 black males (9.4%) and 19 black females (14.8%)." The State claims that this results in a jury pool made up of 24.2% African-Americans, and a disparity of 14.8%. Therefore, depending on whether the defendant's or the State's calculations are correct, the disparity between the number of African-Americans in the general population and their proportion in the venire is either 16.17% or 14.8%.

Our state and federal Constitutions protect a criminal defendant's right to be tried by a jury of his peers. U.S. Const. amend. VI; N.C. Const. art. I, §§ 24, 26. This constitutional guarantee assures that members of a defendant's "own race have not been systematically and arbitrarily excluded from the jury pool which is to decide [his] guilt or innocence." *State v. McNeill*, 326 N.C. 712, 718, 392 S.E.2d 78, 81 (1990). The United States Supreme Court has set forth a three-part

test for determining whether a defendant's Sixth Amendment right to a fair cross-section in the venire has been violated. *Duren v. Missouri*, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 587 (1979). In order to establish a *prima facie* case of disproportionate representation of a defendant's race in a venire, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. In its brief to this Court, the State does not dispute that the first prong of the *Duren* test for establishing a *prima facie* case of disproportionate representation has been satisfied. The issue is whether defendant has satisfied the second and third prongs of the test. For the following reasons, we conclude that defendant has failed to establish his *prima facie* case.

The second prong of the *Duren* test calls for a determination as to whether the representation of African-Americans in the venire is fair and reasonable. In *State v. Price*, 301 N.C. 437, 447, 272 S.E.2d 103, 110 (1980), this Court considered data which was similar to the data set forth in the case at bar. The evidence in *Price* showed that African-Americans made up 17.1% of the jury pool, while the county's population was 31.1% African-American. *Id.* The absolute disparity was 14%. *Id.* Upon reviewing that data, this Court stated: "[W]e are unable to conclude as a matter of law that the applicable percentages are sufficient to establish that the representation of [African-Americans] is not fair and reasonable in light of their presence in the community." *Id.*

In the present case, it is disputed whether the disparity amounts to 14.8% or 16.17%. Even if we consider only defendant's data, a disparity of 16.17%, we cannot conclude that this figure, standing alone, is unfair or unreasonable. "[A] criminal defendant is not entitled to a jury of any particular composition, nor is he entitled to be tried before a jury which mirrors the presence of various and distinctive groups within the community." *Id.* at 448, 272 S.E.2d at 110-11. *See Apodaca v. Oregon*, 406 U.S. 404, 32 L. Ed. 2d 184 (1972). "[T]he right to trial by jury carries with it the right to be tried before a body which is selected in such a manner that competing and divergent interests and perspectives in the community are reflected rather than

reproduced absolutely." *Id. See Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690 (1975).

Defendant argues that the United States Supreme Court ruled that a 23% absolute disparity between the percentage of African-Americans in the venire and the general population established a *prima facie* case of discrimination. *Turner v. Fouche*, 396 U.S. 346, 24 L. Ed. 2d 567 (1970). However, in that decision, the United States Supreme Court did not conclude that the *prima facie* case was solely based upon the disparity of representation of African-Americans in the jury venire. Rather, that Court's conclusion ultimately rested upon the finding that the underrepresentation was the result of the systematic exclusion of African-Americans in the jury-selection process. *Id.* at 360, 24 L. Ed. 2d at 579. Under our interpretation of *Turner*, merely showing a disparity under the second prong of the *Duren* test, standing alone, will not establish a *prima facie* case of disproportionate representation.

With respect to the third prong of the *Duren* analysis, defendant in the case *sub judice* has failed to present any evidence showing that the jury-selection process was tainted by the systematic exclusion of African-Americans from the jury pool. This Court has held:

> "[T]he fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause."

State v. Avery, 299 N.C. 126, 130, 261 S.E.2d 803, 806 (1980) (quoting *Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 607 (1976)). Defendant's only evidence in the instant case consisted of the statistical makeup of this particular jury venire. Statistics concerning one jury pool, standing alone, are insufficient to meet the third prong of *Duren*. *Avery*, 299 N.C. at 130-31, 261 S.E.2d at 806. We must overrule this assignment of error.

[2] In his next assignment of error, defendant contends that the trial court erred in allowing the State's challenge for cause of prospective juror Mercedes Morris, who indicated that she might have difficulty voting in favor of a death sentence. We do not agree.

In order to determine whether a prospective juror may be excused for cause due to that juror's views on capital punishment, the trial court must consider 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). At the outset of *voir dire*, the trial court explained North Carolina's capital sentencing law to the venire. The trial court then asked whether any of the prospective jurors had personal views which would prevent or substantially impair their ability to serve as a juror and to fairly consider both punishments. At that point, Morris indicated that she would have difficulty voting for the death penalty.

During *voir dire*, the prosecutor questioned Morris in order to further explore her feelings concerning the death penalty. The prosecutor asked:

> Q. Do you feel, Ms. Morris, that your own personal beliefs, whether they be religious beliefs, personal beliefs, or moral beliefs, are such that it would prevent you from considering a death penalty in this case?
>
> A. I think so.
>
> Q. Okay. When you say you think so, can you tell me what you mean by that, Ms. Morris?
>
> A. I don't think I would be able to do it because of conscience. I don't think it would be so easy for me to get over.
>
> Q. Yes, Ma'am. So do you feel like, Ms. Morris, that—and, again, there are no right or wrong answers, okay?—Your own personal beliefs are such that you could not consider a sentence of death in this case?
>
> A. I couldn't consider it.

Morris then indicated that she could not recommend a death sentence for defendant. At that point, the prosecutor challenged Morris for cause, and defendant was then permitted to question Morris. Defendant asked Morris whether she would be able to consider both punishments if the State proved defendant guilty of first-degree murder beyond a reasonable doubt. Morris replied that she could. The trial court then clarified that if defendant was convicted of first-degree murder, the jury could recommend only a sentence of death or a sentence of life imprisonment. Morris responded that she understood and indicated that she could fairly consider both alternative sentences.

In view of these answers, the trial court inquired further of Morris as follows:

> THE COURT: All right. I gather then, Ms. Morris, what you're telling us is that you don't have any real personal opposition to the death penalty law—
>
> A. No.
>
> THE COURT: —But you, as an individual, because of your own personal views, don't want to be put in the position of imposing a death penalty—
>
> A. That's right.
>
> THE COURT: —or recommending it to the court?
>
> A. (Nods head up and down.)

The trial court then allowed the prosecutor's for-cause challenge, finding that Morris' views concerning the death penalty would prevent or substantially impair her performance as a juror.

The decision " '[w]hether to allow a challenge for cause in jury selection is . . . ordinarily left to the sound discretion of the trial court which will not be reversed on appeal except for abuse of discretion.' " *State v. Stephens*, 347 N.C. 352, 365, 493 S.E.2d 435, 443 (1997) (quoting *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992)), *cert. denied*, — U.S. —, 142 L. Ed. 2d 66 (1998). This Court has previously noted that "a prospective juror's bias for or against the death penalty cannot always be proven with unmistakable clarity." *State v. Miller*, 339 N.C. 663, 679, 455 S.E.2d 137, 145, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995). Therefore, we must defer to the trial court's judgment as to whether the prospective juror could impartially follow the law. *Id.*

In the present case, Morris clearly stated that she felt her personal beliefs might affect her consideration of the death penalty for defendant. Morris' responses were at best equivocal, in comparison, and the trial court gave ample opportunity to both sides to explore and elicit Morris' views. Absent an abuse of discretion, it is the trial court's decision as to whether this prospective juror's beliefs would affect her performance as a juror. *State v. Hoffman*, 349 N.C. 167, 175-76, 505 S.E.2d 80, 85 (1998). In light of the questioning and responses here, we cannot conclude that the trial court abused its

discretion by excusing prospective juror Morris. This assignment of error is overruled.

[3] By his next assignment of error, defendant contends that the trial court erred in failing to grant a mistrial because the prosecutor repeatedly asked the State's witnesses leading questions and because the State's witnesses also made several impermissible and prejudicial statements. However, while defendant offered objections, he failed to make any motion for a mistrial. Our consideration of this assignment of error is therefore limited to whether the trial court should have ordered a mistrial *ex mero moto.*

This Court has repeatedly held that the decision " '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. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998) (quoting *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 35 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996)). It is appropriate for a trial court to declare a mistrial " 'only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.' " *State v. Norwood*, 344 N.C. 511, 537-38, 476 S.E.2d 349, 361 (1996) (quoting *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982)), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

A review of the record reveals that the trial court sustained defendant's objections and issued curative instructions. "This Court presumes that jurors follow the trial court's instructions." *Norwood*, 344 N.C. at 537, 476 S.E.2d at 361. After a careful reading of the record, we cannot conclude that the prosecutor's questions or the statements complained of, or their cumulative effect, amounted to such serious impropriety that it was impossible for defendant to obtain a fair trial. *Id.* The trial court therefore did not abuse its discretion in failing to declare a mistrial *ex mero motu.* This assignment of error is overruled.

[4] In his next assignment of error, defendant contends that the trial court committed reversible error in instructing the jury on defendant's right not to testify when defendant did not request such an instruction. This Court has consistently held that while it is the better practice not to give an instruction on a defendant's failure to testify absent a request to do so, giving such an instruction does not constitute prejudicial error. *State v. Cunningham*, 344 N.C. 341, 362,

474 S.E.2d 772, 782 (1996); *State v. McDowell*, 301 N.C. 279, 293, 271 S.E.2d 286, 295 (1980), *cert. denied*, 450 U.S. 1025, 68 L. Ed. 2d 220 (1981). This assignment of error is overruled.

[5] Defendant's next assignment of error addresses the trial court's failure to control asserted inflammatory argument by the prosecutor during the guilt and penalty phases of defendant's trial. Defendant contends that the prosecutor took a "cheap shot" at defense counsel during the guilt-phase closing argument. The prosecutor argued:

> And, again, I would ask for you to listen to what the judge defines to you in regards to what reasonable doubt means, because reasonable doubt is a doubt based on reason and common sense. And reasonable doubt arises from the evidence, all the evidence, not one part of it. And reasonable doubt is not created or manufactured by lawyers getting up here and arguing to you and trying to do those lawyer trick things.

Defendant objected to this argument, and the trial court overruled the objection. Defendant argues that this comment amounts to prosecutorial misconduct, which deprived defendant of his right to a fair trial. We do not agree.

This Court has held that "[a]rguments of counsel are left largely to the control and discretion of the trial judge, and counsel is allowed wide latitude in the argument of hotly contested cases." *State v. Robinson*, 346 N.C. 586, 606, 488 S.E.2d 174, 187 (1997). However, "a trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). In evaluating counsel's comments, "remarks are to be viewed in the context in which they are made and the overall factual circumstances to which they referred." *Robinson*, 346 N.C. at 606, 488 S.E.2d at 187.

In the present case, the prosecutor's comment that "reasonable doubt is not created or manufactured by lawyers getting up here and arguing to you and trying to do those lawyer trick things" is not directed clearly and specifically toward the defense counsel in this case, but rather would seem more logically to reference lawyers in general. However, to the extent that it could be considered a comment directed against opposing counsel, the prosecutor did not use "abusive, vituperative, or opprobrious language." *State v. Holden*, 346

N.C. 404, 432, 488 S.E.2d 514, 529 (1997), *cert. denied*, — U.S. —, 140 L. Ed. 2d 132 (1998). This statement was also an isolated comment and not a repeated attempt to "diminish defense counsel before the jury." *Id.* We therefore conclude that this one reference to defense lawyers generally, or perhaps to defendant's counsel particularly, did not amount to misconduct so improper as to deprive defendant of his due process right to a fair trial.

[6] Defendant next assigns error to the trial court's sustaining the prosecutor's objection to defense counsel's definition of reasonable doubt. During the guilt-phase closing arguments, defense counsel offered the following definition of reasonable doubt:

> [W]hen it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that [it] must be fully satisfied or satisfied to a moral certainty of the truth of the charges.
>
> If after considering, comparing, and weighing all the evidence the minds of the jurors are left in such condition that they cannot say that they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt, otherwise not.

At the close of this argument, the trial court excused the jury and then told defense counsel that this explanation of reasonable doubt may not "accurately reflect the law." The trial court recommended that in their final argument, defense counsel might wish to clarify for the jurors that "they must be convinced only to an evidentiary certainty [of defendant's guilt]," rather than to a "moral certainty."

Then, during defendant's final closing argument to the jury, the following transpired:

> Now, his Honor is going to instruct you as to what is a reasonable doubt. A reasonable doubt is an evidentiary standard. And I would contend to you that a shorthand way of saying it, not the legal definition, but a shorthand way is basically if you can look in the mirror after you make a decision.
>
> [PROSECUTOR]: Objection, your Honor.
>
> THE COURT: Sustained. Do not argue that, please.
>
> [DEFENSE COUNSEL]: Yes, sir.

Defendant contends that defense counsel was denied the opportunity to argue its conception of reasonable doubt to the jury, which resulted in depriving defendant of effective assistance of counsel. We disagree.

The United States Supreme Court has held that jury instructions which explain reasonable doubt with "moral certainty" language are permissible so long as the jurors are also explicitly told "that their conclusion had to be based on the evidence in the case." *Victor v. Nebraska*, 511 U.S. 1, 16, 127 L. Ed. 2d 583, 596-97 (1994). In this case, defense counsel knew from the trial court's admonition that any references to "moral certainty" in the context of explaining or defining reasonable doubt could not be disassociated from the evidence. However, defense counsel nevertheless argued that reasonable doubt could be measured by whether a juror "could look in the mirror" after reaching a decision, thus in effect obviating the evidentiary standard. Considering the context in which this argument was made, defense counsel's statement served to reassert the concept of moral conscience and to disassociate this from the sufficiency of the evidence. Since the trial court had previously instructed defense counsel not to define reasonable doubt with moral certainty language, the trial court did not err by sustaining the prosecutor's objection to this portion of defendant's argument. *State v. Warren*, 348 N.C. 80, 105, 499 S.E.2d 431, 445, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 216 (1998).

Assuming *arguendo* that the trial court did err in sustaining the prosecutor's objection, this error was cured because the trial court thereafter correctly instructed the jury as to reasonable doubt in accordance with the pattern jury instruction, N.C.P.I.—Crim. 101.10 (1974). *Warren*, 348 N.C. at 106, 499 S.E.2d at 445. We conclude that this assignment of error is without merit.

[7] In his next assignment of error, defendant contends that he is entitled to a new trial since the trial court allowed the bailiff to interject his interpretation of a written question submitted to the trial court by the jury after deliberations had begun. During guilt-phase deliberations, the trial court received a written inquiry from the jury seeking an explanation of "exactly what premeditation means." The trial court discussed the jury's request with counsel, and the bailiff asked if he might address the court. The trial court gave the bailiff permission to speak, and the following colloquy occurred:

BAILIFF: What they really wanted to know is if there's a time limit on premeditation.

THE COURT: If there was a time limit?

BAILIFF: Yes. If it had to be premeditated ten minutes, an hour, or so forth. That was what they wanted to find out.

The trial court informed counsel that he would respond to the jury's question by repeating only the relevant portions of his jury charge. Defendant then requested the trial court to read all the elements of first- and second-degree murder to the jurors. The trial court declined, stating, "that's not the subject of their question."

Before the trial court directly answered the jury's question, the trial court sought to clarify the jury's concern:

Ladies and gentlemen of the jury, the bailiff has informed me that you had a question on some of the law that I instructed you about. I asked you to have it reduced to writing. He handed me a slip of paper. It says the jury wants to know exactly what premeditation means and explain.

I want to inquire: Is that the question?

A. Yes, sir. (In unison.)

THE COURT: All of you agree that that's the question.

A. Yes, sir. (In unison.)

THE COURT: All right. I'm going to go over with you the instructions that I gave you earlier with regard to premeditation and deliberation. And I'm going to try to [flesh] out for you only briefly the time element for premeditation and deliberation. I assume that was your concern; is that correct?

A. Yes, sir. (In unison.)

After the trial court was satisfied it understood the jury's concern, the trial court repeated its previous instructions concerning premeditation and deliberation. In addition to these instructions, the trial court stated:

Now, there is no specific time element required for the formation of the intent to kill, not in hours, not in minutes, not in seconds. The requirement is that he acted after premeditation;

that is, he formed the intent to kill the victim over some period of time, however short, before he acted.

Defendant now contends that he is entitled to a new trial because the trial court failed to answer the jury's question as written, and instead only answered the question that the bailiff claimed the jurors intended to ask. We do not agree.

The record reveals that the trial court did not rely exclusively on the bailiff's explanation in responding to the jury's written question. The trial court personally addressed the jury in order to confirm that it wanted to know "what premeditation means." The trial court then continued its inquiry in order to confirm that the jury's main concern related to time limits associated with premeditation. Only after the trial court was satisfied that it correctly understood the jury's question did the trial court proceed with its instructions. There is nothing in the record to indicate that the trial court addressed only the bailiff's interpretation and ignored the jurors' written inquiry. This assignment of error is overruled.

[8] In his next assignment of error, defendant contends that the trial court erred in admitting victim-impact evidence at the penalty phase of defendant's trial. The prosecutor examined Letha Marie Jones and Sabrina Joan Pugh, the mothers of each of defendant's victims. Defendant failed to object when each of these witnesses testified as to how their sons' murders affected them and their families. Since defendant failed to object during the victims' mothers' testimony, we must limit our review to whether admission of this victim-impact evidence constitutes plain error. *State v. Moody*, 345 N.C. 563, 572, 481 S.E.2d 629, 633, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 125 (1997). "In order to prevail under a plain error analysis, defendant must establish not only that the trial court committed error, but that 'absent the error, the jury probably would have reached a different result.' " *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994) (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

The United States Supreme Court has held that a victim-impact statement may be admitted during a capital sentencing proceeding unless that evidence "is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735 (1991). In addition, this Court has stated that "the State should be given some latitude in fleshing out the humanity of the victim so long as it does not go too far." *State v. Reeves*, 337 N.C.

700, 723, 448 S.E.2d 802, 812 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995). Defendant points out that the key to this Court's approval of victim-impact evidence in recent cases is the *de minimus* nature of that evidence. In contrast to those prior cases, defendant argues that in the instant case the State made the victim-impact evidence the "centerpiece" of its sentencing-phase presentation. Defendant contends that he is thus entitled to a new sentencing proceeding. We disagree.

There is no evidence in the record which suggests that the jury based its decision for the death penalty on this victim-impact evidence. The sole aggravating circumstance that the prosecution submitted and the jury found was that defendant committed the murders as part of a course of conduct in committing another crime of violence. N.C.G.S. § 15A-2000(e)(11) (1997). Nowhere in his closing argument did the prosecutor argue for the jury to impose the death penalty based on the impact the murders had on the victims' families. Therefore, we cannot conclude that this evidence served any purpose other than " 'to remind the jury that the victims were sentient beings with close family ties before they were murdered by defendant.' " *State v. Bond*, 345 N.C. 1, 37, 478 S.E.2d 163, 182 (1996) (quoting *State v. Conaway*, 339 N.C. 487, 528, 453 S.E.2d 824, 850, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)), *cert. denied*, — U.S. —, 138 L. Ed. 2d 1022 (1997).

[9] Defendant also argues that the trial court increased the severity of the victim-impact evidence when it precluded defendant from questioning the victims' mothers about their feelings toward the death sentences in this case. During the cross-examination of Mrs. Pugh, defense counsel asked if she had any feelings about the death penalty in this case. The State objected to this question, and the trial court sustained the objection. Outside of the jury's presence, defendant made an offer of proof showing that Mrs. Pugh had conflicting feelings as to punishment. During *voir dire*, Mrs. Pugh stated that she wanted to see defendant "lose his life the same way he took my son's life." Mrs. Pugh then went on to explain:

> [B]ut before that, I want him to be able to tell me why he took my son's life. And I want him to tell his two-year-old daughter why she's never going to see her daddy again, because every night she's asking me to see her daddy. And there's no way I can tell this two-year-old why she's never going to see her daddy again.

Defendant argues that the trial court should have admitted this portion of Mrs. Pugh's testimony into evidence since it constitutes a reason as to why defendant should be sentenced to life imprisonment instead of death. Defendant further contends that since Mrs. Pugh's statement offers a reason as to why defendant should be sentenced to life imprisonment, then it falls within the definition of "mitigating circumstance." Thus, defendant asserts, the trial court erred in excluding evidence that could mitigate defendant's sentence. This argument is without merit.

The United States Supreme Court has held that a jury should "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978). The Supreme Court also noted that this rule was not intended to "limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n.12, 57 L. Ed. 2d at 990 n.12. We have adopted the Supreme Court's rule, and we have also stated that a mitigating circumstance may be defined as "a fact or group of facts . . . which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than other first-degree murders." *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981).

In the instant case, defendant contends that a victim's mother's opinion as to whether defendant should receive a sentence of death should come within the definition of "mitigating circumstance." However, this evidence has no bearing as to "defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12; *Bond*, 345 N.C. at 33, 478 S.E.2d at 180. It also fails to reduce the "moral culpability of the killing." *Irwin*, 304 N.C. at 104, 282 S.E.2d at 446-47. We cannot conclude that Mrs. Pugh's statement constituted mitigating evidence or that it could be fairly construed as offering a reason why defendant should be sentenced to life imprisonment instead of death. We therefore conclude that the trial court did not err in excluding this evidence. This assignment of error is overruled.

[10] In his final assignment of error, defendant asserts that the trial court erred in the capital sentencing proceeding by allowing the prosecution to cross-examine him concerning the fact that he was on

parole from a conviction in New York at the time he committed the murders in the instant case. Defendant asserts that, as a result, the prosecutor improperly injected the issue of parole in the sentencing proceeding. However, during cross-examination, defendant failed to object to the prosecutor's questions which he now contends were improper. We must therefore determine whether the prosecution's questions constituted plain error. *Sierra*, 335 N.C. at 761, 440 S.E.2d at 796.

The record reveals that on direct examination defendant testified about his prior convictions for selling drugs and his early release on parole. Thus, defendant effectively opened the door to cross-examination on these issues. *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998). In addition, there is no evidence suggesting that the prosecutor attempted to connect defendant's prior record to improper parole considerations with respect to sentencing. *Conaway*, 339 N.C. at 522, 453 S.E.2d at 846. Defendant has failed to show that a different result would have occurred had the trial court acted *ex mero motu* and prohibited the prosecution's cross-examination regarding his prior criminal record. We therefore conclude that the trial court did not err in failing to intervene during defendant's cross-examination. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises two additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred in instructing the jury that it could reject a submitted nonstatutory mitigating circumstance if it found that circumstance not to have mitigating value; and (2) the trial court erred in its penalty-phase charge to the jury by instructing that it may, rather than must, consider any mitigating circumstances that the jury determines to exist in weighing the aggravating and mitigating circumstances in Issues III and IV on the verdict sheet.

Defendant raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for possible further judicial review of this case. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[11] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now review the record and determine as to each murder: (1) whether the evidence supports the aggravating circumstance found by the jury; (2) whether the sentence was entered under the influence of passion, prejudice or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). We have thoroughly reviewed the record, transcript and briefs in this case. We conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no indication that the sentences of death in this case were imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

[12] In the present case, defendant was found guilty of two counts of murder under the theory of premeditation and deliberation. Following a capital sentencing proceeding, the jury found the one aggravating circumstance submitted as to each murder: 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." N.C.G.S. § 15A-2000(e)(11).

The trial court submitted, and the jury found, as to each murder, the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). The trial court also submitted the statutory "catchall" circumstance, but the jury did not find "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9). Of the twenty-three nonstatutory mitigating circumstances submitted as to each murder, the jury found two to exist.

One purpose of our 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). In conducting proportionality review, we 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). This Court has found the death penalty disproportionate in seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. 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, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. First, defendant was convicted of two counts of first-degree murder. This Court has never found a sentence of death disproportionate in a case where the jury has found defendant guilty of murdering more than one victim. *State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995). In addition, the jury convicted defendant under the theory of premeditation and deliberation. This Court has stated that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Finally, the jury found the only aggravating circumstance submitted: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to support a sentence of death. *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)(11) circumstance, which the jury found here, is among them. *Id.*

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 to those in which juries have consistently returned recommendations of life imprisonment.

Finally, this Court has noted that similarity of cases is not the last word on the subject of proportionality. *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). Similarity "merely serves as an initial point of inquiry." *Id.* 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).

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentences of death were excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. RONNIE THOMPSON

No. 80PA98

(Filed 31 December 1998)

1. Arrest and Bail § 143 (NCI4th)— pretrial detention—domestic violence—automatic forty-eight hour detention—substantive due process

Defendant failed to carry his burden of showing that the detention authorized by N.C.G.S. § 15A-534.1(b) is facially unconstitutional as violative of substantive due process where defendant was arrested on a warrant for charges including misdemeanor assault inflicting serious injury, a domestic violence charge; defendant arrived before a magistrate seeking a release order pending trial at 3:34 p.m. on October 28, immediately following his arrest; the magistrate completed a release order form but, under N.C.G.S. § 15A-534.1, designated defendant as a domestic violence arrestee and ordered him sent to jail with an Order of

Commitment Form directing the custodian of the detention facility to bring defendant before a judge or magistrate on October 30 at 3:45 p.m. for bond; defendant remained in jail until Monday afternoon, almost forty-eight hours after his arrest; and there were at least two district court judges available early on Monday to conduct defendant's bond hearing, and probably two superior court judges. The United States Supreme Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may; the statute here serves the General Assembly's legitimate interest in ensuring that a judge rather than a magistrate consider the terms of a domestic violence offender's pretrial release and the detention authorized by the statute is properly classified as a regulatory restraint.

2. Arrest and Bail § 143 (NCI4th)— pretrial release—domestic violence—automatic forty-eight-hour detention—procedural due process

Defendant failed to carry his burden of showing that the detention authorized by N.C.G.S. § 15A-534.1(b) following a domestic violence arrest is facially unconstitutional as violative of procedural due process. The statute insures that an arrestee detained by a magistrate pending a judicial determination of the conditions of his or her pretrial release will be detained no longer than forty-eight hours without a hearing and the arrestee detained under N.C.G.S. § 15A-534.1(b) should receive a hearing as soon as possible following his or her arrest. The statute thus provides the procedural protection considered to be immune from systemic challenges.

3. Arrest and Bail § 143 (NCI4th)— pretrial detention—domestic violence—automatic forty-eight-hour detention—double jeopardy

The defendant did not satisfy his burden of establishing that N.C.G.S. § 15A-534.1(b) is facially unconstitutional on double jeopardy grounds because detentions under the statute, when administered as intended, are regulatory and subsequent criminal prosecution of an arrestee who has been regulated, but not punished, does not expose the arrestee to multiple punishments for the same offense under established double jeopardy principles. Furthermore, the statute does not require pretrial detention or prescribe any minimum period of detention.

4. Appeal and Error § 150 (NCI4th)— pretrial detention—constitutionality of statute as applied—reserved for appeal

Defendant preserved for appeal the constitutionality of a pretrial detention statute as applied to him by assignments of error to the court's conclusion that the statute was constitutional on the grounds that the statute did not violate double jeopardy and due process as well as the conclusion that the statute does not violate any substantive law. These assignments of error attack the broad conclusion by the court that the statute is constitutional and defendant is not limited either to a facial constitutional challenge or to an as-applied constitutional challenge.

5. Arrest and Bail § 143 (NCI4th)— pretrial detention—domestic violence—unconstitutional as applied

N.C.G.S. § 15A-534.1(b) was unconstitutional as applied to defendant in this case where defendant was arrested at 3:45 p.m. on a Saturday, the order of commitment did not authorize his release from jail for a bond hearing until 3:45 the following Monday, he was not brought before a judge upon the opening of court on Monday morning, and it is clear that at least two district court judges were available early on Monday and probable that two superior court judges were available. Under these discrete facts, the magistrate's order automatically detaining defendant without a hearing until well into the afternoon while available judges spent several hours conducting other business violated defendant's procedural due process rights to a timely pretrial release hearing under N.C.G.S. § 15A-534.1(a). The constitutional violation deprived defendant of liberty unreasonably, well beyond any time period necessary to serve any governmental interest in detaining him without a hearing for regulatory purposes.

On appeal of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and on discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 547, 496 S.E.2d 597 (1998), affirming an order and supplemental order entered by Hudson, J., at the 18 March 1996 Criminal Session of Superior Court, Durham County. Heard in the Supreme Court 14 October 1998.

Michael F. Easley, Attorney General, by Teresa L. Harris, Assistant Attorney General, for the State.

Office of the Public Defender, by Russell J. Hollers III, Assistant Public Defender, for defendant-appellant.

The American Civil Liberties Union of North Carolina Legal Foundation, by Mebane Rash Whitman, amicus curiae.

WHICHARD, Justice.

The issue is whether N.C.G.S. § 15A-534.1(b), regarding the bail and pretrial release of individuals accused of having committed crimes of domestic violence, is unconstitutional, on its face or as applied, under the Due Process and Double Jeopardy Clauses of the United States Constitution. We conclude that the statute, as applied to defendant under the discrete facts presented, deprived him of his federal constitutional right to procedural due process.

In 1979 Governor James B. Hunt, Jr., formally recognized that domestic violence is a "serious and invisible problem" in North Carolina. North Carolina Legislation 1979, at 61 (Inst. of Gov't, Univ. of N.C. at Chapel Hill, Joan G. Brannon & Ann L. Sawyer eds. 1979). Shortly thereafter, the General Assembly responded to public concern about domestic violence by passing Senate Bill 171, which was codified as N.C.G.S. § 15A-534.1. This legislation established a special pretrial-release provision for individuals charged with crimes of domestic violence. *Id.* at 62. The General Assembly recognized that in particular situations, individuals charged with crimes of domestic violence may pose an identifiable threat to their victims after these individuals have been released on bond. Thus, this legislation empowered judicial officials, including judges and magistrates, to order preventive, pretrial detention of a domestic-violence arrestee for a "reasonable period of time" while determining the conditions of the arrestee's release. Act of May 14, 1979, ch. 561, sec. 4, 1979 N.C. Sess. Laws 592, 594. This grant of authority to judicial officials also contained a limitation: They could order pretrial detention of a domestic-violence arrestee only if they specifically found that the arrestee's immediate release on an appearance bond posed a danger of injury or was likely to result in intimidation of the alleged victim. *Id.*

In 1995, almost two decades after the enactment of N.C.G.S. § 15A-534.1, the General Assembly amended this statute. Act of

June 10, 1975, ch. 527, sec. 3, 1995 N.C. Sess. Laws 546, 546 (making amendments effective upon ratification). "[P]erhaps the most significant change" in this domestic-violence legislation "provides that a magistrate may no longer set conditions of pretrial release in certain domestic violence cases." North Carolina Legislation 1995, at 5-9 (Inst. of Gov't, Univ. of N.C. at Chapel Hill, Joseph S. Ferrell ed. 1995). Under the amended statute, "the judicial official who determines the conditions of pretrial release shall be a judge," N.C.G.S. § 15A-534.1(a) (1997), and a magistrate may act only "[i]f a judge has not acted" within forty-eight hours following the arrest of the accused, N.C.G.S. § 15A-534.1(b). Essentially, under the amended domestic-violence legislation, the arrestee "must be held in jail," without a consideration of the specific facts of his or her case, "until a judge [or, after forty-eight hours, a magistrate] sets conditions of pretrial release." North Carolina Legislation 1995, at 5-9. The amended statute provides:

> **§ 15A-534.1. Crimes of domestic violence; bail and pretrial release.**
>
> (a) In all cases in which the defendant is charged with assault on or communicating a threat to a spouse or former spouse or a person with whom the defendant lives or has lived as if married, with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes, the judicial official who determines the conditions of pretrial release shall be a judge, and the following provisions shall apply in addition to the provisions of G.S. 15A-534:
>
> (1) Upon a determination by the judge that the immediate release of the defendant will pose a danger of injury to the alleged victim or to any other person or is likely to result in intimidation of the alleged victim and upon a determination that the execution of an appearance bond as required by G.S. 15A-534 will not reasonably assure that such injury or intimidation will not occur, a judge may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.
>
> (2) A judge may impose the following conditions on pretrial release:
>
> a. That the defendant stay away from the home, school, business or place of employment of the alleged victim;

b. That the defendant refrain from assaulting, beating, molesting, or wounding the alleged victim;

c. That the defendant refrain from removing, damaging or injuring specifically identified property;

d. That the defendant may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge.

The conditions set forth above may be imposed in addition to requiring that the defendant execute a secured appearance bond.

(3) Should the defendant be mentally ill and dangerous to himself or others or a substance abuser and dangerous to himself or others, the provisions of Article 5 of Chapter 122C of the General Statutes shall apply.

(b) A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.

N.C.G.S. § 15A-534.1.

On 21 October 1995, shortly after the amendments to N.C.G.S. § 15A-534.1 became effective, Tina Upchurch took out a warrant for defendant Ronnie Thompson's arrest. Upchurch alleged that defendant was formerly her domestic partner and that he had assaulted her, inflicting serious injury. Based upon these allegations, a magistrate determined that probable cause existed to issue a warrant for defendant's arrest for misdemeanor assault inflicting serious injury.

Seven days later, on Saturday, 28 October 1995, the police arrested defendant and charged him with three misdemeanor offenses: assault inflicting serious injury, N.C.G.S. § 14-33(b)(1) (1993); assault on a female, N.C.G.S. § 14-33(b)(2); and second-degree trespass, N.C.G.S. § 14-159.13 (1993). The charge of misdemeanor assault inflicting serious injury, N.C.G.S. § 14-33(b)(1), is the only charge of domestic violence. The assault on a female, N.C.G.S. § 14-33(b)(2), and second-degree trespass, N.C.G.S. § 14-159.13, charges were allegedly committed against Dorothy Bennett, who was a friend of Tina Upchurch's. There is no suggestion of a domestic-partner relationship between defendant and Bennett.

Immediately following defendant's arrest, at 3:45 p.m. on 28 October, defendant arrived before a second magistrate seeking a "Release Order" pending trial. The magistrate completed a "Release Order" form, but under recently amended N.C.G.S. § 15A-534.1, the magistrate did not authorize defendant's release pending trial. Instead, the magistrate denied bond, designated defendant as a "Domestic Violence" arrestee, and ordered him sent to jail. The magistrate completed an "Order of Commitment" form directed to the "Custodian of the Detention Facility" to which defendant was sent. He ordered that the custodian of the detention facility "[b]ring [defendant] before Judge or Magistrate 10/30/95 3:45 p.m. for Bond." The magistrate signed and dated this order at the time of its issuance on Saturday, 28 October 1995.

Upon this order of commitment, defendant spent almost forty-eight hours, including two nights, in jail without bond on three misdemeanor charges. On 30 October, officers led defendant from the jail to the courtroom. Following a bond hearing on the facts relevant to the charges, a judge released defendant on a $5,000 secured bond.

When defendant's case was called for trial in District Court, defendant argued that N.C.G.S. § 15A-534.1(b), the amended domestic-violence, pretrial-release legislation, was unconstitutional because it authorized a magistrate to detain defendant in jail for forty-eight hours prior to trial and without a prompt post-detention hearing before a judge. Defendant also moved to dismiss the charges against him under N.C.G.S. § 15A-954(a)(4) (1997), which authorizes a court to dismiss charges against a criminal defendant when that defendant's constitutional rights have been violated resulting in irreparable prejudice. The District Court concluded that "[t]he application of N.C.G.S. § 15A-534.1 was unconstitutional." The court recognized that defendant was automatically denied bond by a magistrate based solely upon defendant's status as a domestic-violence arrestee, that defendant was "not entitled to present evidence regarding appropriate conditions of pretrial release," and that "defendant [had] no right to appeal [the magistrate's] denial of conditions of release." The court also explained that defendant's "due process rights have been flagrantly violated," that defendant "was denied his constitutional right to reasonable conditions of pretrial release within a reasonable amount of time," and that "[f]urther prosecution would subject him to punishment for the same offense twice." The District Court dismissed the charges.

The State appealed, and the Superior Court reversed. The Superior Court concluded, without explanation, that "[t]he domestic violence bond law, N.C.G.S. § 15A-534.1[,] is constitutional and thus does not violate the Double Jeopardy Clause of the 5th Amendment to the U.S. Constitution, the due process clause of the 14th Amendment, nor any other substantive law." The Superior Court reinstated the criminal charges against defendant and remanded to the District Court for trial.

On defendant's appeal from that decision, the Court of Appeals held that, on its face, N.C.G.S. § 15A-534.1 "does not violate either the Double Jeopardy or Due Process Clauses of the United States Constitution," *State v. Thompson*, 128 N.C. App. 547, 558, 496 S.E.2d. 597, 604 (1998), and that "defendant has waived any challenge to the constitutionality of the statute as applied to him," *id.* at 556, 496 S.E.2d at 602. The Court of Appeals affirmed.

Defendant appealed to this Court on the basis that the case presented a substantial question arising under the Constitution of the United States. N.C.G.S. § 7A-30(1) (1995). On 6 May 1998 this Court allowed defendant's petition for discretionary review. We now reverse the Court of Appeals.

Defendant again argues that N.C.G.S. § 15A-534.1(b) is unconstitutional, on its face and as applied to him, under the Double Jeopardy and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Before reaching the merits of defendant's contentions, we address two preliminary matters.

First, defendant states in his brief that N.C.G.S. § 15A-534.1(b) is unconstitutional under both the United States Constitution and the North Carolina Constitution. He has failed, however, to make any argument under the North Carolina Constitution. We agree with the Court of Appeals that because "defendant has . . . failed to present arguments regarding . . . state constitutional violations[,] . . . [he] has waived any further consideration of those issues." *Thompson*, 128 N.C. App. at 556, 496 S.E.2d at 602; *see* N.C. R. App. P. 28(b)(5).

Second, although defendant at times argues broadly about N.C.G.S. § 15A-534.1 in its entirety, the substance of his arguments challenges only subsection (b), under which a magistrate ordered defendant held in jail for almost two days without a prompt bond hearing before a judge. Defendant's arguments do not challenge subsection (a), under which a judge considered the facts applicable to

the charges against defendant and released defendant on a $5,000 bond. Thus, no challenge to N.C.G.S. § 15A-534.1(a) is presented.

"A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). "The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." *Ramsey v. N.C. Veterans Comm'n*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). An individual challenging the facial constitutionality of a legislative act "must establish that no set of circumstances exists under which the [a]ct would be valid." *Salerno*, 481 U.S. at 745, 95 L. Ed. 2d at 707. The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

Defendant contends that N.C.G.S. § 15A-534.1(b) is unconstitutional on its face under principles of substantive due process, procedural due process, and double jeopardy. We consider each of these arguments in turn.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. It provides two types of protection for individuals against improper governmental action. "Substantive due process" protection prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 190 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 292 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969). "Procedural due process" protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner. *Salerno*, 481 U.S. at 746, 95 L. Ed. 2d at 708; *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33 (1976).

[1] Defendant asserts that N.C.G.S. § 15A-534.1(b) violates substantive due process requirements because the forty-eight-hour pretrial detention authorized shocks the conscience and constitutes an impermissible deprivation of freedom before guilt has been established by trial and without a preliminary hearing regarding an arrestee's potential dangerousness if released on bond. An individual's liberty interest is substantial. *See Schall v. Martin*, 467 U.S. 253,

265, 81 L. Ed. 2d 207, 217 (1984). Governmental action depriving an individual of that interest via detention prior to a hearing is subject to substantive due process review. *See Salerno*, 481 U.S. at 746, 95 L. Ed. 2d at 708; *Schall*, 467 U.S. at 263, 81 L. Ed. 2d at 216. When considering the facial constitutionality of pretrial detention provisions under principles of substantive due process, the United States Supreme Court "has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Bell v. Wolfish*, 441 U.S. 520, 537, 60 L. Ed. 2d 447, 467 (1979); *see also Salerno*, 481 U.S. at 747, 95 L. Ed. 2d at 708. The Court has determined that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *Salerno*, 481 U.S. at 746, 95 L. Ed. 2d at 708. Pretrial detention may, "in appropriate circumstances," amount to permissible regulation. *Id.* at 748, 95 L. Ed. 2d at 709.

In *Salerno* the Court said:

> Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on " 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " [*Schall*, 467 U.S. at 269, 81 L. Ed. 2d at 220], quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 9 L. Ed. 2d 644[, 661] (1963).

Salerno, 481 U.S. at 747, 95 L. Ed. 2d at 708. Further, when legislation serves a nonpunitive purpose, pretrial detention for up to forty-eight hours without a determination of probable cause may "in a particular case" pass constitutional muster under the prompt-trial requirements of the Fourth Amendment. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 114 L. Ed. 2d 49, 63 (1991).

Here, the General Assembly did not express an intention to punish domestic-violence offenders when it amended N.C.G.S. § 15A-534.1 by enacting subsection (b). Instead, N.C.G.S. § 15A-534.1(b) serves the General Assembly's legitimate interest in ensuring that a judge, rather than a magistrate, consider the terms of a domestic-violence offender's pretrial release. Subsection (b) reflects the General Assembly's regulatory purpose by authorizing magistrates to detain an arrestee for up to forty-eight hours while attempting to secure the first available judge to hold a pretrial-release hearing. This limited authorization of pretrial detention is not exces-

sive in relation to the government's legitimate interest. It does not authorize indefinite or extensive detention of an arrestee to effectuate the legislative purpose; instead, it limits detention to a maximum of forty-eight hours. If a judge has not performed an arrestee's pretrial release hearing within forty-eight hours of arrest, the magistrate "shall" conduct the hearing. N.C.G.S. § 15A-534.1(b). Thus, as a general matter, under *Schall* and *Salerno*, the detention authorized by N.C.G.S. § 15A-534.1(b) is properly classified as a regulatory restraint, not a punitive measure.

Because regulatory pretrial detention for forty-eight hours can, in appropriate circumstances, comport with the demands of substantive due process, *see County of Riverside*, 500 U.S. at 56, 114 L. Ed. 2d at 63; *Salerno*, 481 U.S. at 751, 95 L. Ed. 2d at 711, "we cannot categorically state" that the forty-eight-hour maximum pretrial detention authorized by N.C.G.S. § 15A-534.1(b) " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Salerno*, 481 U.S. at 751, 95 L. Ed. 2d at 711 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 677 (1934). Thus, we conclude that defendant has failed to carry his burden of showing that the detention authorized by N.C.G.S. § 15A-534.1(b) is facially unconstitutional as violative of substantive due process.

[2] Defendant next contends that N.C.G.S. § 15A-534.1(b) fails procedural due process scrutiny because it authorizes detention of an arrestee prior to trial based solely upon a probable-cause determination and without any other predetention hearing. Defendant emphasizes that N.C.G.S. § 15A-534.1(b) does not require that a magistrate provide a defendant with an adversary hearing with the right to an attorney, the right to present evidence, and the right to cross-examine witnesses before the magistrate may detain the defendant pending a judicial determination of the conditions of that defendant's pretrial release. Defendant asserts that because N.C.G.S. § 15A-534.1(b) does not require such procedural safeguards, it is facially unconstitutional under principles of procedural due process.

In order to sustain the procedure contained in N.C.G.S. § 15A-534.1(b) against this facial challenge, we need only find the procedures "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," *Schall*, 467 U.S. at 264, 81 L. Ed. 2d at 217, "whether or not they might be insufficient in some particular circumstances," *Salerno*, 481 U.S. at 751, 95 L. Ed. 2d at

711. The United States Supreme Court has held that "extensive safeguards" prior to pretrial detention, including a hearing at which defendant's attorney may cross-examine witnesses, "suffice to repel a facial challenge." *Id.* at 752, 95 L. Ed. 2d at 712. However, that Court has not *required* such procedures to defeat such a challenge. In fact, the Court has upheld significantly less-exacting procedures when challenged as facially unconstitutional. *See County of Riverside*, 500 U.S. at 57, 114 L. Ed. 2d at 63 (holding that detention of an arrestee who was arrested without a warrant and was detained without any hearing survived a facial constitutional challenge when a judicial hearing on probable cause was provided as soon as possible following arrest and in any event within forty-eight hours); *Schall*, 467 U.S. at 274-75, 81 L. Ed. 2d at 223-24 (holding that the procedures afforded juveniles detained prior to fact-finding provided "sufficient protection against erroneous and unnecessary deprivations of liberty" even though those procedures did not require the full panoply of adversarial safeguards); *Gerstein v. Pugh*, 420 U.S. 103, 120-22, 43 L. Ed. 2d 54, 69-70 (1975) (holding that a procedure whereby a magistrate determined in a "nonadversary proceeding [based] on hearsay and written testimony" that probable cause existed to believe the suspect had committed a crime was sufficient to withstand constitutional scrutiny and to effect limited postarrest detention).

In *County of Riverside*, the United States Supreme Court considered the constitutional claims of individuals who, unlike defendant here, were arrested without a warrant and, like defendant here, were detained for up to forty-eight hours before receiving a hearing of any kind. 500 U.S. at 48, 114 L. Ed. 2d at 57. The arrestees in *County of Riverside* appear to have argued, as defendant argues here, that legislation authorizing pretrial detention without providing an evidentiary hearing violates the protections afforded by the United States Constitution. *Id.* at 49, 114 L. Ed. 2d at 58. The Court contemplated these claims under the Fourth Amendment's promptness requirement, but it ultimately reached the broad conclusion that "jurisdiction[s] that provide[] judicial [hearings] . . . within 48 hours of arrest will, as a general matter, . . . be immune from systemic challenges" to the constitutionality of any prehearing detention. *Id.* at 56, 114 L. Ed. 2d at 63.

N.C.G.S. § 15A-534.1(b) ensures that any arrestee detained by a magistrate pending a judicial determination of the conditions of his or her pretrial release will be detained no longer than forty-eight hours without a hearing. It directs that "[i]f a judge has not acted pur-

suant to this section within 48 hours of arrest, the magistrate *shall* act under the provisions of this section" to provide defendant with the appropriate hearing. N.C.G.S. § 15A-534.1(b) (emphasis added). An arrestee detained under N.C.G.S. § 15A-534.1(b) should receive a hearing under N.C.G.S. § 15A-534.1(a) as soon as possible following his or her arrest and no later than forty-eight hours after arrest. Thus, N.C.G.S. § 15A-534.1(b) provides the procedural protection considered to be "immune from systemic challenges." *County of Riverside*, 500 U.S. at 56, 114 L. Ed. 2d at 63. We thus conclude that defendant has failed to carry his burden of showing that the detention authorized by N.C.G.S. § 15A-534.1(b) is facially unconstitutional as violative of procedural due process.

[3] In his final facial challenge to N.C.G.S. § 15A-534.1(b), defendant contends that the statute violates the Double Jeopardy Clause of the Fifth Amendment because it permits individuals to be punished twice for the same offense. The Double Jeopardy Clause states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The clause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989). Defendant asserts that he has been subjected to the third of these abuses here. He contends that when an individual is arrested on a charge of domestic violence and detained without a hearing under N.C.G.S. § 15A-534.1(b), he has been "punished" for purposes of double-jeopardy analysis. Thus, a subsequent criminal prosecution based upon the same conduct amounts to a "multiple punishment" for the same offense.

Contrary to defendant's position, there are a number of circumstances under which the detention N.C.G.S. § 15A-534.1(b) authorizes does not raise double-jeopardy concerns. As discussed above, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *Salerno*, 481 U.S. at 746, 95 L. Ed. 2d at 708. When N.C.G.S. § 15A-534.1 is administered as intended, detentions thereunder are regulatory. *See id.* Thus, when an individual arrested upon an allegation of domestic violence undergoes regulatory detention under N.C.G.S. § 15A-534.1(b) for a brief period of time while awaiting the first available judge to hold a pretrial release hearing under N.C.G.S.

§ 15A-534.1(a), no double-jeopardy concern arises. Subsequent criminal prosecution of an arrestee who has been regulated, but not punished, does not expose the arrestee to "multiple punishments" for the same offense under established double-jeopardy principles.

Further, N.C.G.S. § 15A-534.1(b) does not *require* pretrial detention or prescribe any minimum period of detention. Individuals charged with domestic violence might not be detained at all under the statute; they might be brought before a judge for a pretrial-release hearing immediately following arrest. In such instances, no double-jeopardy concern arises because the arrestee, who has not been punished or detained under N.C.G.S. § 15A-534.1(b), suffers no "multiple punishment" upon subsequent criminal prosecution.

We conclude that defendant has not satisfied his burden of "establish[ing] that no set of circumstances exists under which the [a]ct would be valid." *Salerno*, 481 U.S. at 745, 95 L. Ed. 2d at 707. N.C.G.S. § 15A-534.1(b) thus survives defendant's facial constitutional challenge on double-jeopardy grounds.

[4] We turn, then, to defendant's contention that this statute was applied unconstitutionally in this case. The State argues, and the Court of Appeals held, that "defendant has waived any challenge to the constitutionality of the statute as applied to him" because "defendant's assignments of error . . . attack only the facial validity of the statute." *Thompson*, 128 N.C. App. at 556, 496 S.E.2d at 602. We disagree. Defendant assigned as error "[t]he [superior] court's conclusion of law that the bond statute is constitutional on the ground that the statute violates the double jeopardy clauses of the United States Constitution and North Carolina Constitution." Defendant also assigned as error "[t]he [superior] court's conclusion of law that the bond statute is constitutional on the ground that the statute violates the due process clauses of the United States Constitution and North Carolina Constitution." Defendant further assigned as error "[t]he [superior] court's conclusion of law that the bond statute does not violate any substantive law." These assignments attack the broad conclusion by the Superior Court that N.C.G.S. § 15A-534.1(b) is constitutional. They are not limited either to a facial constitutional challenge or to an as-applied constitutional challenge. Thus, they suffice to preserve both.

[5] Defendant correctly recognizes that pretrial detention pursuant to N.C.G.S. § 15A-534.1(b) does not pass constitutional muster in a particular case simply because it is constitutionally permissible in

the abstract. Constitutional attacks on criminal statutes must often "be made on a case-by-case basis." *Schall*, 467 U.S. at 269 n.18, 81 L. Ed. 2d at 220 n.18; *see also County of Riverside*, 500 U.S. at 56, 114 L. Ed. 2d at 63 (holding that a provision authorizing pretrial detention of an individual arrested without a warrant for up to forty-eight hours pending a probable-cause hearing by a judge survives a facial constitutional challenge, but recognizing that this provision may be unconstitutionally applied in an individual case); *Salerno*, 481 U.S. at 751, 95 L. Ed. 2d at 711 (holding that the pretrial detention procedures under the Bail Reform Act were sufficient to survive a facial constitutional challenge, but recognizing that "they might be insufficient in some particular circumstances"). Defendant contends that N.C.G.S. § 15A-534.1(b) is unconstitutional as applied under the Fifth and Fourteenth Amendments under principles of procedural due process, substantive due process, and double jeopardy. We first consider defendant's procedural due process contentions.

Defendant argues that the magistrate here unconstitutionally delayed the post-detention process to which he is entitled under the Due Process Clause of the Fifth Amendment. Defendant was arrested at 3:45 p.m. on a Saturday. The magistrate's order of commitment did not authorize defendant's release from jail for a bond hearing until 3:45 p.m. the following Monday. Defendant was not brought before a judge upon the opening of court on Monday morning. He, instead, remained in jail until Monday afternoon, almost forty-eight hours after his arrest.

This Court may take judicial notice of the public records of other courts within the state judicial system. *Alpine Motors Corp. v. Hagwood*, 233 N.C. 57, 62 S.E.2d 518 (1950). We accordingly take judicial notice of the following facts established by the public records contained in the office of the Clerk of Superior Court, Durham County. Two sessions of District Court convened in Durham County at or about 9:00 a.m. on 30 October 1995, the date in question: a session of District Criminal Court with Judge Carolyn Johnson presiding, and a session of District Traffic Court with Chief Judge Kenneth Titus presiding. Two sessions of Superior Criminal Court also commenced in Durham County on that date: one with Judge Robert L. Farmer presiding, and one with Judge A. Leon Stanback, Jr., presiding. The records do not reveal the starting time for the Superior Court sessions. We can, however, take judicial notice of matters of common and general knowledge. *Hughes v. Vestal*, 264 N.C. 500, 506, 142 S.E.2d 361, 366 (1965); *Dowdy v. Southern Ry. Co.*, 237 N.C. 519, 526,

75 S.E.2d 639, 644 (1953). We accordingly take judicial notice of the commonly known fact that our superior courts generally convene for the conduct of business somewhere in the 9:00-10:00 a.m. range. It is thus clear that at least two District Court judges were available early on Monday, 30 October 1995, to conduct defendant's bond hearing, and it is probable that two Superior Court judges were available. Under these discrete facts, we agree with defendant that the magistrate's order automatically detaining him without a hearing until well into the afternoon, while available judges spent several hours conducting other business, violated his procedural due process rights to a timely pretrial-release hearing under N.C.G.S. § 15A-534.1(a).

As discussed above, procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews*, 424 U.S. at 332, 47 L. Ed. 2d at 31. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965). " 'Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.' " *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236 (1961) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63, 95 L. Ed. 817, 849 (1951) (Frankfurter, J., concurring)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494 (1972). Accordingly, resolution of whether the statutory procedures as implemented here are constitutionally sufficient requires analysis of the particular circumstances of the case.

In deciding whether the challenged delay in judicial review of defendant's pretrial detention satisfies the flexible demands of procedural due process, we must examine both the private and governmental interests affected. *Mathews*, 424 U.S. at 334, 47 L. Ed. 2d at 33. The United States Supreme Court has articulated the following factors to be considered when a statute is challenged as unconstitutional as applied under principles of procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any,

> of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 47 L. Ed. 2d at 33. More recently, the Court slightly reformulated these factors for use in assessing the permissibility of post-deprivation process delay such as that at issue here. It stated:

> In determining how long a delay is justified in affording a post-[deprivation] hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken.

FDIC v. Mallen, 486 U.S. 230, 242, 100 L. Ed. 2d 265, 279 (1988). The Fourth Circuit has explained this reformulation as follows:

> Presumably, this refinement was undertaken out of recognition of the awkwardness of a literal application of the *Mathews* factors in this context. Where the question is not whether there will be post-deprivation review, but the timeliness of such review, it is not meaningful to inquire, as it is in the typical procedural due process context, whether the procedure sought—sooner review—would reduce the likelihood of an erroneous deprivation. The deprivation has already occurred, it is understood that there will be judicial review, and the deprivation, even if in error, cannot be "undone" by sooner judicial review. At most, the risk of an extended erroneous deprivation could be reduced. The more relevant questions therefore are the harm to the private interests that will be occasioned by the delay in review and the state's justifications for the delay.

Jordan v. Jackson, 15 F.3d 333, 345 (4th Cir. 1994) (citation omitted).

In considering the first factor articulated in both *Mathews* and *FDIC*, it is beyond question that the private interest at stake, liberty, is a fundamental right. "Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Stack v. Boyle*, 342 U.S. 1, 4, 96 L. Ed. 3, 6 (1951). The right to freedom prior to trial is reflected in the "principle that there is a presumption of innocence in favor of the accused [which] is the undoubted law,

axiomatic and elementary, and . . . lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 39 L. Ed. 481, 491 (1895).

Delay in post-deprivation judicial review under N.C.G.S. § 15A-534.1(b) may result in significant harm to a defendant's private interest in liberty prior to trial. "The consequences of prolonged detention [prior to trial] may be more serious than the interference occasioned by arrest." *Gerstein*, 420 U.S. at 114, 43 L. Ed. 2d at 65; *see also Stack*, 342 U.S. at 4, 96 L. Ed. at 6 (recognizing that freedom prior to trial ensures a defendant's unhampered preparation of his defense). Additionally, "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein*, 420 U.S. at 114, 43 L. Ed. 2d at 65.

Having recognized the importance of defendant's interest in liberty prior to trial as well as the potential harm caused by delay in providing post-detention proceedings, we consider "the justification offered by the Government for delay [in providing post-deprivation proceedings] and its relation to the underlying governmental interest." *FDIC*, 486 U.S. at 242, 100 L. Ed. 2d at 279. Defendant's private interests in liberty are not without public counterpart. The State has a legitimate interest in providing that a legally trained judge perform individualized determinations of bail and set conditions of release in domestic-violence cases. The State, however, also claims a corollary interest in detaining a domestic-violence arrestee while securing a judge to perform this function. The State argues that this legitimate interest justifies a forty-eight-hour delay in providing post-deprivation proceedings to a domestic-violence offender, even when a judge becomes available to conduct such hearing prior to the expiration of the forty-eight hours. This argument is untenable. Here, once a judge became available to conduct a post-detention hearing on Monday morning, further delay in providing this hearing did not serve any underlying interest of the State. All such interests had been served in full. Judicial review of pretrial detention may not be delayed unreasonably without running afoul of the Constitution. *County of Riverside*, 500 U.S. at 56, 114 L. Ed. 2d at 63. The failure to provide defendant with a bond hearing before a judge at the first opportunity on Monday morning, and the continued detention of defendant well into the afternoon, was unnecessary, unreasonable, and thus constitutionally impermissible under *County of Riverside*.

The State suggests a second justification for an automatic forty-eight-hour delay in bringing a domestic-violence arrestee before an

available judge for a pretrial-release hearing. It contends that this delayed hearing is justified to allow the arrestee to "cool off." In this manner, the State argues, as stated by the Court of Appeals, "N.C. Gen. Stat. § 15A-534.1 . . . protect[s] victims of domestic violence from further harm by their abusers and . . . provide[s] a period of time in which inflamed tempers may abate." *Thompson*, 128 N.C. App. at 555, 496 S.E.2d at 601.

This "cooling off" justification for detaining a domestic-violence arrestee beyond the time at which a judge is available to consider the conditions of that arrestee's pretrial release has no relationship to the State's interest in having a judge, rather than a magistrate, conduct domestic-violence, pretrial-release hearings under N.C.G.S. § 15A-534.1(b). Further, providing a prompt pretrial-release hearing can provide ample opportunity for a domestic-violence offender to "cool off." A judge conducting such a hearing "may retain the defendant in custody for a reasonable period of time" beyond the initial forty-eight hours authorized by N.C.G.S. § 15A-534.1(b) if the judge determines that "release of the defendant will pose a danger of injury to the alleged victim." N.C.G.S. § 15A-534.1(a).

Eliminating unnecessary delay in bringing a domestic-violence arrestee before a judge for a hearing to determine bail and conditions of pretrial release benefits domestic-violence arrestees at minimal or no cost to the State. *See Mathews*, 424 U.S. at 335, 47 L. Ed. 2d at 33 (stating that considering whether a statute violates procedural due process as applied requires that a court consider "the probable value, if any, of additional or substitute procedural safeguards"). Here, for example, a prompt hearing before the first available judge would likely have prevented several hours of unnecessary governmental deprivation of defendant's liberty as well as the potential harm incident to that deprivation. When defendant ultimately received a pretrial-release hearing before a judge, he was promptly released upon a secured bond. This suggests that if he had received this hearing earlier, he would have been released earlier.

Further, providing a domestic-violence arrestee with a pretrial-release hearing before the first available judge, rather than delaying the hearing until the outer limits of the forty-eight-hour prehearing detention limitation under N.C.G.S. § 15A-534.1(b), would involve little or no expense to the State. *See id.* (stating that courts considering a procedural due process challenge to a statute should consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute proce-

dural requirement would entail"). The State incurs the cost of providing a judge, other personnel, and courtroom space, whether the hearing occurs immediately after arrest or later. When the State provides the hearing sooner rather than later, it may save costs incident to further detention.

We now consider the final *FDIC* factor: "the likelihood that the interim decision [to detain defendant] may have been mistaken." *FDIC*, 486 U.S. at 242, 100 L. Ed. 2d at 279. A first magistrate determined that there was probable cause to arrest defendant on a domestic-violence charge based upon the allegations of one individual. A second magistrate ordered defendant detained based solely upon that probable-cause determination. When his case came to trial, defendant pled not guilty and asserted that he did not commit a crime of domestic violence. There is no record evidence establishing definitively whether detention was warranted.

Even assuming that defendant committed the three misdemeanor offenses with which he was charged, defendant might have "irretrievably suffer[ed] the full penalty" for two of those offenses prior to a hearing before a judge. *FDIC*, 486 U.S. at 246, 100 L. Ed. 2d at 282. The three misdemeanor offenses established under N.C.G.S. §§ 14-33(b)(1), (2), and -159.13 were each punishable by a minimum sentence of one day. *See* N.C.G.S. § 15A-1340.23(c)(2) (1997). Here, the application of N.C.G.S. § 15A-534.1(b) left defendant in jail on a Saturday, Sunday, and Monday for a total of almost forty-eight hours. Thus, if defendant had been tried and convicted for each of the three offenses with which he was charged and had received the minimum sentence for each, he would have suffered the full penalty for two of those offenses before the State satisfied its burden of proving his guilt beyond a reasonable doubt. In situations where this is possible, "the State must assure a prompt post-[detention] hearing, 'without appreciable delay.' " *FDIC*, 486 U.S. at 246, 100 L. Ed. 2d at 282 (quoting *Barry v. Barchi*, 443 U.S. 55, 66, 61 L. Ed. 2d 365, 376 (1979)).

Having considered the factors articulated in *FDIC* and *Mathews*, we conclude that the application of N.C.G.S. § 15A-534.1(b) here significantly harmed defendant's fundamental right to liberty when unreasonable delay prevented him from receiving a prompt post-detention hearing before the first available judge regarding the conditions of his pretrial release. Because defendant did not obtain his hearing before a judge regarding his bail and conditions of release "as soon as [was] reasonably feasible," *County of Riverside*, 500 U.S. at 57, 114 L. Ed. 2d at 63, defendant was detained longer than necessary

to serve the State's interest in having a judge, rather than a magistrate, determine the conditions of his pretrial release. As such, defendant was not given an opportunity to be heard "at a meaningful time and in a meaningful manner," *Armstrong*, 380 U.S. at 552, 14 L. Ed. 2d at 66, and the application of N.C.G.S. § 15A-534.1(b) violated his procedural due process rights.

Having determined that N.C.G.S. § 15A-534.1(b)—as applied to defendant under the discrete facts presented here—operated unconstitutionally under established principles of procedural due process, we need not consider defendant's additional arguments that it was unconstitutionally applied to him under principles of substantive due process and double jeopardy as well. We dispose of the case solely upon procedural due process grounds. The constitutional violation deprived defendant of liberty unreasonably, well beyond any time period necessary to serve any governmental interest in detaining him without a hearing for regulatory purposes. It denied him the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong*, 380 U.S. at 552, 14 L. Ed. 2d at 66. The District Court thus correctly dismissed the charges. N.C.G.S. § 15A-954(a)(4).

Accordingly, we reverse the decision of the Court of Appeals and remand the case to that court for further remand to the Superior Court, Durham County, for the entry of an order of dismissal.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. CHARLES TIMOTHY MATHIS AND BARAK ELLIOT WILLIAMSON

No. 10PA98

(Filed 31 December 1998)

1. Arrest and Bail § 199 (NCI4th)— arrest of principal—authority of bondsmen

Although the common law of North Carolina has always recognized the sweeping powers of sureties, or bail bondsmen acting as their agents, to apprehend the principal and use whatever force is reasonably necessary in the process, the arrest provisions of N.C.G.S. § 58-71-30 do not create a law enforcement officer in the person of the bail bondsman.

2. Arrest and Bail § 199 (NCI4th)— arrest of principal—authority of bondsman—home of third party

While the contract between a surety and principal authorizes a surety to exercise certain powers as to the principal, this contractual authority cannot be extended to cases where a surety is seeking the principal in the home of a third party where the principal does not preside. However, when the principal himself resides in the home of a third party, the bond agreements giving the principal's consent for the sureties or their agents to break and enter his residence authorize them to enter.

3. Arrest and Bail § 199 (NCI4th)— arrest of principal—authority of bondsman—use of force

Sureties or their agents may use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal, but only such force as is reasonably necessary under the circumstances to accomplish the arrest.

4. Arrest and Bail § 199 (NCI4th)— assault and breaking or entering—prosecution of bail bondsman—authority of bondsman—instructions

The trial court erred in the prosecution of two bail bondsmen for assault and breaking or entering during an arrest by not instructing the jury concerning the common law and statutory authority of sureties and their agents to search for and seize their principal. A jury could find from the evidence here that the bondsmen had a reasonable belief that the principal was in his residence, that the owner of the residence was interfering with the arrest, and that the bondsmen were justified in using the force necessary to enter and seize the principal. Where competent evidence is introduced tending to show a surety or his agent acted as a matter of right pursuant to lawful authority, it is a substantial and essential feature of the case about which the court is required to properly instruct the jury.

Justice WYNN did not participant in the consideration or decision of this case.

Justice FRYE concurring in part and dissenting in part.

Justice WHICHARD joins in this concurring and dissenting opinion.

STATE v. MATHIS

[349 N.C. 503 (1998)]

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the decision of the Court of Appeals, 126 N.C. App. 688, 486 S.E.2d. 475 (1997), reversing judgments entered by Davis (James C.), J., on 7 June 1996 in Superior Court, Cabarrus County, and remanding for a new trial. Heard in the Supreme Court 28 May 1998.

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

Aaron E. Michel for defendant-appellees.

MITCHELL, Chief Justice.

The questions presented for review by the State's petition for writ of certiorari involve whether the Court of Appeals, in ordering a new trial, improperly construed the common law powers of bail bondsmen to allow them to break into a residence and use force against a third party when searching for their principal. For the reasons that follow, we affirm the decision of the Court of Appeals.

Defendants Charles Timothy Mathis and Barak Elliot Williamson were charged with misdemeanor breaking and entering. Mathis was also charged with misdemeanor assault on a female and misdemeanor injury to real property. They were tried and found guilty on 18 January 1996 in District Court, Cabarrus County. Defendants appealed to the Superior Court.

Defendants, appearing *pro se*, were tried *de novo* at the 3 June 1996 Civil Session of Superior Court, Cabarrus County. Evidence at trial tended to show the following. On 21 April 1995, William Tankersley, III, signed a bail bond in the amount of $1,500 with Marie's Bail Bonding Company to secure his release upon the charge of passing worthless checks. After Mr. Tankersley failed to appear in court, a warrant was issued for his arrest, and the bond was ordered forfeited.

Defendants Mathis and Willamson, licensed bail bondsmen, were employed by Marie's Bail Bonding. On 9 December 1995, defendants received a call from their employer telling them to find and apprehend Mr. Tankersley and surrender him to the Mecklenburg County Sheriff. Defendants went first to 1700 The Plaza in Charlotte, the residence of Ms. Joanne McKnight, Mr. Tankersley's sister-in-law. Not finding Mr. Tankersley there, they proceeded to his residence.

Mr. Tankersley resided at his mother's house at 8 Willowbrook Drive, Concord, North Carolina, together with his mother Mrs. Susan

Nelson, her husband, Mr. Tankersley's sister Ms. Noto, and Ms. Noto's three children. Both Mrs. Nelson and Ms. Noto had dealt with Marie's Bail Bonding before. Ms. Noto had cosigned the bond on this occasion. The bond papers showed that Mr. Tankersley drove a white 1990 Mazda MX-6 and Mrs. Nelson drove a blue 1990 Toyota Camry.

Upon defendants' arrival at the residence, Ms. Noto told defendants that Mr. Tankersley was not home and that he had gone shopping with his mother in the white Mazda. Defendant Mathis testified that when he asked Ms. Noto if Ms. McKnight had called her, she answered "no," but she said that Ms. McKnight had spoken to Mr. Tankersley just before he left the house. After waiting outside the residence and watching it for two hours, defendants were relieved by another bail bondsman. At 6:47 p.m., defendant Mathis received a call indicating that Mr. Tankersley had entered the house.

Defendants drove back to Concord to Mr. Tankersley's residence where they observed the white Mazda parked outside the house. Defendant Mathis went to the back door of the house and knocked. Mrs. Nelson came to the door, stepped outside, and closed the glass storm door behind her. Defendant Mathis testified that he then identified himself, showed Mrs. Nelson his bail bondsman's license, and told her he was there to arrest her son.

Mrs. Nelson told defendant Mathis that her son was not at home and refused to allow him to enter. Mathis told her that he knew her son was there because his car was in the driveway. Mrs. Nelson said that the white Mazda was not her son's car and that he no longer used it. Defendant told Mrs. Nelson that if it would make her feel better, she could call the police and that he was "going to come in there . . . . I have a warrant, and I'm going to leave when I get my man."

Mrs. Nelson blocked the door, persisting in her refusal to allow defendant Mathis to enter. He testified that as he slowly opened the storm door, Mrs. Nelson began striking him about the chest and shoulders, yelling loudly. He then pushed the storm door against Mrs. Nelson, pinning her against the exterior wall of the house. As defendant Mathis pushed the door in one direction, Mrs. Nelson pushed in the other direction, which caused the clips holding the glass panel in place to pop out, damaging the door.

While defendant Mathis held the storm door, defendant Willamson entered the house. At this point, defendant Mathis released the storm door and also entered the house. They were followed by Mrs. Nelson, who then called the police. Defendant

Williamson proceeded to search the rooms in the house but did not enter a locked front bedroom because Mr. Nelson told him a baby was asleep inside.

After arriving on the scene, the police asked defendants to step outside and told them that they would notify them when the arrest was made. At 2:00 a.m., having not received the call, defendants went back to Mr. Tankersley's residence. After they saw the white Mazda in the driveway, defendants flagged down a police officer who helped them take Mr. Tankersley into custody.

At the conclusion of the evidence, the trial court conducted a jury charge conference. At that time, defendants requested that the trial court include in its final instructions to the jury instructions defining the authority of bail bondsmen to break and enter the home of a principal and to use such force as reasonably necessary to apprehend him. The trial court denied this request.

At the conclusion of the trial court's final instructions to the jury, the trial court asked if the State or defendants wished to have any additional instructions given. Defendants again requested that appropriate instructions be given regarding the authority of bail bondsmen and made specific requests that the trial court read portions of certain opinions of this Court defining that authority as it related to the evidence presented at trial. The trial court again denied defendants' requests. Defendants were found guilty of all charges.

Defendants appealed to the North Carolina Court of Appeals. In a unanimous opinion, the Court of Appeals reversed the convictions and remanded defendants' cases for a new trial, concluding that the trial court had erred "by failing to instruct the jury on the common law and statutory authority of bail bondsmen to break and enter a principal's home to accomplish a lawful arrest." *State v. Mathis*, 126 N.C. App. 688, 693, 486 S.E.2d 475, 478 (1997). The Court of Appeals also concluded that the jury should have been instructed regarding the privilege of bail bondsmen to use reasonable force and the prohibition against their use of excessive force when apprehending their principal.

This Court granted the State's petition for certiorari on 5 February 1998. In analyzing the authority granted bail bondsmen, two issues are before us: (1) whether a bail bondsman may forcibly enter his principal's residence to search for and seize him; and (2) whether, in the process of gaining entry, a bail bondsman may overcome the

resistance of a third party. We conclude that bail bondsmen have both such powers under the common law. Therefore, we answer both of these questions in the affirmative.

We begin our discussion with a brief overview of the history of the American system of bail,[1] which is rooted in the English common law. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731, 744 (1996) [hereinafter *When Man Hunts Man*]. Release on bail pending trial developed from "an ancient and extremely vigorous form of suretyship or hostageship, which rendered the surety liable to suffer the punishment that was hanging over the head of the released prisoner." 2 Sir Frederick Pollack & Frederic William Maitland, *The History of English Law* 589 (2d ed. 1959). The surety was, in effect, "bound body for body" with the principal. *Id.* at 590.

The now-common practice of allowing the surety to pay a sum of money should the accused not appear for trial was first utilized in the early thirteenth century.[2] By releasing the prisoner into the custody of the surety, not only was the return of the prisoner assured, but also, and importantly, his release strengthened the presumption of innocence fundamental to our system of justice. *Stack v. Boyle*, 342 U.S. 1, 4, 96 L. Ed. 3, 6 (1951). Freedom of the accused protected him from the punishment of pretrial detention and also improved his opportunity to prepare a defense. *Id.* The release of the prisoner has always been considered a form of continued detention, and the common law viewed the surety's custody as a single, continuous event. " 'A man's bail are looked upon as his jailers *of his own choosing*, and the person bailed is, in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper jailer.' " Annotation, *Surrender of Principal by Sureties on Bail Bond*, 3 A.L.R. 180, 183 (1919) (quoting II William Hawkins, *Pleas of the Crown* 138, 138-39 (8th ed. 1824)) (emphasis added).

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1. The popular meaning of "bail" is the security given for the appearance of the accused to obtain his release from prison. The person who posts the required amount of bail is generally called the "surety" and in earlier cases simply "bail." The "principal" is the person who has been arrested and is released on bond pending his scheduled court appearance. 8A Am. Jur. 2d *Bail & Recognizance* § 1 (1997).

2. In earlier times, the surety was typically an acquaintance of the accused, a property owner, and a reputable member of the community. If the principal failed to appear at trial, the surety would quite often have to forfeit his real property. *When Man Hunts Man*, 33 Hous. L. Rev. at 745.

Similarly, no distinction was made between a law enforcement officer's recapture of an escaped prisoner and a surety's apprehension of his principal; neither was considered an original taking. *Commonwealth v. Brickett*, 25 Mass. (8 Pick.) 138, 141 (1829). The surety was granted the same rights and powers as a sheriff capturing an escaped prisoner and returning him to the proper authorities. Because the principal was never out of the "custody" of the surety, the surety could take him at any time, "when and where he pleases." *Read v. Case*, 4 Conn. 166, 170 (1822).

The United States Constitution recognized the need for bail in our system of justice by requiring that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII. In doing so, the English common law system of bail was adopted. However, due to rapid urbanization and the weakening of close community ties which resulted, by the mid-nineteenth century the personal-surety system of bail utilized for centuries was no longer practical, and the modern-day system of relying on commercial bondsmen[3] evolved. *When Man Hunts Man*, 33 Hous. L. Rev. at 749. Today's commercial bondsmen have retained the same broad common law powers sureties have always enjoyed regarding the custody, control, and recapture of the principal.

In the most often quoted case in this area of the law, *Taylor v. Taintor*, 83 U.S. 366, 21 L. Ed. 287 (1872), the United States Supreme Court defined the rights and powers of sureties and bail bondsmen at common law:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuation of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State, may arrest him on the Sabbath, and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It

3. The bail procedure operates as follows: A relative or friend will contact a bail bondsman, who decides on the basis of the accused's background, criminal record, and community ties whether he is a good risk. If the bondsman decides he will write the bond, he charges a fee, typically ten percent of the full bail amount paid, and presents the court with a bail bond securing release of the defendant, or "principal." If the principal fails to appear for trial as scheduled, the bondsman is responsible for the entire financial obligation. Michael Goldstein, *The Hunters and the Hunted: Rights and Liabilities of Bailbondsmen*, 6 Fordham Urb. L.J. 333, 333 n.2 (1978).

> is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern [231], it is said: "The bail have their principal on a string, and may pull the string whenever they please and render him in their discharge."

Id. at 371-72, 21 L. Ed. at 290. This decision established the law of the land to be applied in federal courts. *In re Von Der Ahe*, 85 F. 959, 962 (W.D. Pa. 1898).

The comprehensive powers of the bondsman recognized in *Taintor* are based on the underlying source of the bondsman's authority to recapture the principal which derives from the contractual relationship between the surety and the principal. Essentially, the bond agreement provides that the surety post the bail, and in return, the principal agrees that the surety can retake him at any time, even before forfeiture of the bond. By entering into the contract, not only does the principal *voluntarily* consent to be committed to the custody of the surety, but under common law, he also implicitly agrees that the surety or the surety's agent may break and enter his home and use reasonable force in apprehending him. *Id.* at 960. Further, the contract establishes the surety's and bondsman's right of recapture as private in nature, with the understanding that the government will not interfere. *Reese v. United States*, 76 U.S. 13, 22, 19 L. Ed. 541, 544 (1869). Thus, this common law right of recapture established that the seizure of the principal by the surety is technically not an "arrest" at all and may be accomplished without process of law.

We think it important to note here that while most statutory and decisional authorities use the term "arrest" when referring to the recapture of the principal, in this area of the law, that term is not used in the traditional way to mean to "deprive another of his liberty" or "to take custody of." Since the principal is always in the "custody" of the surety, his apprehension by the surety or his agent is merely a "continuation of the original imprisonment." The term "arrest" in the context involved here is meant to convey an "apprehension," "seizure," or "recapture." As the court in *Von Der Ahe* stated in holding that the private contract between the principal and the surety implicitly authorized the surety to seize the principal at any time,

> there is a fundamental difference between the right of arrest by bail and arrest under warrant where such right to arrest is based upon a court process . . . . The latter right depends upon the process of the court . . . . The former arrest . . . is based

upon the relationship which the parties have established between themselves . . . .

Von Der Ahe, 85 F. at 960; *see Fitzpatrick v. Williams*, 46 F.2d 40, 40 (5th Cir. 1931) ("The right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bail bond. It is not the right of the state but of the surety."); *Nicolls v. Ingersoll*, 7 Johns. 145, 154 (N.Y. 1810) ("[T]his shows that the jurisdiction of the court in no way controls the authority of the bail; and as little can the jurisdiction of the State affect this right, as between the bail and his principal."); *see also State v. Nugent*, 199 Conn. 537, 508 A.2d 728 (1986); *State v. Perry*, 50 N.C. App. 540, 274 S.E.2d 261, *appeal dismissed*, 302 N.C. 632, 280 S.E.2d 446 (1981). Absent the involvement of the State, the constitutional protections of due process are not implicated.

It has long been settled common law that the surety may use reasonable force to apprehend the principal and may even forcibly enter the principal's residence. "His dwelling is no longer his castle as against the right of the sureties, but may be entered at any time of day or night, and on a Sunday as well as on a week day." *United States v. Keiver*, 56 F. 422, 426 (W.D. Wis. 1893); *see also Brickett*, 25 Mass. (8 Pick.) at 140 ("If the door should not be opened on demand at midnight, the bail may break it down, and take the principal from his bed, if that measure should be necessary . . . ."); *Nicolls*, 7 Johns. at 155 (the bail is entitled to break the outer door of a dwelling to enter the premises where the principal is). Since the nineteenth century, the common law principles granting sureties and their agents power and authority have been modified very little, if at all. Courts throughout the country have upheld the decisions of the earlier cases, confirming the role of the bondsman in the pretrial process. Numerous cases have reemphasized that the surety and his agents have a right to arrest the principal without a warrant, pursue him across state lines, return him to the home state without extradition proceedings, and use other means necessary to achieve the goal of apprehending the principal. *E.g.*, *Fitzpatrick*, 46 F.2d at 41; *Smith v. Rosenbaum*, 333 F. Supp. 35, 39 (E.D. Pa. 1971), *aff'd*, 460 F.2d 1019 (3d Cir. 1972); *Curtis v. Peerless Ins. Co.*, 299 F. Supp. 429, 435 (D. Minn. 1969); *Thomas v. Miller*, 282 F. Supp. 571, 573 (E.D. Tenn. 1968); *McCaleb v. Peerless Ins. Co.*, 250 F. Supp. 512, 515 (D. Neb. 1965).

[1] We turn now to an analysis of the applicable law of North Carolina.

> [T]he "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. N.C.G.S. § 4-1.

Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995). The common law of North Carolina has always recognized the sweeping powers of sureties, or bail bondsmen who act as their agents, to apprehend the principal and use whatever force is reasonably necessary in the process. *State v. Lingerfelt*, 109 N.C. 775, 14 S.E. 75 (1891). "At common law, when bail was given, and the principal relieved from the custody of the law, he was regarded, not as freed entirely, but as transferred to the friendly custody of his bail. They had a dominion over him, and it was their right at any time to arrest and surrender him again to the custody of the law, in discharge of their obligation." *State v. Schenck*, 138 N.C. 560, 561, 49 S.E. 917, 917-18 (1905). "Persons who become bail are favored by the law, and the powers given the bail over his principal are given to enable him more easily to perform the onerous duties and obligations which he has voluntarily assumed." *Pickelsimer v. Glazener*, 173 N.C. 630, 640, 92 S.E. 700, 705 (1917).

We also note that the authority of the surety, or a bondsman acting as his agent, to apprehend and surrender the principal in accord with the common law principles set out above also finds support in statutory authority:

> For the purposes of surrendering the defendant, the surety may arrest him before the forfeiture of the undertaking, or by his written authority endorsed on a certified copy of the undertaking, may request any judicial officer to order arrest of the defendant.

N.C.G.S. § 58-71-30 (1994).

> (a) A surety may surrender his principal to the sheriff of the county in which the principal is bonded to appear or to the sheriff where the defendant was bonded. A surety may arrest his principal for the purpose of returning him to the sheriff. Upon surrender of the principal the sheriff must provide a receipt to the surety, a copy of which must be filed with the clerk.

N.C.G.S. § 15A-540 (1997). This statutory right of arrest granted the surety does not change—but simply codifies a part of—the common law powers of sureties that have always been recognized in our state. *State v. Perry*, 50 N.C. App. 540, 274 S.E.2d 261 (decided under former N.C.G.S. § 85C-7). The arrest provisions of N.C.G.S. § 58-71-30 do not create a law enforcement officer in the person of the bail bondsman. *Id.* at 542, 274 S.E.2d at 262. "Neither do we conclude that the bondsman's right to request that a judicial officer order the arrest of a defendant creates a law enforcement officer in the person of the bail bondsman." *Id.* Interestingly, N.C.G.S. § 58-71-105 prohibits law enforcement officers from becoming sureties on a bail bond.

[2] While we acknowledge that the contract between the surety and the principal authorizes the surety to exercise certain powers as to the principal, we do not find that this contractual authority can be extended to cases where a surety is seeking the principal in the home of a third party *where the principal does not reside.* In those cases the surety must first have the consent of the homeowner to enter the premises and conduct a search. *See State v. Tapia*, 468 N.W.2d 342 (Minn. Ct. App. 1991).

At least one court appears to have indicated that a surety may enter the home of a third party where the principal does not reside even *without* consent of the owner if (1) the surety identifies himself and makes his intention known, (2) the surety actually sees the principal in the house, and (3) the surety acts in a reasonable manner in gaining entry. *Livingston v. Browder*, 51 Ala. App. 366, 370, 285 So. 2d 923, 927 (1973). We do not agree with this analysis. The right of the surety to enter the residence of his principal and to seize him arises as a matter of contract from the bond agreement which carries with it the principal's implied consent that the surety may seize him at any time and may use such force as is reasonably necessary to enter his residence at any time in order to do so. The principal has no authority to authorize the surety, by contract or otherwise, to enter the residence of a third party in which the principal does not himself reside. Therefore, the surety obtains no such power by virtue of the bond agreement.

When the principal himself resides in the home of a third party, however, a different rule applies. There is "no difference between a house of which [the principal] is solely possessed, and a house in which he resides by the consent of another." *Sheers v. Brooks*, 126 Eng. Rep. 463, 464 (1792); *see* also *Nicolls*, 7 Johns. at 155. Bond agreements giving, as a matter of law, the principal's consent for the

sureties or their agents to break and enter his residence authorize them to enter even when the principal resides there with others. *Nicolls; see Mease v. State*, 165 Ga. App. 746, 302 S.E.2d 429 (1983).

[3] This brings us to the final question of whether sureties or their agents may lawfully overcome the resistance of a third party who is impeding their apprehension of the principal. Although we have found no North Carolina case directly on point, it is generally recognized that

> [w]here the third person knowingly causes the arrestor to believe that he or she is intentionally impeding the privileged arrest or recapture of a suspect or is attempting to rescue or assist the suspect in resisting arrest or escaping therefrom, the arrestor is privileged to use such force against the third person as he or she would be privileged to use against one who resisted or attempted escape.

5 Am. Jur. 2d *Arrest* § 116 (1995). Therefore, we conclude that sureties or their agents may use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal. But they may use only such force as is reasonably necessary under the circumstances to accomplish the arrest.

[4] We now apply the foregoing principles of law to the case before us. The State contends that the trial court was not required to instruct the jury concerning the common law and statutory authority of sureties and their agents to search for and seize their principal. Therefore, the State argues that the Court of Appeals erred in reversing the trial court and remanding for defendants to receive a new trial. We do not agree.

When instructing the jury, the trial court has the duty to declare and explain the law arising on the evidence. Where competent evidence is introduced tending to show that a surety or his agent acted as a matter of right pursuant to lawful authority, it is a substantial and essential feature of the case about which the trial court is required to properly instruct the jury. *Lingerfelt*, 109 N.C. 775, 14 S.E. 75; *see State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986).

In the present case, evidence tended to show that defendants were licensed bail bondsmen employed by Marie's Bail Bonding, which issued Mr. Tankersley's bond. Mr. Tankersley testified that 8

Willowbrook Drive was his residence, and that is where he was later arrested. Furthermore, Mrs. Nelson testified that he resided in the house with her. Ms. Noto and Ms. McKnight also testified that he lived at the house. This was sufficient evidence to permit a properly instructed jury to find that the house was, in fact, Mr. Tankersley's residence.

As we have explained in detail above, the surety or a bondsman acting as his agent has the authority and the contractual right to break and enter the *principal's* residence and to use the force reasonably necessary to apprehend him. Therefore, a properly instructed jury could find that when Mr. Tankersley failed to appear in court according to the terms of his bail bond, defendants were exercising their common law rights as bondsmen to break and enter his residence at 8 Willowbrook Drive to seize him.

Again, we stress that although evidence suggested that Mrs. Nelson was the owner of the home, this alone would not create a case of violation of a third party's privacy rights. Evidence tended to show that Mr. Tankersley also was a resident there. Even a warrantless search by a police officer may be consented to by a common resident or cotenant who possesses common authority or other sufficient relationship to the premises, regardless of the fact that the property may contain evidence incriminating another person. 68 Am. Jur. 2d *Searches and Seizures* § 92 (1993). A surety enters pursuant to the consent of his principal, which is valid if the principal is a common resident in the premises. *See Mease v. State*, 165 Ga. App. 746, 302 S.E.2d 429 (1983) (Two bondsmen went looking for their principal at the house where she lived with someone else. After being told by the other occupant of the house that she was not there, and without consent, the bondsmen entered the residence and searched for the principal. The defendants in that case were found not guilty of criminal trespass because the court found that the evidence did not support a finding that they had entered the house for an "unlawful purpose."). Here, there was evidence that 8 Willowbrook Drive was Mr. Tankersley's residence. Therefore, a properly instructed jury could find that defendants had the authority and a legitimate right to enter and to search for Mr. Tankersley inside the house at 8 Willowbrook Drive.

Furthermore, evidence was introduced from which a jury could find that defendants had a reasonable belief that Mr. Tankersley was inside his residence. Evidence tended to show that defendants were notified by another bondsman watching the residence that Mr.

Tankersley had come home. Upon arriving at the house, defendants noticed the white Mazda parked in the driveway; the Mazda had not been there earlier, and Mr. Tankersley had indicated on the bond application that it was the car he drove. Mrs. Nelson made quite an effort to keep defendants out of the house. There was also evidence of a locked bedroom to which defendants were denied access because they were told a sleeping baby was inside. From such evidence, a jury could find that defendants were within the limits of their powers as bondsmen in conducting a search of the residence.

As to the reasonableness of defendant Mathis' actions, we note that upon encountering Mrs. Nelson in the residence of the principal, Mathis was met with some resistance. Evidence tended to show that when he identified himself and stated his intentions, Mrs. Nelson denied him entry and blocked the door. According to the testimony of defendant Mathis, she began striking him about the chest and shoulders. Pushing the door against her, Mathis forced his way in. Mrs. Nelson testified that she was not injured.

We are not suggesting that there are no limits to a bondsman's powers. However, a jury could find from such evidence that the bondsmen here had a reasonable belief that Mr. Tankersley was in his residence, that Mrs. Nelson was interfering with the arrest, and that the bondsmen were justified in using the force necessary to enter and seize Mr. Tankersley.

For the foregoing reasons, we conclude that the trial court should have instructed the jury on the common law and statutory authority of bail bondsmen. The decision of the Court of Appeals to reverse the judgment of the Superior Court and remand for a new trial due to the trial court's failure to give such instructions is therefore affirmed.

AFFIRMED.

Justice WYNN did not participate in the consideration or decision of this case.

Justice FRYE concurring in part and dissenting in part.

In this opinion, the majority concedes that the right of a surety to seize his or her principal is not absolute. In fact, the majority emphasizes that a surety has no authority to enter the residence of a third party in which the principal does not himself reside in order to retake the principal. However, the majority holds that if the principal him-

self resides in the home of a third party, the surety is authorized to break and enter the home to search for and apprehend the principal. While I have reservations regarding this holding, the weight of authority supports the majority opinion on this issue. Thus, I concur with the majority that defendants were entitled to appropriate instructions on the charges of breaking and entering and injury to real property.

However, the majority also holds that "sureties or their agents may use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal." For the following reasons, I disagree with this statement, and therefore, I respectfully dissent from that portion of the majority opinion which holds that the jury should have been so instructed as to the charge of assault.

The issue of the use of force by sureties and bondsmen is one of first impression for this Court. The majority cites *State v. Lingerfelt*, 109 N.C. 775, 14 S.E. 75 (1891), for the proposition that the common law of North Carolina "has always recognized the sweeping powers of sureties, or bail bondsmen who act as their agents, to apprehend the principal and use whatever force is reasonably necessary in the process." However, the sole issue addressed by the Court in *Lingerfelt* was whether the defendants had the right to arrest their principal. *Id.* at 776, 14 S.E. at 76. In *Lingerfelt*, the Court did not decide or remark on the issue of the use of force by a surety, and to the extent that the facts of that case suggest anything about the use of force, it is that the defendants had the right to defend against the violent resistance of their principal.

In this case, the majority states that "the contract between the surety and the principal authorizes the surety to exercise certain powers as to the principal." I agree. As the majority explains, it is by virtue of this consent that the surety has the right to enter the principal's residence to search for and apprehend him, even in cases where the principal shares the residence of others. However, the majority then summarily concludes that "sureties or their agents may use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal," citing only secondary authority on the law of arrests. I strongly disagree with this conclusion.

The source of a surety's power is the contractual agreement by which the surety guarantees the principal's bail and the principal

agrees to submit to the "custody" of his surety. As the majority notes, the surety's and bondsman's right to "arrest" the principal is the right to apprehend, seize, or recapture the principal. It is from this right that the surety or his agent gains the implied right to use reasonably necessary force *against the principal* to effect his recapture. Without this implied right to use force against the principal, the right to seize or apprehend would be meaningless in the face of resistance. However, the majority makes an unsupported leap from this implied right to use force against the principal to the conclusion that the surety or bondsman is therefore privileged to use force against a third party to effect a seizure of the principal. If the right of the surety to retake his principal arises from a private contract, there is no basis for the surety, or bondsman acting as his agent, to interfere with the rights of any third party. The principal cannot consent to the breaking and entering of another's home where he does not reside, nor can he consent to the use of force against one who is not a party to the agreement.

In this case, Mr. Tankersley's implied consent, by virtue of the bond contract, gave defendants the right to break and enter his residence to search for him. However, Tankersley could not consent to defendants' use of force against Mrs. Nelson or anyone else in the course of exercising that right. No principal may give consent to a surety to assault a third party. *See State v. Portnoy*, 43 Wash. App. 455, 466, 718 P.2d 805, 811 (dismissing the defendant's argument, the court stated that "Portnoy offers no authority for the proposition that the bondsman may sweep from his path all third parties who he thinks are blocking his search for his client, without liability to the criminal law"), *review denied*, 106 Wash. 2d 1013 (1986).

Furthermore, as the majority correctly notes, a bail bondsman is not a law enforcement officer. Thus, the right of a surety or bondsman to use force to effect a seizure of the principal is not the same as the right of a law enforcement officer to use force in making a criminal arrest. By statute in North Carolina, police officers have been given the authority to use reasonable force in an arrest situation against a third person or against the person being arrested. N.C.G.S. § 15A-401(d) (1997). Private citizens may assist in or effect an arrest, and thus become privileged to use reasonable force, only when specifically requested to do so by law enforcement officers. N.C.G.S. § 15A-405 (1997). A surety or bail bondsman has no greater general power of arrest than any other private citizen. While sureties are given specific statutory authority to "arrest" their principal, N.C.G.S.

§ 58-71-30 (1994), the General Statutes contain no express authority for the surety to use force to do so.

The majority, while distinguishing the term "arrest" as used in the context of surety and principal from its traditional meaning as used in the criminal law, nonetheless relies on the general law of arrest applicable to peace officers and private citizens to justify the right of the surety to use force to overcome the resistance of a third party in the course of apprehending a principal. As noted above, however, the power of sureties or bondsmen to arrest their principal is specifically granted by statute and is not the same as the power of arrest given to those acting in a law enforcement capacity. Therefore, the law of arrest, as stated by 5 Am. Jur. 2d *Arrest* § 116 (1995) and quoted by the majority, is simply inapplicable to this situation.[1]

This Court should not recognize a right of bail bondsmen to use force against third parties where none is expressly given by statute. To do so is to invite breaches of the peace and needless injury. It is for this reason that the common law power of a citizen to arrest has been abrogated and is now wholly defined by statute. *See* N.C.G.S. § 15A-404 (1997) (allowing detention only, as opposed to arrest; official commentary states that "[t]he notion of a private citizen 'arresting' another . . . had led persons at times to act without authority and at times to place themselves or others in unjustified danger."); *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954) (noting that the power of arrest without warrant is entirely defined and limited by statute). Prohibiting bondsmen from using force against third parties will not deprive them of the seizure of their principal. Such a rule merely requires a surety or bondsman to obtain the assistance of law enforcement rather than resort to self-help measures against third parties. As the facts of this case show, defendants ultimately did find it necessary to seek the assistance of law enforcement officers to apprehend Mr. Tankersley.

In summary, I agree with the majority's conclusion that defendants were entitled to jury instructions defining the authority of bail bondsmen to break and enter the home of their principal. For the above-stated reasons, however, I do not believe that defendant Mathis was entitled to an instruction that says a bondsman may use force to overcome the resistance of a third party in order to

1. In fact, the introduction to the article cited by the majority notes that the topic of the power of bail bond sureties to arrest their principal is treated elsewhere. See 8A Am. Jur. 2d *Bail and Recognizance* (1997) for specific treatment.

gain entry. Therefore, I would hold that defendants are entitled to a new trial only on the charges of breaking and entering and injury to property.

Justice WHICHARD joins in this concurring and dissenting opinion.

VICKIE ANN BROWN, ADMINISTRATRIX OF THE ESTATE FOR MARY LOUISE BROWN v. KENNETH MICHAEL FLOWE, M.D.

No. 110PA98

(Filed 31 December 1998)

Judgments § 652 (NCI4th)— prejudgment interest—settlement and verdict—calculation

A medical malpractice action which was settled against some parties and which reached a verdict against this defendant was remanded for recalculation of the judgment by adding prejudgment interest at the legal rate to the entire compensatory damages award as N.C.G.S. § 24-5(b) requires; adding interest at the legal rate to the settlement sum from the date of settlement until the date of judgment; and subtracting the second calculation from the first to determine the amount of compensatory damages defendant owes to plaintiff. This method harmonizes N.C.G.S. § 1B-4 and N.C.G.S. § 24-5(b) by giving effect, fairly to both parties, to a legislative intent to both compensate plaintiffs with prejudgment interest on their compensatory damage awards and give defendants the benefit of an appropriate setoff for the portion of that award already paid by a settling codefendant.

Justice WYNN did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 668, 496 S.E.2d 830 (1998), affirming in part, reversing in part, and remanding a judgment entered by Everett, J., on 30 September 1996 in Superior Court, Pitt County. Heard in the Supreme Court 16 November 1998.

Faison & Gillespie, by O. William Faison and John W. Jensen, for plaintiff-appellant.

Walker, Barwick, Clark & Allen, L.L.P., by Thomas E. Barwick, for defendant-appellee.

WHICHARD, Justice.

This appeal arises from a medical malpractice action brought by Vickie Ann Brown, administratrix of the estate of Mary Louise Brown, against defendant Dr. Kenneth Flowe, a Pitt County Memorial Hospital emergency-room physician. Defendant and a medical resident performed surgery on the decedent, Mary Louise Brown, at Pitt County Memorial Hospital. Brown died while undergoing the surgery. Prior to filing suit, plaintiff entered a settlement agreement with the medical resident and the hospital, releasing them from liability in consideration of the payment of $178,486.76. On 15 July 1994 plaintiff filed the present action against defendant. The matter was tried before a jury at the 12 August 1996 Civil Session of Superior Court, Pitt County, and the jury returned a verdict finding defendant negligent and awarding compensatory damages in the amount of $250,000. Pursuant to N.C.G.S. § 24-5(b), the trial court applied prejudgment interest at the legal rate of eight percent to the jury's verdict, resulting in a compensatory damages award of $293,013.70. A portion of the award, $71,513.24, was to bear post-judgment interest as well. The trial court allowed plaintiff's motion to tax costs to defendant in the amount of $42,104.44. Aggregating these numbers, the court entered a judgment in the amount of $335,115.14, to which it credited the settlement amount of $178,486.76. The trial court then ordered defendant to pay plaintiff $156,628.38.

Defendant appealed, assigning error, *inter alia*, to this method of calculating prejudgment interest. The Court of Appeals agreed with defendant and held that "the trial court erred in awarding plaintiff prejudgment interest on the full amount of the verdict, and we remand the case for prejudgment interest to be assessed after applying a credit in the amount of the $178,486.76 settlement to the verdict." *Brown v. Flowe*, 128 N.C. App. 668, 674, 496 S.E.2d 830, 834 (1998). On 8 July 1998 this Court allowed plaintiff's petition for discretionary review. The question presented is how to reduce a claim against a nonsettling tort-feasor under N.C.G.S. § 1B-4 when prejudgment interest under N.C.G.S. § 24-5(b) applies.

Two statutes interact in this situation. First, N.C.G.S. § 24-5(b) provides:

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

N.C.G.S. § 24-5(b) (1991) (emphasis added). Second, N.C.G.S. § 1B-4 provides, in pertinent part:

> [A] *release or a covenant not to sue* . . . given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) . . . *reduces the claim against the others* to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

N.C.G.S. § 1B-4 (1983) (emphasis added).

"Legislative intent controls the meaning of a statute." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986). To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish. *See id.* at 81-82, 347 S.E.2d at 828. First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings. *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). The Court's analysis therefore properly begins with the words themselves. *Correll v. Division of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992).

This Court previously has determined "judgment" to be unambiguous and has given that word its plain meaning when interpreting N.C.G.S. § 97-10.2 and Rule 68 of the North Carolina Rules of Civil Procedure. We held that "judgment" indicates the final amount of money due to the plaintiff, consisting of the verdict, costs, fees, and interest. *See Hieb v. Lowery*, 344 N.C. 403, 410, 474 S.E.2d 323, 327 (1996); *Poole v. Miller*, 342 N.C. 349, 352-53, 464 S.E.2d 409, 411

(1995). A judgment is rendered by the court and is therefore a judicial act, in contrast to a verdict that is rendered by a jury. *Hieb*, 344 N.C. at 410, 474 S.E.2d at 327; *Poole*, 342 N.C. at 352, 464 S.E.2d at 411. Therefore, the judgment was the final verdict, $250,000, *plus* costs, fees, and interest, for a total of $335,115.14.

Under section 24-5, the "portion of money judgment designated by the fact finder as compensatory damages bears interest." N.C.G.S. § 24-5(b). The jury found $250,000 to be "damages . . . the estate of Mary Louise Brown, Vickie Brown, Administratrix, [was] entitled to recover by reason of the injury to and death of Mary Louise Brown." Therefore, the trial court properly calculated interest, from the date the action was instituted, on $250,000, the portion of the judgment which the jury found to be compensatory damages. There is no indication in the statute that the compensatory portion *minus settlements* bears interest; rather, the statute says simply that the "compensatory damages" portion of the judgment bears interest. *Id.* The statutory language is clear, and this Court therefore must not engage in judicial construction. *Poole*, 342 N.C. at 351, 464 S.E.2d at 410.

We must, though, determine the application of section 1B-4 to section 24-5. The release at issue was executed before this suit was filed. The hospital and the surgical resident paid $178,486.76 to plaintiff in return for being released from liability for plaintiff's decedent's injury and death. This release "reduces the claim against the others" by the amount of the payment. N.C.G.S. § 1B-4.

While "judgment" as used in section 24-5 has a plain meaning under the decisions of this Court, "claim" as used in section 1B-4 does not. The section itself is silent as to when or how to reduce the "claim" against the remaining tort-feasors, and this Court has not previously decided when or how to reduce a claim under section 1B-4 when prejudgment interest under section 24-5 applies.

"[W]here a statute is ambiguous, judicial construction must be used to ascertain the legislative will. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) (citation omitted). A question of statutory interpretation is ultimately a question of law for the courts. *See Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 642, 256 S.E.2d 692, 696 (1979). Although sections 1B-4 and 24-5 both apply in tort actions, they neither refer to each other nor use the same terminology. When multiple statutes address a single

subject, this Court construes them *in pari materia* to determine and effectuate the legislative intent. *See Board of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). Our task is to give effect, if possible, to all sections of each statute and to harmonize them into one law on the subject. *See Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980). We have held that the probable intent of the prejudgment interest statute, section 24-5, is threefold: (1) to compensate plaintiffs for loss of the use of their money, (2) to prevent unjust enrichment of the defendant by having money he should not have, and (3) to promote settlement. *See Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984) (interpreting the 1983 version of section 24-5). We now must decide what method of calculation best implements the provisions of each statute as well as effectuates the legislative intent.

Both parties cite case law assertedly consistent with their respective positions. In support of her contention that the settlement sum should be subtracted after the prejudgment interest is calculated, plaintiff notes two cases from this Court decided before the prejudgment-interest statute was enacted. First, this Court has said that the amount paid for a covenant not to sue is "a credit to be entered on the total recovery." *Slade v. Sherrod*, 175 N.C. 346, 348, 95 S.E. 557, 558 (1918). Later, the Court stated that "the weight of both authority and reason is . . . that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage[,] should be held for a credit on the total recovery in any action for the same injury or damage." *Holland v. Southern Pub. Utils. Co.*, 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935). Plaintiff also cites a decision in which the Court of Appeals held that a defendant "was entitled to a credit against the judgment in the amount of $2,000, the sum paid by the 'joint-tort-feasor.' " *Ryder v. Benfield*, 43 N.C. App. 278, 287, 258 S.E.2d 849, 855 (1979). None of these cases, however, deal with the issue of prejudgment interest and the interaction between sections 24-5(b) and 1B-4.

One case plaintiff cites seems to use "total recovery" and "verdict" interchangeably. *See Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 134, 468 S.E.2d 69 (1996). In *Ryals* the trial court reduced a $25,000 jury verdict to $15,000 because of a $10,000 settlement between the plaintiff and a codefendant. Although the Court of Appeals said the settlement amount applies to the "total recovery," citing *Holland*, the jury's *damages* award was reduced to $15,000. *See id.* at 141-42, 468 S.E.2d at 74-75. There was no mention of prejudg-

ment interest, and the Court of Appeals found no error in the trial court's calculation. Again, this case gives us no guidance as to the proper interaction between 24-5(b) and 1B-4.

Defendant cites numerous cases in which our courts implicitly have approved his position, which calls for a subtraction of settlement amounts from the compensatory damages verdict before prejudgment interest is calculated. In *Baxley v. Nationwide* this Court addressed the definition of "damages" in the context of an auto accident in which one insurer had tendered its policy limits of $25,000 to the clerk of court while the other went to trial on its underinsured-motorist coverage. In defining damages, the Court had to determine what amount the insured was "legally entitled to recover" from the tort-feasor. The Court stated: "We believe the insured is *legally entitled to recover* the total amount of money that the judgment says she is entitled to recover from the tort-feasor. In this case, the judgment awarded the insured $100,000 in compensatory damages and prejudgment interest on $75,000." *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 7, 430 S.E.2d 895, 899 (1993). Defendant also points to this Court's per curiam opinion affirming the Court of Appeals' decision in *Beaver v. Hampton*, 106 N.C. App. 172, 416 S.E.2d 8 (1992), *aff'd in part and vacated in part*, 333 N.C. 455, 427 S.E.2d 317 (1993) (per curiam). In *Beaver* the jury returned a $30,000 compensatory damages verdict in an auto accident case. One insurer had tendered $25,000 after the claim was filed but prior to trial. The Court of Appeals held that the trial court should have awarded prejudgment interest on the entire $30,000, including the $25,000 paid by the liability carrier. However, the $25,000 bore prejudgment interest only from the filing date until it actually was paid; prejudgment interest continued for the entire trial only on the remaining $5,000. *See id.* at 179, 416 S.E.2d at 12. This Court explicitly affirmed the Court of Appeals' determination that prejudgment interest should be awarded on the full amount of the judgment. *See Beaver*, 333 N.C. at 457, 427 S.E.2d at 318. Again, though, *Baxley* and *Beaver* did not speak directly to the proper interaction between sections 24-5(b) and 1B-4.

The Court of Appeals did not address any prejudgment interest issue in *Braddy v. Nationwide*, but the recitation of the damages and judgment computations there reveals that the trial court subtracted the amount of the settlement before calculating prejudgment interest. *See Braddy v. Nationwide Mut. Liab. Ins. Co.*, 122 N.C. App. 402, 405, 470 S.E.2d 820, 821, *appeal dismissed and disc. rev. denied*, 343 N.C. 749, 473 S.E.2d 610 (1996). It appears, therefore, that some trial

courts are applying the statutes as defendant urges. Again, *Braddy* did not specifically present the issue of harmonizing sections 24-5(b) and 1B-4.

As noted, one legislative purpose in enacting the prejudgment interest provision of the statute was to compensate plaintiffs for loss of the use of their money between the filing of the suit and the entry of the judgment. *Powe*, 312 N.C. at 413, 322 S.E.2d at 764. We do not believe, however, that the legislature intended to overcompensate plaintiffs. Here, plaintiff's preferred method of calculation would do that by awarding interest on money the use of which she has had since the time of the codefendants' settlement. "Both reason and justice decree that there should be collected no double compensation, for any injury, however many sources of compensation there may be." *Holland*, 208 N.C. at 292, 180 S.E. at 594. Defendant's preferred method, however—subtracting the settlement amount from the compensatory damages verdict before calculating prejudgment interest—is prohibited by the plain language of N.C.G.S. § 24-5, which requires calculation of prejudgment interest on the entire compensatory-damages verdict. We do not believe the General Assembly intended either result, and we thus decline to adopt either method.

The trial court calculated the prejudgment interest as the General Assembly has directed, that is, on the entire compensatory damages award without subtracting settlements. To effectively, accurately, and fairly reduce the "claim" against a nonsettling tort-feasor as section 1B-4 of the Uniform Contribution Among Tort-Feasors Act requires, the changing value of that claim over time must be considered. The scheme adopted by the United States Court of Appeals for the Second Circuit in interpreting similar New York statutes does this effectively by converting the settlement amount to judgment-time dollars, using the same legal rate of interest that is used in calculating prejudgment interest on the compensatory damages verdict, then subtracting the adjusted settlement figure from the adjusted compensatory damages figure. *See In re Joint E. Dist. & S. Dist. Asbestos Litig.*, 18 F.3d 126 (2d Cir. 1994). Calculation under this method consistently results in a plaintiff being compensated for the loss of use of his or her money at, rather than below or above, the legal rate of interest. Neither plaintiffs nor defendants are unjustly enriched, and defendants are not unfairly penalized for exercising their legal right to defend against a claim. This method harmonizes sections 1B-4 and 24-5(b) by giving effect, fairly to both parties, to the legislative intent to both compensate plaintiffs with prejudgment interest on their compensatory dam-

age awards and give defendants the benefit of an appropriate setoff for the portion of that award already paid by a settling codefendant. *See id.* at 133; *Williams*, 299 N.C. at 180-81, 261 S.E.2d at 854.

Accordingly, 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, Pitt County, for recalculation of the judgment by (1) adding prejudgment interest at the legal rate to the entire compensatory damages award as N.C.G.S. § 24-5(b) requires, (2) adding interest at the legal rate to the settlement sum from the date of settlement until the date of judgment, and (3) subtracting the second calculation from the first to determine the amount of compensatory damages defendant owes to plaintiff.

REVERSED AND REMANDED.

Justice WYNN did not participate in the consideration or decision of this case.

BRINKLEY v. PELL PAPER BOX CO.

No. 421P98

Case below: 130 N.C.App. 610

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Justice Wynn recused.

CARTER v. HUCKS-FOLLISS

No. 484P98

Case below: 131 N.C.App. 145

Petition by defendant (Moore Regional Hospital, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

CITY OF MONROE v. W. F. HARRIS DEV., LLC

No. 483P98

Case below: 131 N.C.App. 22

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Justice Wynn recused.

DAETWYLER v. DAETWYLER

No. 372A98

Case below: 130 N.C.App. 246

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 30 December 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

DODDER v. YATES CONSTR. CO.

No. 490P98

Case below: 131 N.C.App. 152

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Justice Wynn recused.

IN RE WILKINSON CHILDREN

No. 355P98

Case below: 130 N.C.App. 340

Petition by respondent (Lisa Wilkinson) for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

JOHNSON v. FIRST UNION CORP.

No. 485PA98

Case below: 128 N.C.App. 450

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 30 December 1998. Conditional petition by defendants (Cigna and Deffenbaugh) for discretionary review pursuant to G.S. 7A-31 allowed 30 December 1998.

KOONTZ v. DAVIDSON COUNTY BD. OF ADJUST.

No. 401P98

Case below: 130 N.C.App. 479

Petition by respondent for writ of supersedeas denied and temporary stay dissolved 30 December 1998. Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

LEAHY v. N.C. BD. OF NURSING

No. 360PA96

Case below: 123 N.C.App. 354

Petition by respondent (N.C. Board of Nursing) for discretionary review pursuant to G.S. 7A-31 allowed 30 December 1998.

MARTIN MARIETTA TECHNOLOGIES, INC. v.
BRUNSWICK COUNTY

No. 443P98

Case below: 126 N.C.App. 806

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Conditional petition by plaintiffs for

discretionary review pursuant to G.S. 7A-31 dismissed as moot 30 December 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

MURPHREY v. STALLINGS OIL CO.

No. 361P98

Case below: 130 N.C.App. 341

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

PACK v. RANDOLPH OIL CO.

No. 343P98

Case below: 349 N.C. 361

130 N.C.App. 335

Petition by plaintiff to rehear petition for discretionary review pursuant to Rule 31 dismissed 30 December 1998.

POWERS v. POWERS

No. 318P98

Case below: 130 N.C.App. 37

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

RAINTREE HOMEOWNERS ASSOC'N v.
RAINTREE COUNTRY CLUB

No. 395P98

Case below: 130 N.C.App. 757

Petition by defendant (Raintree Country Club) for writ of supersedeas denied 30 December 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 30 December 1998. Motion to strike defendant-appellant's reply denied 30 December 1998. Motion by plaintiff (Raintree Homeowners) to dismiss petition denied 30 December 1998.

SCHIMMECK v. CITY OF WINSTON-SALEM

No. 431P98

Case below: 130 N.C.App. 471

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Justice Wynn recused.

STATE v. ALLEN

No. 70A86-5

Case below: 349 N.C. 364
331 N.C. 746
323 N.C. 208
Halifax County Superior Court

Petition by defendant to rehear petition for a writ of certiorari pursuant to Rule 31 dismissed 30 December 1998.

STATE v. BATTEN

No. 445P98

Case below: 130 N.C.App. 760

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Justice Wynn recused. Motion by Attorney General to dismiss appeal allowed 30 December 1998.

STATE v. BLACKMON

No. 466P98

Case below: 130 N.C.App. 692

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 30 December 1998. Justice Wynn recused.

STATE v. BOWEN

No. 393P98

Case below: 130 N.C.App. 485

Motions by defendant for a new trial on newly discovered evidence denied 30 December 1998. Motion by defendant to restrain

State from denying access to law library, copy machine, and typewriter dismissed 30 December 1998. Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 30 December 1998. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 30 December 1998.

STATE v. BREEZE

No. 389P98

Case below: 130 N.C.App. 344

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

STATE v. GOYENS

No. 461P98

Case below: 130 N.C.App. 486

Applications by defendant for writ of habeas corpus denied 30 December 1998. Application filed by defendant pro se for writ of habeas corpus denied 30 December 1998.

STATE v. MARECEK

No. 362P98

Case below: 130 N.C.App. 303

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

STATE v. MARTIN

No. 492P98

Case below: 131 N.C.App. 38

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

STATE v. McCLENDON

No. 392A98

Case below: 130 N.C.App. 368

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 30 December 1998. Justice Wynn recused.

STATE v. SANDERS

No. 330P98

Case below: 130 N.C.App. 343

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

STATE v. THOMAS

No. 91A95-2

Case below: Wake County Superior Court

Petition by defendant for writ of certiorari is allowed December 1998 for the limited purpose of remanding this case to the Superior Court, Wake County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. Bates*, 348 N.C. 29 (1998).

STATE ex rel. UTILITIES COMM'N v. CHARLOTTE VAN & STORAGE CO.

No. 486P98

Case below: 131 N.C.App. 155

Petition by intervenors for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

STEPHENSON v. PITT COUNTY MEM'L HOSP.

No. 496P98

Case below: 131 N.C.App. 155

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

TIMMONS v. N.C. DEP'T OF TRANSP.

No. 470PA98

Case below: 130 N.C.App. 745

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 December 1998 for the limited purpose of remanding to the Court of Appeals for consideration in light of *Adams v. AVX Corporation*, 349 N.C. 676, —— S.E.2d ——, —— (1998).

TISE v. YATES CONSTR. CO.

No. 489P98

Case below: 131 N.C.App. 153

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998. Justice Wynn recused.

UNION CARBIDE CORP. v. OFFERMAN

No. 453PA98

Case below: 130 N.C.App. 761

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 30 December 1998 for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Polaroid Corp. v. Muriel Offerman*, 349 N.C. 290, —— S.E.2d ——, —— (1998). Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

WILCOX v. ZOELLER

No. 400P98

Case below: 130 N.C.App. 487

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

WILKERSON v. CARRIAGE PARK DEV. CORP.

No. 424P98

Case below: 130 N.C.App. 475

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 December 1998.

STATE OF NORTH CAROLINA v. MELVIN LEE WHITE, JR.

No. 505A96

(Filed 31 December 1998)

1. **Constitutional Law § 344.1 (NCI4th)— capital trial—unrecorded bench conferences—defendant present in courtroom**

There was no error in a capital prosecution for first-degree murder where the court conducted fourteen unrecorded bench conferences with defense counsel and the prosecution to which defendant was not privy, even though he was present in the courtroom. It is the presence of defendant's counsel at a bench conference which insures that the subject matter of the conference is not concealed from defendant. Although defendant contended that it must be assumed that he was unable to hear the dialogue and that his right to presence was violated because the court reporter could not hear a portion of the discussion of a request for referral with a prospective juror, the transcript indicates that defendant and his counsel were present and defendant has made no showing that they were not able to hear the prospective juror.

2. **Jury § 248 (NCI4th)— peremptory challenges—racial bias—procedure**

A three-step procedure has been frequently reiterated for use when a defendant objects to a prosecutor's use of peremptory challenges on the basis of racial discrimination. Defendant must first make a *prima facie* case that the prosecutors exercised a peremptory challenge on the basis of race; once the *prima facie* case has been established by defendant, the burden shifts to the State, which must offer a race-neutral explanation for attempting to strike the juror in question; and the court must make the ultimate determination of whether defendant has established purposeful discrimination.

3. **Jury § 260 (NCI4th)— jury selection—peremptory challenges—racial discrimination—racially neutral reasons for challenge**

The trial court's determination in a capital prosecution for first-degree murder that there was no purposeful racial discrimination in two peremptory challenges was not clearly erro-

neous where the prosecutor provided certain reasons for the strikes.

4. Jury § 260 (NCI4th)— jury selection—peremptory challenges—racial discrimination—prosecutor's reasons

The trial court's conclusion in a capital prosecution for first-degree murder that there was no purposeful racial discrimination in the strike of a prospective juror was not clearly erroneous where defendant argued that the rationales articulated by the prosecution were clearly pretext since the prosecutor never asked the prospective juror whether she could be fair and impartial in deciding the case. The prosecutor's explanations for the strike are supported in the record and the prosecutor was not required to ask the prospective juror whether she could be impartial even though she had friends who went to school with defendant; as long as the motive is not racial discrimination, a prosecutor may exercise peremptory challenges based on legitimate hunches and past experience. Moreover, defendant offered no rebuttal.

5. Evidence and Witnesses §§ 318, 351 (NCI4th)— first-degree murder—prior violence toward girlfriend—admissibility to show motive

There was no error in a capital prosecution for first-degree murder in the admission of evidence of defendant's acts and threats of violence toward his girlfriend. The State presented evidence that defendant was determined to control his girlfriend to the point of assaulting her, kidnapping her at gunpoint, tying her to his bed, and threatening to kill her or her family if she tried to leave him. This evidence supported the State's theory that defendant killed the victims, his girlfriend's grandparents, in retaliation against the girlfriend for resisting his control, for seeking the protection of her mother, and for telling defendant in her mother's presence that she did not want to be with him. This evidence was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show defendant's motive and to identify defendant as the person who committed the murders.

6. Evidence and Witnesses §§ 351, 318 (NCI4th)— first-degree murder—prior acts of violence—admissible

The trial court did not abuse its discretion in a prosecution for first-degree murder by allowing evidence that eleven months prior to the murders, defendant took his girfriend by force away

from a cookout and fired a shotgun when members of her family came to check on her safety. The evidence was admissible to show identity and motive, namely, retaliation for the girlfriend's resistance to defendant's forceful control.

7. Evidence and Witnesses §§ 351, 318 (NCI4th)— first-degree murder—prior acts of violence—admissible

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence that, two years before these murders, defendant had gone to the house of Georgia Green and Cleveland Wilson (the victims) with a shotgun, pointed it at Cleveland Wilson, and threatened to kill him. Defendant's earlier threat to kill Cleveland Wilson is relevant to show the ill will between them, the evidence is probative of defendant's motive and identity, and the two-year span between the threat and the murders does not render the threat too remote to show motive and identity.

8. Evidence and Witnesses § 1484 (NCI4th)— first-degree murder—shell casings—found in Arizona—admissible

The trial court did not err in a capital first-degree murder prosecution by admitting into evidence shell casings found in Arizona where Arizona police, responding to a report of shots being fired in a certain area, found several freshly fired nine millimeter shell casings; this site was not far from the motel where defendant was staying; tests showed that the casings were fired from the same gun which fired the empty casings found beside the two murder victims in North Carolina and empty shell casings found outside defendant's residence in North Carolina; and the murder weapon was never located, but defendant had purchased a nine-millimeter handgun shortly before the murders. The relevance of the Arizona casings and their link to defendant and the murders is manifest and, as for the chain of custody, no gap existed which may have rendered the casings irrelevant.

9. Evidence and Witnesses § 2896 (NCI4th)— first-degree murder—cross-examination of defendant—charges without convictions

The trial court did not err in a capital prosecution for first-degree murder by allowing the prosecutor to cross-examine defendant about offenses for which he was charged but not convicted. The prosecutor properly asked defendant about his prior convictions, defendant denied knowing anything about the spe-

cific offenses, and the questioning related to factual elements of the crimes and to necessary detail designed to jog defendant's memory.

10. Evidence and Witnesses § 2815 (NCI4th)— leading questions—nervous witness

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by allowing the State to ask leading questions of a witness who was a very nervous and very quiet person. The trial court recognized the limitations of the witness under the circumstances and allowed a mode of questioning which was necessary to develop the testimony.

11. Evidence and Witnesses § 2815 (NCI4th)— leading questions—direction of witness's attention

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by allowing the prosecutor to ask an officer a leading question where an assault had occurred at one location and the murder at another, and the prosecutor was attempting to turn the witness's attention from the details of the assault to what he had heard at that location about another matter.

12. Criminal Law § 473 (NCI4th Rev.)— first-degree murder—prosecutor's closing argument—defense counsel

There was no plain error in a capital prosecution for first-degree murder where defendant contended that the prosecutor impugned the integrity of counsel for the defense but the prosecutor did not use abusive, vituperative, or opprobrious language and did not impugn the integrity of defense counsel or repeatedly attempt to diminish defense counsel before the jury. Reviewing the argument in context, the prosecutor was merely responding to defense counsel's arguments.

13. Criminal Law § 358 (NCI4th Rev.)— first-degree murder—defendant shackled during sentencing

The trial court did not abuse its discretion during a capital sentencing proceeding by ordering that defendant be shackled during the proceeding. The decision was a rational exercise of the court's discretion and was reasonably necessary to maintain order or provide for the safety of persons. Defendant cites no law for the argument that the trial court has a duty to explore lesser means of restraint before shackling a defendant; moreover, in

this case the court both considered and employed lesser alternatives prior to shackling defendant.

14. Constitutional Law § 284 (NCI4th)— capital sentencing proceeding—defendant's request to release counsel

The trial court did not err in a capital sentencing proceeding by denying defendant's request that his counsel be released. Defendant did not request to represent himself and, from the record, it appears that he was understandably depressed about the guilty verdicts and was not fully aware of the sentencing proceeding's very real consequences, nor was he fully aware of the nature of the sentencing proceeding. He had to be informed by the trial court that he was wrong in his initial impression that there was nothing more that his counsel could do and that it was very important that he retain counsel for the sentencing proceeding.

15. Constitutional Law § 314 (NCI4th)— capital sentencing—strategy—defendant's wishes

The trial court did not err in a capital sentencing proceeding where defense counsel was about to offer evidence concerning the history of domestic violence and abuse in defendant's family while defendant was growing up, defendant made it clear that he did not want any evidence about his family brought out, and the court ruled that it would not allow questions about domestic violence in defendant's home as he was growing up. Defense counsel were not prohibited from presenting all mitigating evidence, they examined nine witnesses on the circumstances of defendant's life and various aspects of his character and submitted to the jury two statutory mitigating circumstances, seven nonstatutory mitigating circumstances and the catchall circumstance. As the colloquy between the court and defendant reveals, an impasse existed between defendant and his counsel over whether the evidence in question would tend to mitigate defendant's sentence or aggravate it. When counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions such as the type of defense to present and witnesses to call, the client's wishes must control. While the trial court denied a full offer of proof, it allowed defense counsel to articulate what defendant's showing would have been and, since the court did not err in precluding the evidence, the denial of the offer of proof was not prejudicial.

16. Criminal Law § 692 (NCI4th Rev.)— capital sentencing—mitigating circumstance—influence of mental or emotional disturbance—peremptory instruction denied

The trial court did not err in a capital sentencing proceeding by refusing to give a peremptory instruction on the statutory mitigating circumstance that the murders were committed while defendant was under the influence of a mental or emotional disturbance. Although defendant contends that a statement by the trial court indicated that the court based its denial on the mistaken belief that it was without authority to grant the peremptory instruction, the statement read in context was merely recognition that the evidence in this case was conflicting.

17. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstances—peremptory instructions

There was no error in a capital sentencing proceeding where defendant contended that the court erred by failing to give peremptory instructions on nonstatutory mitigating circumstances despite having agreed to give such instructions during the charge conference. The trial court was correct not to utilize the pattern instructions suggested by defense counsel because peremptory instructions which are appropriate for statutory mitigating circumstances are inappropriate for nonstatutory mitigating circumstances. Furthermore, it is not error for a trial court in a capital case to refuse to give requested instructions where counsel failed to submit the instructions in writing. Finally, counsel did not object when given the opportunity either at the charge conference or after the charge had been given.

18. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—instructions—consideration of mitigating circumstances—"may" rather than must

The trial court did not err in a capital sentencing proceeding in its instructions on Issues Three and Four by using the word "may" rather than "must."

19. Criminal Law § 1402 (NCI4th Rev.)— capital sentencing—death sentence not disproportionate

A sentence of death for first-degree murder was not imposed under the influence of passion, prejudice, or other arbitrary considerations and the jury's findings of the two aggravating circumstances were supported by the evidence.

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

A sentence of death for two first-degree murders was not disproportionate where defendant was found guilty of the premeditated and deliberate murders of two unsuspecting, defenseless victims in their own home in retaliation for his girlfriend leaving him.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Wainwright, J., on 15 October 1996 in Superior Court, Craven County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment for first-degree burglary was allowed by the Supreme Court on 20 May 1998. Heard in the Supreme Court 12 October 1998.

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

Marshall Dayan for defendant-appellant.

PARKER, Justice.

Defendant was indicted on 18 July 1995 for two counts of first-degree murder and on 18 September 1995 for one count of first-degree burglary. Defendant was tried capitally in September of 1996 and found guilty of both counts of first-degree murder and of first-degree burglary. Following a capital-sentencing proceeding, the jury recommended a sentence of death for each of the murders; after consolidating the judgments, the trial court entered judgment accordingly. For the first-degree burglary conviction, the trial court sentenced defendant to a concurrent term of imprisonment for 82 to 108 months. For the reasons discussed herein, we conclude that the jury selection, the guilt-innocence phase, and the capital-sentencing proceeding of defendant's trial were free from prejudicial error and that the death sentence is not disproportionate.

The State's evidence at trial tended to show that defendant killed victims Georgia Green and Cleveland Wilson in order to retaliate against his girlfriend, Patricia Green, the granddaughter of victim Georgia Green, for not wanting to be with him anymore and for resisting his attempt to take her to Mexico by force and against her will.

Defendant met Patricia Green when he was twenty-three years old and she was fourteen; at the time of the crimes, defendant was twenty-nine, and Patricia was nineteen. Patricia lived with her grandmother, Georgia Green, who had raised Patricia since age four and who was very much like a mother to her. Two years after defendant and Patricia met, they lived together in the house of victim Georgia Green. Later they moved out to their own home. Defendant began to abuse Patricia and became increasingly possessive of her and violent towards her. He would beat her, hitting her on her face, arms, and legs; but she never went to the doctor because she was too ashamed. On one occasion, 4 July 1994, when Patricia went to a cookout with some friends, defendant arrived and ordered her away with such threats and force that she had her mother, Ella Green, call the police. When Ella Green and other family members went to defendant's and Patricia's mobile home, defendant came outside and fired two shotgun blasts before the police arrived.

Defendant continued to assault Patricia, two or three times per month. On occasion she would report the assaults to law enforcement; but when the case came to court, she would not testify against defendant. Defendant told her frequently that if she ever tried to leave him, he would kill her or kill her family members to make her hurt. Defendant knew that Patricia was very close to her grandmother, Georgia Green.

In late April 1995, after she received a beating for threatening to leave him, Patricia left defendant and went to live with a girlfriend. Defendant waited for her outside her place of work and ran her off the road with his car. He forced her into his car and took her back to his house, where he beat her and tied her to the bed with duct tape and rope. Defendant kept her tied up for two days. After untying her, he kept her in the house, which he was able to lock from the outside.

Shortly after this incident, and because of her fear of defendant and his threats to kill her, Patricia went to Florida in May of 1995 and found work there. After about a month she telephoned defendant and told him that she wanted him to stop controlling her and hitting her and that she wanted a friendship with him but not a relationship. The next day defendant appeared in Florida at Patricia's place of work; he got her to come outside, saying he wanted to talk. He then pointed a nine-millimeter handgun at her and forced her to get into the car. Defendant drove her back through the night to North Carolina, telling her that if she screamed he would shoot her. He told her that he loved

her but that if he could not have her, no one would have her and that he would kill her. He took her to his house and again tied her to the bed with duct tape and rope. He later took her with him while he pawned and sold some items, and then he took her to the Sheriff's Department because someone had reported that defendant had kidnapped her. Patricia told the Sheriff's Department, out of fear for her life, that defendant had not kidnapped her.

On 8 June 1995, defendant told Patricia that he wanted her to go to Mexico with him. Because of his threats, and feeling that her mother was her last chance to get away from defendant, she agreed to go if he would take her to see her grandmother and mother before leaving. Defendant stopped pointing the gun at Patricia and told her that he wanted her to trust him. When they got to the house of Patricia's grandmother, Georgia Green, defendant took the gun upstairs and hid it. They then left Georgia Green's house and drove to Patricia's mother's mobile home. While driving there defendant repeatedly told Patricia, "If you try anything . . . I'll kill you. I'll kill all of you all."

Patricia Green's mother, Ella Green, talked with defendant and her daughter to try to calm or solve the situation. Patricia told her mother that she did not want to be with defendant and that she wanted defendant to leave her alone. Defendant then tried to push Patricia into his car; but Ella Green grabbed Patricia and, standing between her daughter and defendant, told defendant to leave. Defendant got into his car and drove it forward into Ella Green, injuring her legs and damaging her house. He then drove off toward Georgia Green's house.

Patricia telephoned the police and called for an ambulance for her mother; she then called her uncle, Jake Howard, and asked him to check on Georgia Green. Mr. Howard had known defendant and his family for some time. When Mr. Howard arrived at Georgia Green's house, he saw defendant coming from the far corner of the house with a gun in his hand. Mr. Howard asked defendant what was the matter; and defendant said, "She's been treating me nice, just like a honey rose all day, until we got to her mother's house. And then they tried to jam me up, and I run over Ella." Mr. Howard then left, without checking on Georgia Green, to see what had happened to Ella Green.

Deputy Sheriff Marvin Haddock spoke with Mr. Howard and went with Patricia Green and other family members to Georgia Green's

house to apprehend defendant. An upstairs window had been raised, and no one responded to their knocking. All the doors were locked; and after Deputy Haddock called for backup, the officers broke into the house. They found Georgia Green's body facedown on the floor in front of a lounge chair; she had been shot two times in the head. They also found the body of Cleveland Wilson on the couch, shot once through the face and neck and twice through the temple into the head. They found six shell casings near the bodies. Shoe tracks on the tin roof of the front porch led to, and away from, the open upstairs window. Patricia Green told the officers that defendant had threatened to kill her family if she left him. Officers then searched defendant's mobile home and found rope tied to the bedpost, and tape, with hair stuck to it, on the bedpost and floor. On the ground outside the mobile home, officers found an empty nine-millimeter shell box and shell casings.

Defendant left the state and was found in Tucson, Arizona three months later, on 11 September 1995, by a police officer who saw him walking on the highway. Defendant walked up to the car and told the officer, "I'm the one you're looking for," and that he was wanted for murder. The officer found there were outstanding warrants for defendant in North Carolina charging him with two counts of first-degree murder. Officers searched defendant's car and Arizona motel room and found a black handgun holster.

Arizona officers also sent to North Carolina nine spent nine-millimeter shell casings which they had found on 5 September 1995 after a report of shots being fired near a convenience store within a mile and a half of defendant's motel room. An examination of three of the shell casings found at defendant's residence in North Carolina revealed they were fired from the same gun which fired the casings found at the murder scene and the casings found in Arizona, to the exclusion of all other guns. A week or two before the murders, defendant had purchased a nine-millimeter automatic pistol for $350.00 from someone he worked with on his job site.

Defendant testified on his own behalf; he denied committing any act of violence or assault upon or kidnapping of Patricia Green and denied committing the murders of Georgia Green and Cleveland Wilson. Defendant admitted buying a nine-millimeter pistol at his job site. Defendant and another witness testified that when defendant and Patricia visited Georgia Green the day before the murders, defendant had given the handgun to Patricia, who hid it upstairs.

Defendant admitted hitting Ella Green with his car, but denied ever threatening to kill Patricia or anyone in her family.

During the sentencing proceeding the State introduced into evidence documents showing defendant's March 1990 conviction for felonious breaking and entering. Also, Beverly Brown testified that she dated defendant and that he was the father of her child. She testified that defendant became possessive of her and on one occasion fired a shot from a gun to make friends of hers leave. She left him and returned to live with her mother; but in October of 1989 defendant went to her house, kicked the door in, snatched their one-year-old baby, and fired a shotgun blast into the bedroom where Ms. Brown was with other family members. Ms. Brown had to lie and promise that she would move back in with defendant to get him to return the baby.

Defendant presented as witnesses at sentencing several members of his family and friends who testified that he had a good reputation in the community. A former instructor and employer testified that defendant was a good worker, with good work habits; that he listened well and had a positive attitude; and that he was a fast learner. Others knew him as a hard worker who worked full-time as a brick mason and who also worked part-time jobs; some testified that he and Patricia acted happy when they were together and that defendant cared about her. A former teacher of defendant's testified that he did well in math and vocational studies; she also testified that defendant had been in a special class for students classified as learning-disabled in English and that he had tried very hard to improve.

JURY SELECTION

[1] Defendant first argues that his right under Article I, Section 23 of the North Carolina Constitution to be present at all stages of his capital trial was violated when the trial court conducted with defense counsel and the prosecution fourteen unrecorded bench conferences to which defendant himself was not privy, even though he was present in the courtroom. We have discussed this issue recently, and at some length. *See State v. Bonnett*, 348 N.C. 417, 432, 502 S.E.2d 563, 574 (1998); *State v. Speller*, 345 N.C. 600, 604-05, 481 S.E.2d 284, 286-87 (1997); *State v. Buchanan*, 330 N.C. 202, 208-24, 410 S.E.2d 832, 835-45 (1991). A defendant's state constitutional right "to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties."

Buchanan, 330 N.C. at 223, 410 S.E.2d at 845. In this case, the record does not show, and defendant does not contend, that he was absent from the courtroom during any of the conferences in question. Moreover, the record shows that defense counsel was present at and took part in each of the fourteen bench conferences. During deliberations, the trial court placed the following in the record:

> THE COURT: Let me say something else on the record. Since the trial has been completed, I believe it is correct to say that all bench conferences in this trial were done in the presence of the district attorney and defense counsel; is that correct? Everybody agrees with that?
>
> [DEFENSE COUNSEL]: That's correct.
>
> [OTHER DEFENSE COUNSEL]: Yes, sir.
>
> [PROSECUTOR]: Yes. The defendant was present in the courtroom during all of this.
>
> THE COURT: That's correct. That each bench conference, both counsel for defendant were present and protecting the rights of the defendant.

It is the presence of defendant's counsel at a bench conference which ensures that the subject matter of the conference is not concealed from defendant. As we have said in such cases, defendant was "in a position to observe the context of the conferences and to inquire of his attorneys as to the nature and substance of each one" such that he could have taken appropriate exception. *Speller*, 345 N.C. at 605, 481 S.E.2d at 286. Defendant, "[t]hrough his attorneys[,] . . . had constructive knowledge of all that transpired." *Buchanan*, 330 N.C. at 223, 410 S.E.2d at 844.

Defendant nevertheless asserts that the conferences held in his case during jury selection make his case virtually indistinguishable from *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992); *State v. Monroe*, 330 N.C. 846, 412 S.E.2d 652 (1992); *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991); and *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), in each of which cases we granted a new trial for violation of Article I, Section 23 when the trial court held unrecorded conferences with prospective jurors at the bench. However, in each of those cases, the trial court conferred with prospective jurors alone without defendant's counsel present at the bench. *Boyd*, 332 N.C. at 104, 418 S.E.2d at 473; *Monroe*, 330 N.C. at 848, 412 S.E.2d at 653;

McCarver, 329 N.C. at 260, 404 S.E.2d at 821; *Smith*, 326 N.C. at 793-94, 392 S.E.2d at 363. Defendant's reliance on *State v. Exum*, 343 N.C. 291, 293-96, 470 S.E.2d 333, 334-36 (1996), with respect to those conferences held during the guilt-innocence and penalty phases of his trial is misplaced. In *Exum* the trial court held an unrecorded conference not in open court where defendant could observe the context of the conference, as here, but in judge's chambers with the defendant's attorneys alone. *Id. Exum*, therefore, is distinguishable on its facts from this case.

Defendant also includes in this assignment of error one instance in which the trial court was discussing a request for deferral with a prospective juror, and the court reporter could not hear or record a portion of their colloquy. Defendant maintains that since the reporter was unable to hear the dialogue, we must assume that defendant was likewise unable to hear the dialogue and that defendant's right to presence was thus violated since he was "constructively absent" from the proceedings. The transcript, however, indicates that defendant and his counsel were present during this proceeding; and defendant has made no showing that they were not able to hear the prospective juror. The juror-deferral process in this case was conducted in open court, unlike the process we held unconstitutional in *McCarver* and *Smith*, where the trial court heard each juror's request for deferment privately at the bench, excluding even trial counsel from the conference. *McCarver*, 329 N.C. at 260, 404 S.E.2d at 821; *Smith*, 326 N.C. at 793, 392 S.E.2d at 363. This assignment of error is overruled.

[2] Defendant next assigns error to the trial court's failure to find that the prosecution used peremptory challenges to strike for purposefully racially discriminatory reasons two African-American prospective jurors, Andronica Crouell and Sherry Edgeston, in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Article I, Section 26 of the Constitution of North Carolina forbids the use of peremptory challenges for a racially discriminatory purpose, *State v. Williams*, 339 N.C. 1, 15, 452 S.E.2d 245, 254 (1994), *cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995), as does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *Batson*, 476 U.S. at 86, 90 L. Ed. 2d at 80. This Court has frequently reiterated the three-step procedure to be utilized by a trial court when a defendant objects on the basis of racial discrimination to a prosecutor's use of peremptory challenges to remove prospective jurors. *See, e.g., State v. Cummings*, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 873 (1998).

First, a defendant must make out a *prima facie* case that the prosecutor has exercised a peremptory challenge on the basis of race. *Hernandez v. New York*, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 405 (1991). The defendant may make this showing based on all relevant circumstances, such as defendant's race, the victim's race, the race of key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, a pattern of strikes against minorities, or the State's acceptance rate of prospective minority jurors. *State v. Hoffman*, 348 N.C. 548, 550, 500 S.E.2d 718, 720 (1998).

Second, once the *prima facie* case has been established by defendant, the burden shifts to the State, which, in order to rebut the inference of discrimination, must offer a race-neutral explanation for attempting to strike the juror in question. *Hernandez v. New York*, 500 U.S. at 358-59, 114 L. Ed. 2d at 405. In cases in which the trial court explicitly rules that defendant failed to make out a *prima facie* case of racial discrimination, our review is limited to whether this finding by the trial court was error. *State v. Fletcher*, 348 N.C. 292, 320, 500 S.E.2d 668, 684 (1998). However, in cases in which the trial court does not explicitly rule on the *prima facie* case and where the prosecution proceeds to step two of *Batson* by articulating its explanations for the strike, the question of whether a *prima facie* case has been established becomes moot. *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386-87 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 618 (1997); *State v. Lyons*, 343 N.C. 1, 11-12, 468 S.E.2d 204, 208, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996). Also, as part of the second *Batson* step, defendant is entitled to surrebuttal to show that the prosecution's explanations for the strike are merely a pretext. *State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997); *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).

Third, the trial court must make the ultimate determination of whether defendant has established purposeful discrimination. *Hernandez v. New York*, 500 U.S. at 359, 114 L. Ed. 2d at 405. An "examination of the actual explanations given by the district attorney for challenging [minority] veniremen is a crucial part of testing defendant's *Batson* claim." *State v. Smith*, 328 N.C. 99, 125, 400 S.E.2d 712, 726 (1991). Other factors to which this Court has looked to determine the presence or absence of intentional discrimination include the susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race

of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors. *State v. Kandies*, 342 N.C. 419, 435, 467 S.E.2d 67, 75, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996). Since the trial court's findings as to purposeful discrimination depend in large measure on its evaluation of credibility, they are given great deference; and the trial court's determination will be upheld unless the appellate court is convinced that the trial court's decision is clearly erroneous. *Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680.

[3] In this case, after the prosecutor peremptorily excused prospective juror Crouell, a black female, defendant raised a *Batson* objection and provided appropriate grounds to state a *prima facie* case of discrimination. The trial court declined to rule on whether the *prima facie* case had been met, but gave the prosecutor the opportunity to state his race-neutral reasons for the strike. Thus, the question of whether the *prima facie* case had been established is moot, and we proceed as if the *prima facie* case had been established. *Williams*, 343 N.C. at 359, 471 S.E.2d at 386-87. The prosecutor then provided reasons for striking Ms. Crouell: that she was twenty years old, unmarried, with a four-week-old child, and did not list on her jury questionnaire a father of the child, or any husband or former spouse; that while she had indicated that she had never been involved in any boyfriend-girlfriend problem, her manifest status as a young, unwed mother who did not list the father of her child throws doubt upon that response; that she was a member of the Pentecostal Holiness Church, which, in the prosecutor's recollection from jury selection in other capital trials, is opposed to the death penalty; that she sat with her arms crossed and was somewhat unresponsive for a period of time during questioning; and that her youth and four-week-old child might have prevented her from being a suitable juror in any trial, much less a lengthy capital trial. Defendant did not offer any surrebuttal of the prosecutor's stated reasons for the strike, appearing to rely on the arguments stated in his *prima facie* case. Finally, the trial court made its determination that there was no purposeful discrimination in the strike of prospective juror Crouell.

Defendant argues that the prosecutor's stated explanations for the strike of Ms. Crouell, even though they were facially race-neutral, were not "related to the particular case to be tried," citing *State v. Robinson*, 346 N.C. 586, 597, 488 S.E.2d 174, 181 (1997). In explanation, defendant argues that some of Ms. Crouell's answers on *voir*

dire favored the prosecution's retaining her as a juror rather than excusing her: she had some college education, she had a relative who worked as a dispatcher for the Jones County Sheriff's Department, and she responded that she could vote for the death penalty under certain circumstances. After reviewing the transcript we conclude that the prosecutor's stated reasons for the strike are supported in the record and are related to the answers elicited from the prospective juror on *voir dire*. We note, too, that this case is one that is not particularly susceptible to racial discrimination, as defendant, the victims, chief witness Patricia Green, and other witnesses are all African-American. *Kandies*, 342 N.C. at 435, 467 S.E.2d at 75. We also note that at the time of this challenge, the prosecutor had accepted one African-American from the venire. We conclude that the trial court's determination that there was no purposeful discrimination in this strike is not clearly erroneous. *Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680.

[4] The prosecutor also peremptorily excused another young black female juror, Sherry Edgeston; defendant objected and stated appropriate grounds for a *prima facie* case. The trial court again explicitly declined to make a ruling on the existence of a *prima facie* case, but gave the prosecution the opportunity to state its reasons for the strike. The prosecutor stated as his reasons that the prospective juror had heard about the murders when they first occurred; that the murders had occurred about ten miles from where the prospective juror lived; that when the prospective juror saw defendant's picture on television, she was with a group of friends who had gone to school with defendant and that they asked her if she had gone to school with him as well; that the prospective juror had gone to school with some people with the last name of Green from the Vanceboro area; and that, in the prosecutor's belief, most of the Greens from that area are related, which might have posed a risk of this prospective juror's knowing possible witnesses later in the trial. Defendant did not attempt to rebut these explanations or show that they were a pretext. The trial court then concluded that the peremptory strike of Ms. Edgeston was without purposeful racial discrimination.

Defendant argues on appeal that the rationales articulated by the prosecution were clearly pretext since the prosecutor never asked the prospective juror whether she could be fair and impartial in deciding the case even though she had some friends who had gone to school with defendant and since the prosecutor's rationale that problems with this juror's knowing witnesses might arise later in the trial

was purely hypothetical. We have reviewed the transcript and conclude that the prosecutor's explanations for the strike are supported in the record. The record indicates that the prospective juror was unsure whether she herself had gone to school with defendant. This Court has previously held that concerns about a prospective juror's knowing the defendant or witnesses were a sufficient basis to support an excusal for cause, *State v. Locklear*, 331 N.C. 239, 247-48, 415 S.E.2d 726, 731-32 (1992); moreover, a prosecutor's explanation for a peremptory strike "need not rise to the level justifying exercise of a challenge for cause," *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. The prosecutor in this situation was not required, as defendant urges, to ask the prospective juror whether she could be impartial even though she had friends who went to school with defendant; as long as the motive is not racial discrimination, a prosecutor may exercise peremptory challenges based on "legitimate 'hunches' and past experience." *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990). We observe, in addition, that defendant proffered no rebuttal to show that any reason offered by the prosecution was a pretext. *See id.* at 501, 391 S.E.2d at 152 (defense counsel was apparently satisfied by the explanations offered by the prosecutor since no effort was made by the defense to demonstrate that the explanations were pretext). Thus, in this case the trial court's conclusion that there was no purposeful discrimination in the strike of prospective juror Edgeston is not clearly erroneous. *Fletcher*, 348 N.C. at 313, 500 S.E.2d at 680. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[5] In defendant's next five assignments of error, he contends that the trial court erred in admitting portions of the State's evidence in violation of the North Carolina Rules of Evidence, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Law of the Land Clause of the North Carolina Constitution. First, defendant contends that the evidence of defendant's acts and threats of violence toward his girlfriend, Patricia Green, was inadmissible under N.C.G.S. § 8C-1, Rule 404(b) and that its probative value, if any, was substantially outweighed by the danger of unfair prejudice to defendant under N.C.G.S. § 8C-1, Rule 403. The crux of defendant's argument is that threats and acts of violence against Patricia Green have nothing to do with the murder of Georgia Green and Cleveland Wilson. We disagree.

The State presented evidence that defendant was determined to control Patricia to the point of assaulting her, kidnapping her at gun-

point, tying her to his bed, and threatening to kill her or her family if she tried to leave him. This evidence supported the State's theory that defendant killed the victims in retaliation against Patricia for resisting his control, for seeking the protection of her mother, and for telling defendant in her mother's presence that she did not want to be with him. The trial court correctly ruled that this evidence was admissible under Rule 404(b) to show that defendant's motive in killing Patricia's family members was retaliation and to identify defendant as the person who committed the murders. N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1997). The evidence of defendant's acts of violence against Patricia, even though not part of the crimes charged, was admissible since it " 'pertain[ed] to the chain of events explaining the context, motive and set-up of the crime' " and " 'form[ed] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.' " *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174-175 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)). Exclusion of evidence on the basis of Rule 403 is within the sound discretion of the trial court, and abuse of that discretion will be found on appeal only if the ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Here, defendant is not able to show that the trial court abused its discretion.

[6] Second, defendant contends on the same grounds that the trial court improperly allowed evidence that eleven months prior to the murders, defendant took Patricia Green by force away from a fourth of July cookout and then fired a shotgun when members of her family came to check on her safety. We hold that evidence relating to this episode is also admissible under Rule 404(b) to show identity and motive, namely, retaliation for Patricia's resistance to defendant's forceful control. The trial court did not abuse its discretion in admitting the evidence under Rule 403.

[7] Third, defendant objects to evidence presented by the State that two years before the murders, defendant had gone to the house of Georgia Green and Cleveland Wilson with a shotgun, pointed it at Cleveland Wilson, and threatened to kill him. Defendant argues that no other evidence suggested continuing threats to Wilson by defendant or tied this episode to the murders and further contends that the remoteness of the threat to Wilson renders it irrelevant to this case. We disagree and conclude that defendant's earlier threat to kill

Cleveland Wilson is relevant to show the ill will between them, that the evidence is probative of defendant's motive and identity in committing the murders, and further, that the two-year span between the threat and the murders does not render the threat too remote to show motive and identity. "[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991); *see also State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998).

[8] Fourth, defendant takes exception to the admission into evidence of shell casings found in Arizona, arguing that the State was unable to establish any relevance for the admission except that the casings were from a gun similar to that allegedly used by defendant; defendant also argues that the State failed to establish a clear chain of custody for the casings. Defendant's arguments are meritless. Arizona police, responding to a report of shots being fired in a certain area, found several freshly fired nine-millimeter shell casings; this site was not far from the motel where defendant was staying. Tests showed the casings were fired from the same gun, to the exclusion of all other guns, which fired the empty casings found beside the two murder victims' bodies in North Carolina and the empty shell casings found outside defendant's residence in North Carolina. The murder weapon was never located, but defendant had purchased a nine-millimeter handgun shortly before the murders. The relevance of the Arizona casings and their link to defendant and the murder is manifest. As for the chain of custody, no gap existed which may have rendered the casings irrelevant. Defendant has failed to identify any specific problem in the chain of custody, and our review of the record discloses none.

[9] Finally, defendant argues that the trial court should not have allowed the prosecutor to cross-examine defendant about offenses for which defendant was charged but not convicted. Defendant contends that the prosecutor's cross-examination went beyond the scope of N.C.G.S. § 8C-1, Rule 609; that the prosecutor impermissibly asked defendant about the facts underlying the charges; and that the prosecutor violated this Court's rule in *State v. Lynch* that the cross-examiner can elicit only "the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial." *State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993). After reviewing the transcript of

the cross-examination, we conclude that the prosecutor did not improperly cross-examine defendant. The colloquy to which defendant objects is as follows:

Q. Do you recall that on November 11 of 1989 you were convicted of driving while license revoked in Lenoir County?

A. I can't recall specific dates, like I told you before. And like I told the jury, yes, I have been convicted of driving while license revoked.

Q. And weren't you also at that same time convicted of lying to a policeman by giving him fictitious information?

A. Like I said, I remember being charged and pleading guilty to driving while license revoked. Anything else, I don't remember.

Q. You don't remember lying to the policeman and getting charged—

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q. —with giving fictitious information?

A. Like I said, I remember being charged and pleading guilty to driving while license revoked.

Q. Is your name Melvin Lee White, Jr.?

A. Always has been.

Q. Did you at that time live at Route 1, Box 434?

A. What year was it?

Q. 1989. Did you ever live at Route 1, Box 434, anywhere?

A. Yes, I have.

Q. And your date of birth is September 5, 1966?

A. Yes, it is.

Q. I'll ask you again if you don't recall that you were convicted of giving fictitious information to a police officer?

A. Like I told you before, I remember pleading guilty to a driving while license revoked.

After questioning defendant about other convictions which he admitted, the prosecutor continued:

> Q. And then in September of 1992, also in Craven County, you were convicted of failure to stop for a blue light and siren and driving while license permanently revoked again?
>
> A. When was this?
>
> Q. September 3, 1992?
>
> A. Pled guilty to what, now?
>
> Q. Driving while license permanently revoked, and also failure to stop for a blue light and siren.
>
> A. Only thing I remember pleading guilty to is driving while license revoked. That's it.

This exchange reveals that the prosecutor properly asked defendant about his prior convictions but that defendant denied knowing anything about the specific offenses of which he was convicted. The prosecutor did not ask defendant about any "tangential circumstances of the crime[s]." *State v. King*, 343 N.C. 29, 49, 468 S.E.2d 232, 245 (1996). The questioning here "related to the factual elements of the crime[s]" and to necessary detail designed to jog defendant's memory. *Id.* In sum, defendant's assignments of error concerning the admission of evidence are overruled. Defendant also asks this Court to evaluate the cumulative prejudice that accrued to defendant from the admission of all this evidence; however, as we have found no error and no prejudice, there is no cumulative prejudice for this Court to evaluate.

[10] In defendant's next assignment of error, he contends that the trial court abused its discretion in allowing the State to lead its witnesses to such an extent that the State presented virtually its entire case through the use of leading questions in violation of the North Carolina Rules of Evidence, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Law of the Land Clause of the North Carolina Constitution. Defendant notes that Rule 611(c) of the North Carolina Rules of Evidence provides in pertinent part: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." N.C.G.S. § 8C-1, Rule 611(c) (Supp. 1997).

Defendant first takes exception to the prosecutor's leading the State's chief witness, Patricia Green, beyond preliminary matters. Defense counsel objected repeatedly at trial, and the trial court entered the following findings:

> As to the leading, the Court's obviously in a position to take particular notice of the witness' demeanor. And it's obvious that she's very nervous and a very quiet person. . . . She stated this is the first time she's seen the defendant since last year. And with those factors, obviously, it's in the Court's discretion to determine the mode of questioning of any witnesses; and the Court feels that the questioning thus far, while it may [have] some leading aspect, really feels that it would be necessary for [the prosecutor] to question her in a manner in order to develop her testimony.
>
> Again, I would also note that basically everything—generally her testimony up to now was a lot of preliminary matters; but also, if the Court would not allow [the prosecutor] to question as he's done thus far, I think we would have a needless consumption of time. Therefore, [I] overrule[] the objection as to leading.

Later, after more testimony and further objections by defense counsel, the trial court again addressed the objection:

> Objection's overruled. The Court has stated for the record that the defendant—the Court has had the opportunity to observe the demeanor of the witness, and she has stated before that she's obviously very nervous, certainly not an articulate person, and this is the first time she has seen the defendant in quite some time; therefore, the Court is exercising in its discretion and its control to make effective . . . ascertainment of truth. There are some elements of [the prosecutor's] questioning that he will have to repeat himself to go back to preliminary matters and preparatory matters in order to, in the Court's opinion, to assist the witness in understanding exactly where she is. With that the last objection is overruled.

"A ruling on the admissibility of a leading question is in the sound discretion of the trial court, and these rulings are reversible only for an abuse of discretion." *State v. Marlow*, 334 N.C. 273, 286-87, 432 S.E.2d 275, 282-83 (1993). We have reviewed the transcript in these instances and conclude that the trial court, in recognizing the limitations of the witness under the circumstances and by allowing a mode of ques-

tioning which was necessary to develop the testimony, has not abused its discretion.

[11] Defendant also takes exception to what he claims are leading questions posed by the prosecutor to Officer Marvin Haddock of the Craven County Sheriff's Department. Officer Haddock was the deputy who was called to the scene where defendant had hit Ella Green with his car; while at the scene, the deputy received information from Jake Howard that defendant was at Georgia Green's house and that defendant had a gun. Defendant objected when the prosecutor asked Haddock the following questions:

> Q. Mr. Haddock, let me ask you if you recall anyone ever having said anything to you at that location during that time about the defendant having a gun?
>
> . . . .
>
> Q. But you do recall somebody making a statement to you about the defendant having a gun?

"A leading question has been defined [by this Court] as one which suggests the desired response and may frequently be answered 'yes' or 'no.' However, a question is not always considered leading merely because it may be answered 'yes' or 'no.' " *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996). A question is not leading where it directs the witness toward a specific matter to be addressed without suggesting an answer. *Id.*; *see also State v. Greene*, 285 N.C. 482, 492-93, 206 S.E.2d 229, 236 (1974). Here, the prosecutor was attempting to turn the witness' attention from the details of the assault at Ella Green's house to what the deputy heard, while at Ella Green's house, about another matter which took place elsewhere. We conclude that the trial court did not abuse its discretion in allowing this questioning, and we overrule defendant's assignment of error.

[12] Defendant next argues that the trial court committed prejudicial constitutional error in failing to intervene during the prosecution's closing argument when the prosecutor argued to the jury as follows:

> You've heard their version and their side and their arguments about what the evidence shows in this case. Now, they have a job in this case. They have a duty to perform. It's their job to represent Melvin Lee White, Jr. Regardless of the truth, regardless of facts, their job is this: [t]o convince you 12 folks to turn him loose.

Defendant maintains that the prosecutor impugned the integrity of counsel for the defense by accusing the defense of manufacturing a defense regardless of the truth. We note preliminarily that since defendant did not object at trial, the burden is on defendant to "demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

"It is well-established that a trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 658-59, 157 S.E.2d 335, 346 (1967). In this case the prosecutor did not use abusive, vituperative, or opprobrious language; nor did the prosecutor impugn the integrity of defense counsel or repeatedly attempt to diminish defense counsel before the jury. Immediately after that portion of the argument about which defendant complains, the prosecutor stated: "And I would say to you they've done a good job. They're good lawyers. They're honorable men."

Moreover, defense counsel in arguing to the jury argued:

> The State made a rush to prosecution in this case based on statements of Patricia Green and . . . the insistence of Ella Green . . . . However, standing here now, . . . we say to you that the allegations of domestic violence were exaggerated at best, fabricated at worst, and not in any way sufficient to establish a motive for Melvin White to kill Georgia Green and Cleveland Wilson.

The prosecutor is entitled to respond to defense counsel's imputations of bad faith on the part of the prosecutor and police investigators. *State v. Payne*, 312 N.C. 647, 665, 325 S.E.2d 205, 217 (1985).

After reviewing the prosecutor's argument in context, we conclude that the prosecutor was merely responding to defense counsel's comments and that the prosecutor's statements were not so grossly improper as to require the trial court to intervene *ex mero motu*. Defendant's assignment is overruled.

SENTENCING PROCEEDING

[13] In defendant's next assignment of error, he contends that the trial court abused its discretion by ordering defendant to be shackled during the sentencing proceeding, thereby violating defendant's fed-

eral and state due process rights. Defendant argues that such physical restraints were not reasonably necessary and that the court did not consider other, less-restrictive alternatives to preserve the security of the courtroom. This issue is governed by N.C.G.S. § 15A-1031, which provides that given proper procedure, which is not contested here, a trial judge may order a defendant subjected to physical restraint in the courtroom when the judge finds the restraint to be "reasonably necessary to maintain order, prevent defendant's escape, or provide for the safety of persons." N.C.G.S. § 15A-1031 (1997); *see also State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976). In this case, after the jury announced its guilty verdict and after the individual jurors were polled, the trial court asked defense counsel if there was anything further they wanted to present in the guilt-innocence phase of the trial. Defense counsel responded that they had nothing further. Defendant himself, however, rose and addressed the court, saying, "Yes, it is, sir. Judge, I would like for my counsel to be released from my case at this time." The trial court told defendant that the matter would be taken up later in the day, and then excused the jury. The trial court then noted the following:

> For purposes of the record, let me state that upon completion of polling the jury, that the defendant made an outburst in court. He was—both defense counsel [were] attempting to restrain him, keep him from saying anything or standing up in court, but there was an outburst. The defendant basically said that he wanted to dismiss his counsel.
>
> The Court acknowledged the fact of what he said, and we will take that matter up in a little while. Probably twenty minutes from now. Which brings us to the issue of whether or not to allow the defendant in the courtroom without having leg shackles. If the Court did entertain that idea, it would be discreetly done. The jury would . . . come in and out of the courtroom with . . . the defendant previously [having been seated] in the courtroom before they arrive. And he would exit the courtroom after the jury left. It would not be a visible thing to the sentencing jury unless he [defendant] made it so.
>
> I would also entertain any comments from the State and from the defense, not only the outburst, but the issue we have before us. I would rather you comment on the outburst[] so that it wouldn't be solely my characterization. I would like to hear from all of you.

The court then heard from the prosecutor, who noted as to the outburst that defendant seemed "somewhat angry" and that, given his physical strength, defendant posed more of a risk after receiving the guilty verdicts than he had previously. The court then noted the verdicts and stated that animosity is typical in such cases; the court then opined that it may be natural for defendant to turn on his lawyers and that, for this reason, the court was concerned about defense counsel's security and safety. Defendant's two trial counsel then voiced opposition to the shackling, arguing that defendant had shown remarkable restraint until that point and that what was being characterized as an outburst was not in fact a physically threatening gesture toward them or anyone else. Defense counsel also noted the possible prejudice to defendant's case if the jury saw him in shackles. The trial court stated in response that the gesture he saw defendant make was indeed physically threatening and that given the presence of spectators in the courtroom and a possible change in attitude on defendant's part in light of his convictions, the court was not going to take any risks. The court then ordered that defendant be shackled while in the courtroom.

After reviewing the transcript, we conclude that the trial court did not abuse its discretion in ordering defendant shackled; the decision was a rational exercise of the court's discretion and was reasonably necessary to maintain order or to provide for the safety of persons. N.C.G.S. § 15A-1031. Defendant argues that the court reporter noted nothing unusual, such as forcefulness or physical menace, concurrent with defendant's request to release counsel; defendant also argues that the trial court seemed to embellish its characterization of the violence of the outburst as the discussions proceeded. We do not find the lack of a notation from the court reporter dispositive on the issue of whether shackles were reasonably necessary, and we disagree with defendant's contention that the trial court expanded its characterization of defendant's statement. On the contrary, the trial court refrained from undue comment until fully hearing from the State and defense counsel on the matter.

Defendant also argues that a trial court has a duty to explore lesser means of restraint before shackling a defendant and that, in this case, the trial court considered no lesser means to enhance security in the courtroom before shackling defendant. We disagree. Defendant cites no law from this Court establishing such a duty; moreover, the trial court in this case both considered and employed lesser alternatives prior to shackling defendant. The transcript

reveals that earlier in the trial, prior to the opening statements of the parties, the trial court gave consideration to the State's concerns about increased courtroom safety; at that time, the court specifically declined to order defendant shackled and, as a lesser measure, ordered that there be more bailiffs and more security personnel in the courtroom. When defendant finally was shackled, at sentencing, he did not request or suggest any alternatives to the trial court; and defendant, in his brief to this Court, has suggested no alternative that the trial court could have used. Defendant also argues that the jury may have seen or heard the leg shackles on defendant during the sentencing proceeding and, finally, that the shackles may have affected defendant's demeanor in court, including a possible chilling effect on his decision whether to testify during sentencing. However, nothing in the record suggests that these possibilities raised on appeal actually occurred at trial. This assignment of error is overruled.

[14] Defendant next assigns error to the trial court's denial of defendant's request to release his court-appointed counsel from the sentencing proceeding. The transcript indicates that at the close of the guilt-innocence phase, after the jury had returned its verdicts of guilty on all three counts and each juror had responded to individual polling, the trial court asked, "Anything further for this jury in the guilt-innocence phase for the defendant?" Defense counsel responded, "No, Your Honor." At this point defendant himself addressed the court and stated, "Yes, it is, sir. Judge, I would like for my counsel to be released from my case at this time." After excusing the jury and taking care of some other matters, the trial court heard from defendant on his request; and the following colloquy took place:

> [THE COURT:] . . . Mr. White, when you were here while ago, you said something about wanting to release your counsel; is that right?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Let me ask you this, Mr. White. You need to give me a reason for that.
>
> DEFENDANT: My reason why is that I want them released; they have done all the services they can do. I have no further need for them. Verdict done been passed, you know. As far as I am concerned, they just as soon give me the death penalty.
>
> THE COURT: I understand your position, Mr. White. Thank you, Mr. White, for your comments.

Let me ask you this way, Mr. White: I take it you're just basically saying that you want the death penalty?

DEFENDANT: I'm saying that—not that I want it; but what I'm saying is they have done all the services they could do for me, as far as I'm concerned. I got no need to be coming back in here anymore. They have made their decision. Mr. McFadyen [the prosecutor] is happy with what he got. I'm not satisfied, though.

THE COURT: I understand your position better, Mr. White. Mr. White, actually at the next phase of this matter, it is extremely important that you [be] represented. You're now facing either life imprisonment without parole or you're facing the death penalty. I would not in all fairness to you relieve these counsel of their duty to continue through with this matter. And I can also tell you that it is very important that you have competent legal counsel in the next phase of this proceeding. And you obviously have two excellent lawyers. I couldn't get two better for you.

DEFENDANT: Yes.

THE COURT: I couldn't get two better for you. But I will not relieve them from their duties. And with that being said, I would deny your motion for release of counsel. Mr. Barnhill and Mr. Willey, you will continue on in this matter.

This colloquy reveals that defendant's reason for wanting to release counsel was, at its core, his feeling at the time that "they ha[d] done all the services they could" for him and that whatever was to come next was unimportant compared to the guilty verdicts he had just received. After the trial court elicited from defendant that defendant did not, in fact, want to be put to death, the court advised defendant that it was extremely important that he have representation for the sentencing proceeding, in which the jury would decide whether he would be imprisoned for life or put to death. Defendant then expressed agreement that his lawyers were excellent; he expressed no dissatisfaction with his counsel. Significantly, defendant did not request to represent himself in the sentencing proceeding. "Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intent to represent oneself." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). From the record it appears to this Court that defendant was understandably depressed about the guilty verdicts and was not fully aware of the sentencing proceeding's very real consequences to his life. Nor

was he fully aware of the nature of the sentencing proceeding as evidenced by his statement that he had "no need to be coming back in here anymore."

The right to counsel provided by the Sixth Amendment to the United States Constitution also provides the right to self-representation. *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975); *see also* N.C. Const. art. I, § 23; *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). We have held, in accordance with the Sixth Amendment, that it is error for a trial court to allow a criminal defendant to release his counsel and proceed *pro se* unless, first, the defendant expresses "clearly and unequivocally" his election to proceed *pro se* and, second, the defendant knowingly, intelligently, and voluntarily waives his right to in-court representation. *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475-76 (1992). Defendant did not meet this test in this case. Although part of his statement was, "I want them released," he did not clearly express his desire for, nor was he fully aware of the consequences of, proceeding *pro se*. He had to be informed by the trial court that he was wrong in his initial impression that there was nothing more that his counsel could do for him and that, on the contrary, it was very important that he retain counsel for the sentencing proceeding. We overrule this assignment of error.

[15] In defendant's next assignment of error, he contends that the trial court erred in interfering with defense counsel's ability to effectively represent defendant at sentencing by allowing defendant's wishes to prevail over defense counsel's strategy to present certain mitigating evidence.

During sentencing, after defense counsel had presented mitigating evidence through the examination of three witnesses, defense counsel asked to be heard by the trial court outside the presence of the jury. Counsel informed the court that as he was about to ask defendant's aunt about the history of domestic violence and abuse in the family while defendant was growing up, defendant leaned over to him and told him not to pursue that line of questioning. The trial court agreed to hear from defendant personally; and defendant expressed his wishes, telling the court, "My family as far as that goes have nothing to do with this case at all . . .[;] what they did, ain't got nothing to do with this right here. I don't feel like it should be brought out. I don't feel like it should come before anybody in this courtroom. Not even you." The trial court asked defendant if it would make any

difference if the courtroom were cleared except for the jurors and attorneys; and defendant replied, "I don't want it brought out, period." Defendant made it clear that he did not want any evidence about his family brought out, whether it be through his aunt or any other family member, or anybody else. The prosecutor then interjected that perhaps defendant should be advised on the record about why such evidence is important, to the extent that his counsel believed it to be important evidence to present during the sentencing proceeding. Defendant broke in and explained his position in the following colloquy:

> DEFENDANT: I see why they say that they think it's important. But it would be further contradictory to what I [testified to] earlier. And what I said earlier, I did not inflict any domestic violence on Patricia or anybody else. And by them bringing this out, they're [the jurors] just going to be saying, well, he seen it somewhere, so he must have done it. So I know better than that.
>
> THE COURT: So you're really saying, Mr. White, it could be used against you—
>
> DEFENDANT: Surely. That's what it's going to be, used totally against me. It's going to be just like when I got up on the stand, whatever I said was a lie. Which it come out that way anyway, because I've been convicted. Whatever they thought that I said, they think I told a lie.
>
> THE COURT: Let me ask you this. I think what you're saying is even though your attorneys believe it would help you, you foresee the possibility that it may hurt you.
>
> DEFENDANT: It will hurt me. Not may, but will.
>
> THE COURT: Okay.
>
> DEFENDANT: Like I said, it would be totally contradictory to what I said earlier as far as me not inflicting any domestic violence on anybody. And then the jury's going to say, well, he must [have] lied about that; he lied about everything else. So we're going to give him whatever, you know.

Defense counsel then asked the court not to tie the defense's hands, even at defendant's request, since the defense is charged with presenting mitigating evidence. Defense counsel also explained that they had advised defendant at some substantial length that the line of evidence in question would be presented not to excuse what he had

been convicted of, but to explain his inability "to make informed judgments about doing those things." The court then addressed defense counsel:

> THE COURT: Mr. Barnhill, when I discussed this matter with Mr. White [defendant]—and this may be something you are aware of or not aware of. While your position in representing Mr. White is that this would be a mitigating matter, Mr. White quite forcibly said that in his opinion it could be an aggravating factor, and it could be used against him. In other words, your contention is this may somewhat mitigate Mr. White's circumstances, but I hear him pretty clearly say that he feels just the opposite, that this may be what really aggravates the matter. It is a valid point.

After a short recess, the trial judge confirmed with defendant his understanding of defendant's contention and then ruled that the court would not allow questions about domestic violence in defendant's home as he was growing up:

> THE COURT: I thought that's what was your position. That's fine. You will have a seat, Mr. White.
>
> What we'll do is I'm not going to allow that line of questioning. That will be the ruling. And I think Mr. White has stated his reasons. The Court feels that it is the defendant's life that we are talking about. And for the reasons he's stated, which I feel . . . are justified, . . . I will not allow the line of questioning.

After allowing defense counsel to state on the record their reasoning for wanting to present the evidence, the trial court reiterated its findings, stating:

> THE COURT: Let me go back. My findings of fact, obviously from the record, that this is not so much . . . a matter of the defendant not consenting to something as it is that the defendant's position is that this whole matter and line of questioning could just as easily be used as an aggravating matter rather than a mitigating factor. And the course of conduct by the defendant, which he has already stated, would again possibly be so prejudicial to him that it could conceivably weigh the scales to the most aggravating side.

The court then made even more explicit its finding that, "in the [c]ourt's mind, [there] certainly is the possibility that testimony of this nature could well be aggravating instead of mitigating."

Defendant now argues that the trial court, by ruling in accordance with defendant's request that no evidence be presented regarding acts of domestic violence in defendant's home while he was growing up, deprived defendant's counsel of any opportunity to be effective and, in doing so, deprived both defendant and the people of this state of a regularly applied, fair, and nonarbitrary capital-sentencing proceeding under the Eighth and Fourteenth Amendments to the United States Constitution. We disagree.

Preliminarily, we note that defense counsel were not prohibited from presenting all mitigating evidence. Defense counsel examined nine witnesses on the circumstances of defendant's life and various aspects of his character and submitted to the jury two statutory mitigating circumstances, seven nonstatutory mitigating circumstances, and the catchall circumstance. Defendant has cited a case from another jurisdiction, *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (1988), *cert. denied*, 488 U.S. 1017, 102 L. Ed. 2d 803 (1989), for the proposition that a criminal defendant should not be allowed, out of fairness in sentencing, to prevent the presentation of mitigating evidence. We find the reasoning in *Koedatich* inapposite to this case in that the defendant in *Koedatich* waived the right to present any mitigating evidence whatsoever to the jury. *Id.* at 327-28, 548 A.2d at 992.

The United States Supreme Court has held that the Eighth and Fourteenth Amendments mandate that a jury in a capital case must " 'not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *State v. Wilkinson*, 344 N.C. 198, 211, 474 S.E.2d 375, 381 (1996) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978)). This mandate, however, presupposes that defendant has proffered the evidence and that the evidence is in fact mitigating. The Eighth and Fourteenth Amendments do not require a defendant to acquiesce in a trial strategy to present evidence which the defendant reasonably believes will be aggravating rather than mitigating. Defendant argues that the evidence of defendant's violent home could have lent additional support to the (f)(2) statutory mitigator, that the murders were committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1997); but this contention ignores the question whether the evidence would harm defendant more than help him in this case.

As the colloquy between the court and defendant reveals, an impasse existed between defendant and his counsel over the tactical decision of whether the evidence in question would tend to mitigate defendant's sentence or aggravate it. Normally, the responsibility for tactical decisions, such as the type of defense to present and what witnesses to call, "rests ultimately with defense counsel." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 211 (1991). However, as we have said, "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991). In *Ali* we stated that when such impasses arise, defense counsel should make a record of the circumstances, the advice given to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. *Id.* After reviewing the transcript in this case of the discussion between the trial court, defendant, and defense counsel, we conclude that there was an absolute impasse between defendant and his counsel over the presentation of evidence concerning domestic violence while defendant was growing up. Defendant even stated that he would make whatever disturbance was necessary to prevent the evidence from being presented. We conclude further that defendant was fully informed and that defense counsel made a proper record of the circumstances, including their advice to defendant and the reasons for their decision to present the evidence. Thus, we hold that the trial court did not err in prohibiting counsel from presenting the controversial evidence.

Defendant further argues that the trial court erred in precluding defense counsel from making an offer of proof as to what evidence they would have presented concerning the domestic violence experienced by defendant as a child. We note that while the trial court denied full offer of proof, it allowed defense counsel to articulate what defendant's showing would have been by identifying witnesses and presenting a detailed forecast of evidence for the record on what each witness would have said. Moreover, since we have concluded that the trial court did not err in precluding defense counsel from presenting the evidence, the trial court's denial of the offer of proof has not prejudiced defendant on appeal. This assignment of error is overruled.

[16] Defendant next assigns error to the trial court's failure to give a peremptory instruction to the jury on the (f)(2) statutory mitigating

circumstance, that the murders were committed while defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2). The trial court stated as its reason for not giving the peremptory instruction that "[w]hether the defendant was under [the] influence of emotional disturbance, again, that is a jury call. I can't take that as a matter of law." Defendant contends that this statement indicates that the court based its denial on the mistaken belief that the court was without legal authority to grant a peremptory instruction. We disagree with defendant's interpretation of the trial court's statement; when read in context, the trial court's statement was merely a recognition that the evidence in this case was conflicting. A defendant is entitled to a peremptory instruction when a mitigating circumstance is supported by uncontroverted evidence. *State v. Womble*, 343 N.C. 667, 683, 473 S.E.2d 291, 300 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). "Conversely, a defendant is not entitled to a peremptory instruction when the evidence supporting a mitigating circumstance is controverted." *Id.*

In this case the evidence of whether, at the time of the murders, defendant was under the influence of a mental or emotional disturbance was not uncontroverted. Defendant had purchased a nine-millimeter handgun shortly before the murders, and he had threatened to kill Patricia Green's family members. Defendant himself testified that he did not murder Georgia Green and Cleveland Wilson; that he had decided to leave Patricia Green and leave town; and that he visited several friends that evening as he made his preparations to leave. *See State v. Noland*, 312 N.C. 1, 23, 320 S.E.2d 642, 655-56 (1984) (defendant bought the murder weapon two days before the killings and, in a nonemotional state of mind, killed the victims in the exact manner in which he threatened, going through a "detailed series of steps . . . before, during, and after the killing[,] suggest[ing] deliberation, not the frenzied behavior of an emotionally disturbed person"), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). This assignment of error is overruled.

[17] In defendant's next assignment of error, he contends that the trial court erred in failing to give peremptory instructions to the jury regarding nonstatutory mitigating circumstances despite having agreed to give such instructions during the charge conference. The transcript reveals that at the charge conference defense counsel made an oral request for the submission of nonstatutory mitigating circumstances. The trial court asked the prosecutor if he objected to the submission of the nonstatutory mitigating circumstances, and the

prosecutor responded that he did not. Thereafter, defense counsel orally requested that peremptory instructions be given for the nonstatutory mitigating circumstances. The prosecutor then asked whether defense counsel was requesting peremptory instructions for the nonstatutory mitigating circumstances; and defense counsel responded, "That's correct." Defense counsel did not provide written instructions at this point, but merely cited N.C.P.I.—Crim. 150.11 as the appropriate pattern instruction. The prosecutor then referred to the pattern book and pointed out to defense counsel and the trial court that N.C.P.I.—Crim. 150.11 provides a pattern peremptory instruction only for statutory mitigating circumstances, not for nonstatutory mitigating circumstances. After recessing and then resuming the charge conference, the trial court agreed to give peremptory instructions on the nonstatutory mitigating circumstances and told counsel the language he would use:

> [THE COURT:] So as I read it—nonstatutory mitigating factors—I will take an example and read it like this and see if this is what you agree with. On the first nonstatutory mitigating factor the issue would be: "Consider whether the defendant was raised in a poverty stricken home. You would find this mitigating factor if you so find the defendant was raised in a poverty stricken home and that this circumstance has mitigating value. If one or more of you finds by the preponderance of the evidence this circumstance exists and is also deemed mitigating, you would so indicate by having your foreperson write 'yes' in the space provided after this mitigating factor on the issue and recommendation form. If none of you finds the circumstance to exist, or if none of you deem it to have mitigating value, you would so indicate by having your foreperson write 'no' in that space." I will follow that sequence in all of the nonstatutory mitigating factors.
>
> [DEFENSE COUNSEL]: Yes.

Defense counsel thus agreed with this proposed language, made no objection to it, and neither suggested nor provided any other language either orally or in writing. Thereafter, the trial court instructed the jury exactly as it had indicated. Defense counsel did not object at this point either, though given the opportunity.

We have held that peremptory instructions which are appropriate for statutory mitigating circumstances are inappropriate for nonstatutory mitigating circumstances. *State v. Green*, 336 N.C. 142, 173-74, 443 S.E.2d 14, 32, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547

(1994); *see also State v. Buckner*, 342 N.C. 198, 235, 464 S.E.2d 414, 435 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996). This distinction is due to the disparate nature of the two types of mitigating circumstances under our capital-sentencing procedure; a jury that finds a statutory mitigating circumstance to exist must accord it mitigating value, but a jury which finds the existence of a nonstatutory mitigating circumstance may still decide that the circumstance has no mitigating value. *Green*, 336 N.C. at 173, 443 S.E.2d at 32. Thus, in this instance, the trial court was correct not to utilize the pattern instruction suggested by defense counsel in reference to the nonstatutory mitigating circumstances submitted in this case.

Further, we have held that it is not error for a trial court in a capital case to refuse to give requested instructions where counsel failed to submit the instructions to the trial court in writing. *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 647 (1998); *see also* N.C.G.S. § 1-181 (1996); N.C.G.S. § 1A-1, Rule 51(b) (1990). Here, defense counsel did not submit any proposed instructions in writing. Counsel also did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal. *State v. Wilkinson*, 344 N.C. at 213, 474 S.E.2d at 396. We overrule this assignment of error.

[18] In his next assignment of error, defendant contends that the trial court's instructions on Issues Three and Four, which used the word "may" rather than "must," improperly allowed the jurors to ignore mitigating circumstances which they had found to exist. The trial court instructed as follows, in accordance with the pattern instructions: "If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstance or circumstances against the mitigating circumstance or circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two." We have previously addressed and rejected arguments identical to those made by defendant in support of this assignment of error. *State v. Carter*, 338 N.C. 569, 604-05, 451 S.E.2d 157, 176-77 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). This assignment is overruled.

PROPORTIONALITY

[19] Finally, defendant argues that the sentence of death in this case was imposed under the influence of passion, prejudice, or other arbitrary considerations and that, based on the totality of the circumstances, the death penalty is disproportionate. We are required by N.C.G.S. § 15A-2000(d)(2) to review the record and determine (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

After a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we are convinced that the jury's findings of the two aggravating circumstances submitted as to each murder were supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[20] Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). Our consideration is limited to those cases within the pool which are roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *Syriani*, 333 N.C. at 400, 428 S.E.2d at 146. 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.

Defendant was convicted of two counts of first-degree murder based on premeditation and deliberation. As to each murder, the jury found both the submitted aggravating circumstances: (i) that defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and (ii) that the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

Three statutory mitigating circumstances were submitted for the jury's consideration: (i) defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (iii) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury found the (f)(2) mitigator, that the murder was committed while defendant was under the influence of mental or emotional disturbance; the jury also found as a circumstance supporting the (f)(9) mitigator defendant's "[f]ather's possessive influence over mother's in family life." The jury declined to find the (f)(1) mitigator, that defendant had no significant history of prior criminal activity. Of the six nonstatutory mitigating circumstances submitted, five were found by the jury.

We begin our analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (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 not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

This Court has never found the sentence of death disproportionate where the defendant has been convicted of the murders of more than one person. *State v. Warren*, 348 N.C. 80, 129, 499 S.E.2d 431,

459, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 216 (1998); *State v. McLaughlin*, 341 N.C. 426, 466, 462 S.E.2d 1, 23 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). This defendant has been found guilty of the premeditated and deliberate murders of two unsuspecting, defenseless victims in their own home, in retaliation against his girlfriend for leaving him. This case is similar to *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), in which Noland killed the father and sister of his estranged wife after threatening to kill them if she did not return to him. *Id.* at 5-6, 320 S.E.2d at 645-46. We found no error in that case and affirmed the defendant's sentences of death.

Although we review all the cases in the pool when engaging in this statutory duty, as we have repeatedly stated, "[W]e will not undertake to discuss or cite all of those cases each time we carry out that duty." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. We conclude 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.

Accordingly, we conclude that defendant received a fair trial and sentencing proceeding, free from prejudicial error, and that the sentence of death ordered by the trial court upon the jury's recommendation for each murder is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. ERIC FERNANDO MURILLO

No. 209A96

(Filed 31 December 1998)

1. Criminal Law § 98 (NCI4th Rev.)— discovery—form of response

The trial court did not err in a first-degree murder prosecution by denying defendant's motions for discovery and by failing to sanction the State for its failure to provide discovery. Defendant did not indicate that the prosecution suppressed any evidence, but merely asserted disjointed presentation of the

statements. The statements provided complied with the letter and the spirit of the mandate of N.C.G.S. § 15A-903(a)(2), defendant was protected from unfair surprise, and any other evidence of which defendant might have been deprived was not material.

2. Evidence and Witnesses §§ 876, 881 (NCI4th)— first-degree murder—statements of victim—abused spouse—state of mind hearsay exception

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting testimony that the victim had said she was going home to Massachusetts for the summer, leaving the inference that the victim and defendant were separating. Competent evidence had been introduced that defendant had threatened to kill the victim if she left him and her statement was relevant to show motive and to show her state of mind.

3. Evidence and Witnesses § 929 (NCI4th)— first-degree murder—abused spouse—statement of victim—excited utterance

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting testimony about a phone conversation in which the victim related that defendant had held a gun to her head. The testimony indicated that the victim had called her brother-in-law immediately after the incident while she was still upset and had not had time to reflect; the testimony was properly admitted as an excited utterance. N.C.G.S. § 8C-1, Rule 803(2).

4. Evidence and Witnesses §§ 929, 3126 (NCI4th)— first-degree murder—statement of victim—excited utterance—not corroboration

There was no prejudicial error in a capital prosecution for the first-degree murder of an abused spouse where the court allowed the victim's father to testify that the victim had told him that defendant had beaten her while they were on a beach trip and that defendant had shot a gun next to her head. The testimony was not admissible to corroborate the witness's testimony about the two incidents; prior consistent statements are admissible for corroboration, but this rationale does not justify admission of extrajudicial declarations of someone other than the witness. However, this witness gave testimony as to these incidents within the excited utterance exception, so that the hearsay testimony of

what the victim belatedly told the witness about the same events did not effect the verdict and was not prejudicial.

5. Evidence and Witnesses § 876 (NCI4th)— first-degree murder—abused spouse—statements by victim in workplace

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by permitting the assistant principal at the victim's workplace to testify about beatings the victim described after the alleged abuse occurred. The transcript reveals that the victim recounted the past beatings only when confronted with her injuries and that she broke down and explained what was happening in her life to make her afraid, upset, and bruised. The victim's explanatory comments about the beatings were made contemporaneously with and in explanation of her statements and crying, thus showing her state of mind.

6. Evidence and Witnesses §§ 876, 929 (NCI4th)— first-degree murder—abused spouse—statements to sisters and friends

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by allowing the victim's sisters and friends to testify as to various beatings that the victim described. The victim either called the witnesses immediately after the beating or described the beatings as the bases for her fear, placing the statements within the excited-utterance exception or the state of mind or emotion exception.

7. Evidence and Witnesses § 876 (NCI4th)— first-degree murder—abused spouse—tape recorder—state of mind of victim

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by allowing a friend of the victim to testify that she gave the victim a voice-activated tape recorder to use to catch defendant committing adultery. The trial court found that there was competent evidence that defendant had threatened to kill the victim if she left him and the existence of the tape was relevant to show the victim's intent to leave the defendant.

8. Evidence and Witnesses §§ 876, 929 (NCI4th)— first-degree murder—abused spouse—victim's statement as to bruise

There was no prejudicial error in a capital prosecution for the first-degree murder of an abused spouse where the court permitted a witness to testify that the victim had told her that she received a large bruise on her head when defendant threw her into a wall. The victim was not upset and was not relating feelings or intent regarding her relationship with defendant, so that the testimony was an improper recitation of mere remembered facts. However, the voluminous admissible testimony regarding violence directed toward the victim renders this error harmless. Other testimony by this witness was tangential to the question of defendant's guilt or reflected the victim's state of mind about her marriage and related to an event that could cause a confrontation with defendant.

9. Evidence and Witnesses § 735 (NCI4th)— first-degree murder—abused spouse—admission not plain error

There was no plain error in a capital prosecution for the first-degree murder of an abused spouse where the court admitted hearsay testimony that defendant came to the school where the victim worked to collect her paychecks and that the defendant determined whether the victim could drive a car. The admission of this testimony was not such a prejudicial error as to prevent justice from being done.

10. Evidence and Witnesses § 876 (NCI4th)— first-degree murder—abused spouse—creation of nest egg—state of mind hearsay exception

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting testimony that the victim had given part of her paycheck to a friend to create a "nest egg" and that she planned on leaving defendant. This clearly reflects the victim's state of mind about her marriage and related directly to circumstances giving rise to a potential confrontation with defendant.

11. Evidence and Witnesses § 761 (NCI4th)— first-degree murder—abused spouse—testimony of previous incidents—admission not prejudicial

There was no prejudicial error in a capital prosecution for the first-degree murder of an abused spouse where the trial court

admitted testimony from the victim's sister about a beating the victim had suffered at Thanksgiving in 1988 and about the circumstances leading to the victim's final trip to Massachusetts to retrieve her sons. The Thanksgiving beating had previously been explored with competent testimony and the testimony that defendant and the victim argued before the Massachusetts trip was harmless in light of overwhelming competent evidence that defendant and the victim argued often.

12. Evidence and Witnesses § 3127 (NCI4th)— first-degree murder—abused spouse—testimony of victim's mother—corroboration

There was no prejudicial error in a capital prosecution for the first-degree murder of an abused spouse in the admission of testimony from the victim's mother. Her testimony about an incident in which defendant held a gun to the victim's head was admissible to corroborate a deputy's earlier testimony, the mother's testimony to an argument between defendant and the victim was not prejudicial in light of overwhelming competent evidence that defendant and the victim argued often, and the remainder of her testimony recounted excited utterances or the victim's state of mind.

13. Evidence and Witnesses § 90 (NCI4th)— first-degree murder—abused spouse—previous attacks on spouse—not overly prejudicial

There was no abuse of discretion in a capital prosecution for the first-degree murder of an abused spouse in the admission of evidence of prior incidents toward the spouse. Contrary to defendant's assertion, the evidence was not overly prejudicial as subjecting defendant to trial for beating his wife. Testimony about a defendant-husband's arguments with, violence toward, and threats to his wife were properly admitted in his subsequent trial for her murder.

14. Evidence and Witnesses § 876 (NCI4th)— first-degree murder—abused spouse—state of mind hearsay exception—remoteness

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting certain statements of the victim as within the state of mind exception. Although defendant contended that the statements should have been excluded because of remoteness, evidence spanning the

entire marriage has been allowed when a husband is charged with murdering his wife.

15. Evidence and Witnesses § 335 (NCI4th)— first-degree murder—abused spouse—killing of prior spouse—admissible

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting evidence of defendant's first wife's death at his hands in 1970. The evidence was properly admitted to show lack of accident and to support a finding that defendant intended to kill this victim. The court told the jury that it could consider evidence of the prior shooting when deciding issues of intent, plan, premeditation, and absence of accident, but expressly warned jurors not to consider the death as proof of defendant's propensity to commit the crime.

16. Evidence and Witnesses § 292 (NCI4th)— first-degree murder—abused spouse—killing of prior spouse—involuntary manslaughter conviction

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting evidence of the death of defendant's first wife where defendant was convicted of involuntary manslaughter in that death. Although defendant argues that admitting evidence of his first wife's death subjects him to double jeopardy, there was substantial evidence from which a jury could determine that defendant committed the similar act; the evidence of the prior death was not admitted to show only intent, plan, or motive; the probative value of that death does not depend on any additional fact or element not present in defendant's conviction and defendant's own statements call into question his assertion of accident in both deaths. Furthermore, the first death was not so remote in time as to have lost its probative value or be more prejudicial then probative.

17. Constitutional Law § 344.1 (NCI4th)— first-degree murder—right to be present—recorded bench conferences

The federal constitutional rights of a capital first-degree murder defendant were not violated by three recorded bench conferences. Furthermore, defendant's rights under Article I, Section 23 of the North Carolina Constitution were not violated because defendant at all times either had actual knowledge of the substance of the discussion or constructive knowledge through his

attorneys. He makes no showing that his presence at the bench would have been useful.

18. Criminal Law § 532 (NCI4th Rev.)— first-degree murder—juror entering courtroom during hearings—juror not dismissed

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by not excusing a juror *ex mero motu* where the juror twice entered the courtroom inadvertently and fleetingly during hearings. No motion was made for a new trial based on juror misconduct or for a further inquiry into what the juror might have heard and any discussion the juror might have overheard was either eventually allowed before the juror or tangential to the issues. The trial court witnessed all of the events in question and both the existence of misconduct and the effect of misconduct are determinations within the trial court's discretion.

19. Evidence and Witnesses § 264 (NCI4th)— first-degree murder—victim's performance as school teacher—rebuttal of defendant's contention

The trial court did not abuse its discretion in a capital prosecution for the first-degree murder of an abused spouse by admitting character evidence concerning the victim's performance as a school teacher. The trial court determined that the victim's teaching performance was relevant to rebut contentions in defendant's opening statement that the victim was a violent alcoholic whose abusive behavior was not limited to defendant.

20. Evidence and Witnesses § 1776 (NCI4th)— first-degree murder—demonstration—witness the same size as defendant

The trial court did not abuse its discretion in a capital prosecution for the first-degree murder of an abused spouse by allowing the victim's sister to demonstrate, after testifying that she and the victim wore the same clothes and were the same size, that her forearm and head could not be positioned such that the bullet holes matched as they did in the victim's body if an accident had occurred in the way defendant claimed. The trial court conducted a *voir dire* and evaluated the probative and prejudicial value of the demonstration.

21. Evidence and Witnesses § 3161 (NCI4th)— first-degree murder—cross-examination of victim's minor son—use of prior inconsistent statement

There was no abuse of discretion in a capital prosecution for the first-degree murder of an abused spouse where defendant contended that the trial court erroneously sustained the State's objection to defense counsel's cross-examination of the victim's minor son regarding a prior inconsistent statement. Although the son testified that defendant looked angry immediately before the shooting, no such description was present in the statement made to police officers immediately after the shooting; the objection was sustained based on the detective barely talking to the boys because they were traumatized. The son had already presented the evidence defendant sought to elicit and the objection could have been sustained for repetitiveness.

22. Evidence and Witnesses § 1657 (NCI4th)— first-degree murder—abused spouse—nature of relationship—photographs—excluded

There was no abuse of discretion in a capital prosecution for the first-degree murder of an abused spouse where defendant sought to introduce photographs and testimony rebutting various contentions of family animosity, the court determined that some of the photographs could be used to illustrate testimony of the persons pictured, but excluded testimony of the walls of the apartment because no one could testify to taking the pictures and they were not necessary or sufficiently dated to illustrate the testimony of witnesses who denied seeing bullet holes in the walls. The trial court exercised proper discretion to exclude unreliable photographs taken at an indeterminate date that could have been more confusing or misleading than probative, and defendant presented numerous witnesses who testified that he had a happy marriage.

23. Criminal Law § 439 (NCI4th Rev.)— first-degree murder—prosecutor's closing arguments—prior murder

There was no error in a capital prosecution for first-degree murder where the trial court did not intervene *ex mero motu* in the prosecutor's closing argument in the guilt phase where defendant asserted that the prosecutor asked the jury to convict defendant of first-degree murder because he "got away with it" in the death of a prior spouse. A review of the closing arguments

reveals that the prosecutors did no more than indicate similarities between the two wives' deaths and argue the improbability that an expert shooter would accidentally shoot and kill two of his four wives; these are reasonable inferences from the evidence and proper arguments.

24. Criminal Law § 447 (NCI4th Rev.)— first-degree murder—prosecutor's argument—paid expert witness

The prosecutor's arguments in the guilt phase of a capital first-degree murder prosecution concerning payment of defendant's forensic expert were not so grossly improper as to require the trial court to intervene *ex mero motu*. Prior cases involving arguments from sentencing proceedings are instructive but not controlling and, when defense counsel apparently did not believe the argument was prejudicial at trial, the Court could not conclude that the trial court should have intervened. Even assuming that the argument was improper, it was not prejudicial in light of the substantial evidence of defendant's guilt.

25. Criminal Law § 457 (NCI4th Rev.)— capital sentencing—prior out-of-state conviction—prosecutor's argument

The trial court did not err in a capital sentencing proceeding by allowing the prosecutor's statement that dismissals such as defendant's in the 1970 California killing of his first wife were commonplace. Viewed as a whole, the prosecutor was explaining why defendant's California conviction still counted as a conviction for purposes of finding the prior violent felony aggravating circumstance and, even if the statement was error, defendant suffered no prejudice because he argued that not all convictions are set aside and that certain conditions must be met for that to occur.

26. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—nonstatutory mitigating factors

The trial court did not err by not intervening *ex mero motu* in a capital sentencing proceeding where defendant contended that the prosecutor impermissibly asked the jury to find that some of the nonstatutory mitigators were aggravators, but the prosecutor in fact argued that the nonstatutory mitigating circumstances should not weigh heavily in the jurors' minds. There was no additional submission of aggravators and the prosecution emphasized in arguments that only one aggravator was being submitted to the jury.

27. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—death penalty as deterrent

The trial court did not err by not intervening *ex mero motu* in a capital sentencing proceeding where defendant contended that the prosecutor impermissibly argued for imposition of the death penalty because it would deter crime generally. The prosecutor was reminding the jury of its role and obligation to follow the law, did not impermissibly cite to general deterrence, and stayed within the established bounds.

28. Criminal Law § 460 (NCI4th Rev.)— capital sentencing proceeding—prosecutor's argument—sympathy

The trial court did not err in a capital sentencing proceeding by not intervening *ex mero motu* where defendant contended that the prosecutor impermissibly told the jury that the law does not permit sympathy. Although the trial court may not preclude the jury from considering compassion, the prosecutor may discourage the jury from having mere sympathy not related to the evidence; moreover, the prosecutor here did not tell the jury that it could not consider sympathy, but suggested that the jury focus on the facts and not consider sympathy.

29. Criminal Law § 1364 (NCI4th Rev.)— capital sentencing—aggravating circumstance—prior California conviction

The trial court did not err in a capital sentencing proceeding by allowing the submission of the prior violent felony aggravating circumstance based on a twenty-two-year-old California conviction for voluntary manslaughter. Defendant did not argue any effect that the subsequent dismissal of the conviction under California law may have had on North Carolina's sentencing procedures and contended instead that the conviction was too remote in time. The requirements of N.C.G.S. § 15A-2000(e)(3) were met and defendant's arguments about frustrating California's legislative intent were not relevant.

30. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not arbitrary

In a capital sentencing proceeding for the first-degree murder of an abused spouse, the evidence in the record fully supports the finding by the jury of the aggravating circumstance of a prior felony involving the use of violence and there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

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

A sentence of death for the first-degree murder of an abused spouse was not disproportionate in light of a prior violent felony resulting in another death and the long history of defendant's abuse of this victim.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Ellis, J., on 18 April 1996 in Superior Court, Richmond County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 30 September 1998.

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

Margaret Creasy Ciardella for defendant-appellant.

WHICHARD, Justice.

On 15 December 1992 a Hoke County grand jury indicted defendant for the first-degree murder of his wife, Beth Murillo. Upon defendant's motion for a change of venue, the case was transferred for trial to Richmond County. Defendant was tried capitally, and the jury returned a verdict finding him guilty of first-degree murder on the basis of 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 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 showed that defendant and the victim had been husband and wife since 1987. They had histories of alcohol abuse, and defendant had threatened, verbally abused, and severely beaten the victim on many occasions throughout the marriage. The victim's school colleagues, family members, and friends testified to her black eyes and extensive bruising. Law-enforcement officers testified that on numerous occasions when they were summoned to the family home or cabin, they found the victim beaten and bloodied but refusing to swear out a warrant on defendant. The victim's family had intervened and taken her home to Massachusetts several times, but the victim always returned to defendant in North Carolina.

At the time of her death, the victim was staying with her two sons from a previous marriage at the family's cabin a short distance away from the family home. She and defendant had argued that evening at the local tavern they owned. Around 1:00 a.m. on 24 June 1992, after consuming numerous beers, the victim left the bar with her two sons. Defendant told her to go to the family home, but the victim instead drove to the cabin where she had been staying. She told her sons that if defendant came near her, she would kill him.

Defendant claimed he went to the cabin to avoid his wife and to let their tempers cool. The victim's sons testified that defendant arrived at the cabin, woke them, entered the victim's bedroom, and closed the door. The boys could hear the two arguing. The victim said, "Oh God, oh God," and a gun fired. Defendant claimed it fired accidentally while they struggled. When the boys asked about the sound, defendant began saying, "Oh God, don't die Beth." Defendant bundled the victim into his arms and drove her to the hospital, attempting mouth-to-mouth resuscitation as he drove.

The victim never regained consciousness and was removed from life support on 25 June 1992. She had bruises over seventy-five percent of her body and died from a single gunshot wound through the right temple. The bullet had passed through her right forearm before entering her head. The trial court admitted evidence that defendant's first wife, Debbie Kraft Murillo, also had died from a gunshot wound defendant inflicted; that death was ruled accidental.

[1] In his first assignment of error, defendant contends that the trial court erred in denying defendant's motions for discovery and in failing to sanction the State for its failure to provide discovery as the trial court ordered and as applicable statutes and the federal Constitution require. Defendant complains that the documents the State gave in response to orders for discovery were too disjointed to be useful and that his repeated motions to compel discovery are evidence that the State violated the discovery statutes, the requirement that the essence of a statement be provided to a defendant, *see State v. Patterson*, 335 N.C. 437, 454, 439 S.E.2d 578, 588 (1994), and the spirit of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). He finally contends that the delay in discovery hindered his ability to locate witnesses.

Our discovery statutes require the prosecutor "[t]o divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regard-

less of to whom the statement was made." N.C.G.S. § 15A-903(a)(2) (1997). "As used in the statute, 'substance' means: 'Essence; the material or essential part of a thing, as distinguished from "form." That which is essential.' " *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985) (quoting *Black's Law Dictionary* 1280 (5th ed. 1979)). Conversely, "form" is distinguishable from substance and "means the legal or technical manner or order to be observed in legal instruments or juridical proceedings." *Black's Law Dictionary* 651 (6th ed. 1990). Defendant complains solely about the form of the discovery provided. As in *Patterson*, 335 N.C. at 453-54, 439 S.E.2d at 588, the existence of defendant's statements was not repressed. Rather, the statements were not organized to his satisfaction. The names of witnesses, with exculpatory information, were included, and the substance of both inculpatory and exculpatory statements was present. Indeed, the final version of defendant's statements was separated by witness, denoted whether the witness was with law enforcement, and estimated a time frame if the statement was not in reference to the victim. This complied with the letter and spirit of the statutory mandate. *See State v. Strickland*, 346 N.C. 443, 457, 488 S.E.2d 194, 202 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 757 (1998). " '[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.' " *Patterson*, 335 N.C. at 455, 439 S.E.2d at 589 (quoting *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991)). Defendant clearly was afforded this protection by the substantive discovery provided. The State complied with its duty under N.C.G.S. § 15A-907 to render continuing discovery. Defendant received all of the discovery to which the statutes entitled him.

Brady holds that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. Defendant has not indicated that the prosecution suppressed any evidence. He has merely asserted disjointed presentation of the statements. The final list of his statements was provided to his counsel well before trial and contained more than adequate demarcation of time and person. Moreover, defendant presented all of the allegedly exculpatory evidence for which he was unable to obtain testifying witnesses through witnesses who did testify. Therefore, any other evidence of which defendant might have been deprived was not material under the standard in *Kyles v. Whitley*, 514

U.S. 419, 131 L. Ed. 2d 490 (1995). Defendant received a "trial resulting in a verdict worthy of confidence." *Id.* at 434, 131 L. Ed. 2d at 506. There was no evidentiary suppression that " 'undermine[d] confidence in the outcome of the trial.' " *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 678, 87 L. Ed. 2d 481, 491 (1985)). Accordingly, this assignment of error is overruled.

Defendant next contends that evidence admitted regarding his abusive relationship with the victim was hearsay, inadmissible, and unduly prejudicial. He contends that the statements were not within the state-of-mind exception to the hearsay rule because they were recitations of facts or that they were too remote from the time of the crime to have relevance. Defendant asserts that even if the statements were admissible under the state-of-mind exception, the danger of unfair prejudice substantially outweighed their probative value.

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). Even relevant evidence is subject to Rule 403, which disallows evidence when the probative value is "outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1992); *see State v. Hardy*, 339 N.C. 207, 230-31, 451 S.E.2d 600, 613 (1994). Evidence of a defendant's misconduct toward his wife during the marriage is admissible "under Rule 404(b) to prove motive, opportunity, intent, preparation, [or] absence of mistake or accident with regard to the subsequent fatal attack upon her." *State v. Syriani*, 333 N.C. 350, 376, 428 S.E.2d 118, 132, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). However, if the evidence is used to prove the truth of the matter asserted, it must still be admissible under the rules against hearsay. *See Hardy*, 339 N.C. at 231-32, 451 S.E.2d at 614. If it is merely a recitation of facts, offered for the truth of the matter asserted, it is inadmissible. *See id.* at 229, 451 S.E.2d at 613.

[2] Defendant first contends that testimony from Lisa Carter that the victim said she was going home to Massachusetts for the summer, leaving the inference that the victim and defendant were separating, was improperly admitted. Competent evidence had been introduced that defendant had threatened to kill the victim if she left him. The victim's statement indicating the parties were separated or separating "bore directly on the relationship between the victim and defendant at the time of the killing and [was] relevant to show a motive for the

killing." *State v. Bishop*, 346 N.C. 365, 380, 488 S.E.2d 769, 776 (1997). Statements from the victim indicating that she intended to end the marriage reflected her state of mind and were therefore admissible under Rule 803(3). Defendant's contention that several witnesses should not have been allowed to testify as to the victim's statements of her intent to leave him are without merit.

[3] Defendant contends that Harry Callahan should not have been permitted to testify about a phone conversation in which the victim related that defendant had held a gun to her head. Callahan, the victim's brother-in-law, testified that the victim called him in November 1987; she was crying, and her voice was cracking. Callahan testified over objection that "[s]he said she was just—her and Eric Murillo had a fight and he held—held a gun to her head." This testimony indicates that the victim called her brother-in-law immediately after the incident, while she was still upset and had not had time to reflect. It thus was properly admitted as an excited utterance. N.C.G.S. § 8C-1, Rule 803(2) (1992); *State v. Smith*, 315 N.C. 76, 86-87, 337 S.E.2d 833, 841 (1985).

[4] Defendant complains that Bob Cannon, the victim's father, should not have been allowed to testify that the victim told him defendant beat her while they were on a beach trip or that defendant shot a gun next to the victim's head. The State incorrectly contends that Cannon's testimony was admissible to corroborate Callahan's admissible testimony of the events surrounding the victim's beating and abandonment at Carolina Beach and of the gun-to-head incident. Prior consistent statements of a witness are admissible for corroboration; this rationale, however, " 'does not justify admission of extrajudicial declarations of someone other than the witness purportedly being corroborated.' " *State v. Hunt*, 324 N.C. 343, 352, 378 S.E.2d 754, 759 (1989) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 52, at 243 (3d ed. 1988)). The extrajudicial statement of the victim to her father cannot corroborate Callahan's testimony about what the victim said to him. *See State v. Rose*, 335 N.C. 301, 321-22, 439 S.E.2d 518, 529 (hearsay statement of person other than the witness cannot be used to corroborate that witness' testimony), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). However, the admission of this testimony was not prejudicial. Callahan testified extensively, competently, and with admissible exhibits about how he had to rent a room in Atlantic Beach for the distraught victim. The victim had contacted Callahan immediately after the beating because she had no money and needed a hotel room. Callahan testified that he

arranged to pay for the room and produced credit-card statements to prove it; clearly, evidence of the victim's call to him fell within the excited-utterance exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 803(2). Callahan's explanation of the gun-to-head incident was admissible as an excited utterance under Rule 803(2) as well. We thus are confident that Cannon's hearsay testimony of what the victim belatedly told him about these same events did not affect the verdict and that the error thus was not prejudicial. *See* N.C.G.S. § 15A-1443(a) (1997); *Bishop*, 346 N.C. at 381, 488 S.E.2d at 777.

[5] Defendant contends that Carolyn Carter, assistant principal at the victim's workplace, should not have been permitted to testify about beatings the victim described after the alleged abuse occurred. However, the transcript reveals that the victim recounted the past beatings only when confronted with her injuries. Carter testified that the victim "broke down" and explained what was happening in her life to make her afraid, upset, and bruised. The victim's explanatory comments about beatings "were made contemporaneously with and in explanation of the victim's statements" and crying, thus showing her state of mind. *State v. Westbrooks*, 345 N.C. 43, 60, 478 S.E.2d 483, 493 (1996). Accordingly, Carter's testimony was properly admitted.

[6] Defendant next contends that the victim's sisters and friends were improperly allowed to testify to various beatings that the victim described. In each instance, either the victim called the witness immediately after the beating, placing the statements within the Rule 803(2) excited-utterance exception to the hearsay rule, or she described the beatings as the bases for her fear, placing the statements within this Court's interpretation of the Rule 803(3) state-of-mind or -emotion exception. She referred to the incidents of abuse when explaining why she stayed with defendant and why she wanted to leave him. "The factual circumstances surrounding her statements of emotion serve only to demonstrate the basis for the emotions." *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied*, — U.S. —, 140 L. Ed. 2d 486 (1998). The victim told her family and friends about the beatings "contemporaneously with and in explanation of [her] statements," which showed her then-existing state of mind. *Westbrooks*, 345 N.C. at 60, 478 S.E.2d at 493. Accordingly, the testimony was properly admitted.

[7] Defendant next contends that Carolyn Dinekamp, a friend of the victim's, testified to inadmissible hearsay about a voice-activated recorder. Defendant asserts that Dinekamp's testimony that she gave the victim a voice-activated tape recorder to use to catch defendant

committing adultery was not relevant. However, the trial court found the existence of the tape, purportedly recording defendant having an affair, to be relevant to show the victim's intent to leave the defendant, and that, since there was competent evidence that defendant threatened to kill the victim if she left him, the tape was relevant to prove a motive for the murder. We agree. "[A] victim's state of mind is relevant if it relates directly to circumstances giving rise to a potential confrontation with the defendant." *State v. McLemore*, 343 N.C. 240, 246, 470 S.E.2d 2, 5 (1996). The testimony regarding existence of the tape therefore was properly admitted.

[8] Defendant next asserts various problems with Ella Ransom's testimony. We agree that Ransom's testimony that the victim told her she received a large bruise on her head when defendant threw her into a wall was improper. The victim was not upset, nor was she relating any feelings or intent regarding her relationship with defendant. The testimony therefore falls within *Hardy* as an improper recitation of mere remembered facts. *See Hardy*, 339 N.C. at 228, 451 S.E.2d at 612. However, the voluminous admissible testimony regarding violence directed toward the victim in the home renders this error harmless. *See Bishop*, 346 N.C. at 381, 488 S.E.2d at 777. Defendant's additional two assignments of error to Ransom's testimony also lack merit. Contrary to defendant's assertion, Ransom did not testify that defendant took the victim's paycheck but rather that the victim's paycheck was used to pay bills of the couple's two businesses. This evidence was tangential to the question of defendant's guilt, and there is no reasonable possibility of a different result if the testimony had been excluded. Therefore, any error was not prejudicial. *See id.*; *McLemore*, 343 N.C. at 246-47, 470 S.E.2d at 6. Finally, Ransom's testimony that the victim called defendant from work every day was based on her own observations. The victim's statement that she had to call defendant to reassure him that she was at work reflects her state of mind about her marriage and relates directly to an event that could cause a "confrontation with the defendant." *McLemore*, 343 N.C. at 246, 470 S.E.2d at 5. Admission of this testimony was not error.

[9] Defendant contends Mae Roberson's testimony that defendant came to the school to collect the victim's paychecks and that defendant determined whether the victim could drive a car was inadmissible hearsay. Defendant did not object to this testimony; it is therefore reviewable only for plain error. *See Gray*, 347 N.C. at 174, 491 S.E.2d at 551. We do not conclude that admission of this testi-

mony was such a basic or prejudicial error as to prevent justice from being done. *Id.*

[10] Sandra Reid, one of defendant's former employees, testified, over defendant's objection, that the victim had given part of her paycheck to a friend to create a "nest egg." Reid said, "She [the victim] was saving some money, she planned on leaving, and she gave Mark $200 to hold for her." This clearly reflects the victim's state of mind about her marriage, and the statements "related directly to circumstances giving rise to a potential confrontation with defendant." *State v. Corbett*, 339 N.C. 313, 332, 451 S.E.2d 252, 262 (1994). This testimony was properly admitted.

[11] Lisa Ryan, the victim's sister, testified about a beating the victim suffered at Thanksgiving 1988 and about the circumstances leading to the victim's final trip to Massachusetts to retrieve her sons. Ryan was allowed to testify that because the victim rubbed her brother-in-law's back, "it angered [defendant]. He said that she was flirting with my husband, and he beat her that night and there was a gun involved." This incident previously had been explored with competent testimony; thus, any error in the admission of this testimony was harmless. "Defendant cannot show that there is a reasonable possibility that the outcome of [his] trial would have been different if the trial court had excluded the [evidence] at issue." *Bishop*, 346 N.C. at 381, 488 S.E.2d at 777. Likewise, Ryan's testimony that defendant and the victim argued before the victim came to Massachusetts in 1992, if error, was harmless in light of the overwhelming competent evidence that defendant and the victim argued often and that defendant phoned the victim incessantly while she was in Massachusetts. Accordingly, the testimony did not prejudice defendant. The same analysis applies to defendant's contention that Claire Cannon's testimony to this event was improper. *Id.*

[12] The final witness about whose testimony defendant complains was Claire Cannon, the victim's mother. Cannon's testimony about an incident in which defendant held a gun to the victim's head was admissible for corroborative purposes, and the trial court properly instructed the jury on corroboration. Earlier, Deputy Phalen had testified that he responded to a domestic incident at defendant's home and contacted the victim's family because the victim wished to fly home to Massachusetts. Because the deputy had already testified competently to these facts and to his call to Cannon, Cannon's testimony was admissible for corroboration. *See State v. Alston*, 341 N.C.

198, 232-33, 461 S.E.2d 687, 705 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). As noted, Cannon's testimony to the argument between defendant and the victim before the victim's trip to Massachusetts in 1992 was not prejudicial. The rest of Cannon's testimony was proper; it recounted excited utterances or the victim's state of mind. Accordingly, we find no error.

[13] Whether to exclude evidence under Rule 403 as more prejudicial than probative is within the sound discretion of the trial court. *See, e.g., State v. Meekins*, 326 N.C. 689, 700, 392 S.E.2d 346, 352 (1990). Contrary to defendant's assertion, the evidence here was not overly prejudicial as subjecting defendant to trial for beating his wife. The evidence was admitted to show the escalating nature of his attacks and to rebut his claim that the killing was accidental. Testimony about a defendant-husband's arguments with, violence toward, and threats to his wife are properly admitted in his subsequent trial for her murder. *See Syriani*, 333 N.C. at 377, 428 S.E.2d at 132.

[14] Defendant contends finally that certain statements the victim made, admittedly falling within the state-of-mind exception, must nonetheless be excluded because of remoteness. We consistently have allowed evidence spanning the entire marriage when a husband is charged with murdering his wife in order " 'to show malice, intent and ill will towards the victim.' " *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (quoting *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985)). "Remoteness 'generally affects only the weight to be given . . . evidence, not its admissibility.' " *Syriani*, 333 N.C. at 377, 428 S.E.2d at 132 (quoting *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991)). Therefore, evidence of the entire pattern and history of violence between defendant and the victim was relevant. Defendant's assignment of error is meritless.

[15] In his third assignment of error, defendant contends that the trial court erred in admitting evidence of his first wife's death at his hands from a gunshot wound in 1970. He contends that this death was irrelevant to this case, was more prejudicial than probative if relevant, and was contrary to this Court's holding in *State v. Scott*, 331 N.C. 39, 42, 413 S.E.2d 787, 788 (1992). Defendant also challenges the propriety of the trial court's instructions regarding this evidence.

The State offered evidence that defendant's first wife, Debbie Kraft Murillo, was killed by a gunshot wound defendant inflicted in 1970. When defendant objected to this evidence, the trial court conducted an extensive *voir dire*. Evidence adduced tended to show that

defendant married his first wife when he was seventeen and she was fifteen, and they lived together in California. On the afternoon of 23 August 1970, defendant and Debbie were joking about Debbie's dog; defendant teased Debbie that he would shoot the dog. He chambered a "dud round" in his rifle and walked outside. Debbie followed him, and when Debbie picked up the dog, defendant followed her motion with the muzzle of the rifle. As Debbie turned with the dog, the rifle discharged. Defendant ran for help for his wife, but she died from a gunshot wound through the heart. There was no evidence of a struggle, and there was contradictory, but generally favorable, evidence from Debbie's family members about the happiness of the marriage. Defendant was charged with voluntary manslaughter; he pled guilty to involuntary manslaughter and was placed on probation. In later years defendant gave varying accounts of his first wife's death. In 1987 defendant applied for a Special Forces position with the Army and told the interviewing officer that Debbie was shot while she was in the kitchen and he was cleaning a gun in the living room. He made no mention of his role in loading a "dud round," nor did he mention pointing the gun at his wife and her dog. During the investigation of the present case, defendant told SBI Agent Van Parker that he did not know whether the police investigated Debbie's death. Defendant then told Parker that his first wife died when a hunting rifle accidentally discharged as he was cleaning it after a hunting trip.

The State also introduced evidence of defendant's own statements about Debbie's death. Rebecca Huggins, an acquaintance of both the victim in the present case and defendant, testified that in 1991 she was with defendant at his bar complaining about her husband cheating on her. Defendant responded that "he knew how it was because his first wife used to run around on him and she was a whore." Additionally, Bobby Cannon, brother of the victim here, testified that the victim told him in 1987 that defendant had held a gun to her head and told her, "I should shoot you in the head just like I did my first wife." Cannon testified that defendant told him during a telephone call while the victim was in Massachusetts:

> I'll get her back. I will kill her or she will kill herself. It will—it won't happen right away, but it will happen. She's gotta pay me back first. She owes me. I got kicked out of the Army because of her. I've done it before and I'll do it again.

The trial court ruled that evidence of the shooting death of Debbie Kraft Murillo was admissible under Rule 404(b) and listed eight similarities between the deaths to support the decision:

One, each of the defendant's wives in these instances died as a result of one gunshot wound;

Two, the defendant was the person in the immediate company of both of the victims;

Three, that the defendant told each—told others that each of the shootings was an accident;

Four, that the defendant told others that he did not intend to shoot his wife;

Five, that a firearm was found near the location of each shooting;

Six, that the defendant sought help for each wife;

Seven, that the wound on each wife was to a vital organ;

Eight, that the shooting of each wife took place at the residence of the defendant and of the wife involved.

We agree that evidence of Debbie Kraft Murillo's death was admissible under Rule 404(b) and was relevant to show lack of accident in this case. As we said in *Stager*:

> Rule 404(b) provides that evidence of prior similar acts is properly admissible so long as it is used to prove something other than the defendant's propensity or disposition to engage in like conduct. The one exception to that general rule of admissibility applies when the *only* probative value of the evidence is to show the defendant's propensity or disposition to commit offenses of the type charged.

Stager, 329 N.C. at 310, 406 S.E.2d at 894. As in *Stager*, the similarities between the deaths of defendant's two wives was indicative of intent and lack of accident. Similarities need not be bizarre or uncanny; they simply must "tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.* at 304, 406 S.E.2d at 891. In explaining why evidence of the *Stager* defendant's former husband's accidental shooting death was relevant to her trial for the shooting death of her most recent husband, this Court referred to the doctrine of chances as follows:

> "In isolation, it might be plausible that the defendant acted accidentally or innocently; a single act could easily be explained on that basis. However, in the context of other misdeeds, . . . [t]he

> fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed."

Id. at 305, 406 S.E.2d at 891 (quoting Edward J. Imwinkelreid, *Uncharged Misconduct Evidence* § 5:05 (1984) (footnotes omitted)).

We recognize that, unlike in *Stager*, defendant's first wife's death had been ruled accidental. The trial court in this case, without objection, ruled that evidence of defendant's prior conviction was inadmissible unless he took the stand. Defendant was therefore free to argue that Debbie's death was purely accidental and that he was entirely free from culpability. His assertion, therefore, was exactly that of the defendant in *Stager*, that his first spouse's death was an accidental shooting. "Where, as here, an accident is alleged, evidence of similar acts is more probative than in cases in which an accident is not alleged." *Id.* at 304, 406 S.E.2d at 891.

Here the trial court told the jury that it could consider evidence of Debbie's shooting when deciding issues of intent, plan, premeditation, and absence of accident. Jurors were expressly warned not to consider the death as "proof of the defendant's propensity to commit the crime for which [he] is charged or as evidence of the defendant's character." Contrary to defendant's reading of *Stager*, similarities such as those between the deaths of Debbie and the victim here may be used to support a finding of intent. *See id.* at 307, 406 S.E.2d at 892-93. The trial court here properly explained to the jury, using agreed-upon instructions, that intent is part of premeditation. *See State v. Crawford*, 344 N.C. 65, 74, 472 S.E.2d 920, 926 (1996). We therefore reject defendant's arguments regarding the trial court's charge to the jury. Debbie Murillo's death was evidence of a similar act, and it was probative of whether defendant accidentally killed two of his four wives. The evidence was properly admitted to show lack of accident and to support a finding that defendant intended to kill the victim here.

Because evidence of Debbie's death was allowed to show, *inter alia*, lack of accident, defendant's reliance on *State v. Morgan*, 315 N.C. 626, 638, 340 S.E.2d 84, 92 (1986), is misplaced. Rule 404(b) evidence is allowed so long as its probative value is not limited to showing propensity to commit a crime; this remains true even if the evidence tends also to show some other act or propensity or to defeat a claim of self-defense. *See State v. Hipps*, 348 N.C. 377, 404, 501 S.E.2d 625, 641 (1998).

[16] Defendant complains that the evidence of the death of his first wife is probative only if one ignores his involuntary-manslaughter conviction and supposes that he murdered his first wife and escaped punishment. Consequently, he argues that admitting evidence of the first wife's death subjects him to double jeopardy, relying on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787. We disagree. *Scott* involved evidence of a prior criminal charge of which the defendant was acquitted, yet the jury was instructed to consider the evidence "on the issue of defendant's 'intent, knowledge, plan, scheme, or design.' " *Id.* at 41, 413 S.E.2d at 788. Several distinctions are obvious.

First, defendant here pled guilty to manslaughter and therefore stands *convicted* of that crime. *See, e.g.*, N.C.G.S. § 15A-1331(b) (1997); *State v. Sidberry*, 337 N.C. 779, 782, 448 S.E.2d 798, 800 (1994). A prior conviction may be a bad act for purposes of Rule 404(b) if substantial evidence supports a finding that defendant committed both acts, and the "probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged." *Stager*, 329 N.C. at 303, 406 S.E.2d at 890. The trial court here conducted an extensive *voir dire* to determine whether the deaths of defendant's two wives were sufficiently similar to support an inference by the jury that defendant committed both acts. We hold that substantial evidence was presented from which a jury could determine that defendant committed the similar act, and the evidence was properly admitted.

Second, the evidence of Debbie's death was not admitted to show only intent, plan, or motive. In *Scott* the State introduced evidence that the defendant had raped a woman two years earlier after meeting her at the same convenience store where he met his current victim. In the prior rape case, the defendant had been acquitted after claiming consent. Therefore, this Court held it was prejudicial to introduce his prior "rape" as evidence of a scheme or plan in his current rape prosecution. We held it to be error and violative of Rule 403 as a matter of law to introduce evidence of a prior alleged offense for which a defendant "has been tried and acquitted . . . when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime." *Scott*, 331 N.C. at 42, 413 S.E.2d at 788.

Here, however, defendant was not acquitted of the prior crime which was argued to the jury, so *Scott* does not control. *See State v. Lynch*, 337 N.C. 415, 419, 445 S.E.2d 581, 582 (1994) (interpreting

Scott to apply only to cases with prior acquittals). Further, the probative value of Debbie's death does not depend on any additional fact or element not present in defendant's conviction. Defendant's claim of accident in Debbie's death was argued to the jury as making more incredulous his claim of accident in the shooting death of the victim here. "[T]he more often a defendant performs a certain act, the less likely it is that the defendant acted innocently." *Stager*, 329 N.C. at 305, 406 S.E.2d at 891. We note that defendant himself made statements to the victim and her brother, Bobby Cannon, before the victim's death, indicating that he had killed his first wife intentionally. On the day of the victim's death, defendant angrily complained to his employee, Kendal Breedlove, in reference to the drive to the hospital the night before, "The bitch s— in my truck." When asked if he was worried about what people would say about his wife's death, defendant told Breedlove, "I could walk through a pile of s— and come out smelling like a bed of roses." Clearly, defendant's own statements call into question his assertion of accident in both wives' deaths.

Finally, "[w]hether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Id.* at 308, 406 S.E.2d at 893. In light of the extensive *voir dire* and the findings of fact by the trial court, we find no abuse of discretion in allowing the evidence regarding Debbie Kraft Murillo's death. Further, the death was not so remote in time as to have lost its probative value or be more prejudicial than probative. *See id.* at 307, 406 S.E.2d at 893. Accordingly, defendant's third assignment of error is overruled.

[17] In his fourth assignment of error, defendant contends that his federal and state constitutional rights to be present at all stages of his capital trial were violated by three recorded bench conferences. This issue was decided contrary to defendant's position in *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991). In *Buchanan* this Court determined that a defendant's federal constitutional rights are not violated when, as here, he makes no request to be present at the bench conferences, and his attorneys are present to represent and protect his interests. *See id.* at 215, 410 S.E.2d at 839-40. We follow *Buchanan* and hold that defendant's right under the federal Constitution to be present was not violated.

Defendant also asserts that his rights under Article I, Section 23 of the North Carolina Constitution were violated. Defendant bears the burden "to show the usefulness of his presence in order to prove a violation of his right to presence." *Id.* at 224, 410 S.E.2d at 845.

"Once the defendant meets this burden, the burden shifts to the State to establish that the error is harmless beyond a reasonable doubt." *State v. Neal*, 346 N.C. 608, 616, 487 S.E.2d 734, 739 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 131 (1998).

> [A] defendant's state constitutional right to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties.

Buchanan, 330 N.C. at 223, 410 S.E.2d at 845.

Defendant complains that his right to be present was violated by three recorded bench conferences with his attorneys and attorneys for the State. Defendant contends that the first bench conference regarding dismissal of a sick juror and seating of an alternate juror violated his right to be present because he "could have related to his attorneys his observance of this juror." This conference was partly in open court outside the jury's presence and partly at the bench. The second and third conferences, regarding whether opening arguments had referred to the victim's performance as a teacher and whether the victim and her sister were the same size such that a demonstration was proper, were held with defendant's counsel present at the bench and defendant in the courtroom. At all times defendant either had actual knowledge of the substance of the discussion or had constructive notice through his attorneys. As in *Buchanan*, "defendant, through his attorneys, had every opportunity to inform the court of his position and to contest any action the court might have taken." *Id.* Defendant makes no showing that his presence at the bench would have been useful; under *Buchanan*, his rights were not violated by the bench conferences. *See also State v. Robinson*, 346 N.C. 586, 601-02, 488 S.E.2d 174, 184 (1997). This assignment of error is without merit.

[18] In his fifth assignment of error, defendant asserts that the trial court committed constitutional error in failing to excuse *ex mero motu* two jurors who inadvertently and fleetingly entered the courtroom during hearings. The record indicates that there was actually only one juror involved. The first alleged misconduct was during a *voir dire* about evidence of Debbie Kraft Murillo's death, and it appears in the transcript as follows:

> [PROSECUTOR]: In that it did not happen the way the defendant said it happened. If I may refer to Ms. Kraft's testimony before

your Honor, the day after the incident, when Ms. Kraft talked to the defendant, he was talking about Deborah holding the dog over her head. You may remember her holding her hands up like this (demonstrating) and then he shoots her.

(Juror, Mr. Dowless, entering courtroom.)

THE COURT: Wait just a second. You may step out in the hall.

(Juror, Mr. Dowless, exiting courtroom.)

[PROSECUTOR]: Within three days, he tells Mr. Quinn . . . .

The second was during a hearing about a witness' written statement. It appears in the transcript as follows:

[PROSECUTOR]: You have instructed already for us to review this again. We will go back and review again, making sure that every one that we have found to be—have exculpatory information, that it is properly worded, properly paragraphed, and we will turn that over. If there's any change at all, we will make it known immediately to defense counsel.

(Juror, Mr. Dowless, opening the door to jury room.)

THE COURT: Just—just a moment. Sir, if you can wait just a minute.

(Juror, Mr. Dowless, complying with request and remaining in the jury room.)

THE COURT: That's another issue we're gonna have to deal with before we get around to deliberations.

[DEFENSE COUNSEL]: What—what is the harm, at this point, after this showing? We're not asking to allow us to go . . . .

The final instance occurred during a *voir dire* about a police report. It appears in the transcript as follows:

[PROSECUTRIX]: Your Honor, my understanding is the Sheriff's Department policy is to type up some of the information which is included on the handwritten form and that—that the typewritten form is kept in a computer and we just have copies of both of them.

(Juror, Mr. Dallas [sic], opening door to jury room.)

THE COURT: You can step out in hall. Hold on just a second.

(Juror, Mr. Dallas [sic], complying with request.)

THE COURT: If we can make a copy of that for the record—

[DEFENSE COUNSEL]: Surely.

No juror named "Dallas" was seated for this trial. We thus assume that the juror referred to is again Dowless.

"The 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). This Court gives trial courts "the responsibility to conduct investigations to this effect, including examination of jurors when warranted, to determine whether any misconduct has occurred and has prejudiced the defendant" when allegations of misconduct are made. *State v. Barnes*, 345 N.C. 184, 226, 481 S.E.2d 44, 67, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134 (1997), *and cert. denied*, —— U.S. ——, 140 L. Ed. 2d 473 (1998). The trial court retains sound discretion over the scope of any such inquiry. *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992).

In previous cases there was some evidence that misconduct had occurred outside the presence of the court. "An inquiry into possible misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place." *Barnes*, 345 N.C. at 226, 481 S.E.2d at 67. In *Willis*, for example, we held that when outside contact with a juror is shown, the trial court must "determine whether such contact resulted in substantial and irreparable prejudice to the defendant." *Willis*, 332 N.C. at 173, 420 S.E.2d at 168. What action to take on a motion for a new trial is then within the court's discretion.

> "The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge."

State v. Johnson, 295 N.C. 227, 234-35, 244 S.E.2d 391, 396 (1978) (quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915)).

We note first that no motion was made for a new trial based on juror misconduct. We have held that there is no absolute affirmative duty to investigate juror conduct absent reports of prejudicial con-

duct. *See State v. Harrington*, 335 N.C. 105, 115, 436 S.E.2d 235, 240-41 (1993). Both the existence of misconduct and the effect of misconduct are determinations within the trial court's discretion. *See id.* at 115-16, 436 S.E.2d at 241. The trial court here witnessed all of the events in question. Neither party moved for a hearing or for a further inquiry into what juror Dowless might have overheard; both simply continued with their arguments. Further, any discussion juror Dowless might have overheard was either eventually allowed before the jury (the first instance) or tangential to the issues (the second and third instances). We conclude that the trial court did not abuse its discretion in not excusing juror Dowless *ex mero motu* for juror misconduct. Accordingly, this assignment of error is overruled.

[19] In his sixth assignment of error, defendant contends the trial court erroneously admitted certain evidence. He first contends that the trial court should not have allowed, over his objection, character evidence concerning the victim's performance as a school teacher. The trial court held a *voir dire* regarding this evidence and concluded that it was relevant to rebut the contention raised in defendant's opening statement that the victim was an irresponsible alcoholic. "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986); *see also* N.C.G.S. § 8C-1, Rule 401. We have held that

> "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence 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 if it reasonably allows the jury to draw an inference as to a disputed fact."

State v. Jones, 336 N.C. 229, 243, 443 S.E.2d 48, 54 (quoting *State v. Arnold*, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973)) (citations omitted in original), *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994). The trial court here evaluated the evidence for its probative value and determined that the victim's teaching performance, testified to by professional colleagues who worked with her on a regular basis, was relevant to rebut contentions in defendant's opening statement that the victim was a violent alcoholic whose abusive behavior was not limited to defendant. This determination was well within the bounds of the trial court's discretion. *See State v. Jones*, 342 N.C. 457, 464,

466 S.E.2d 696, 699, *cert. denied*, 518 U.S. 1010, 135 L. Ed. 2d 1058 (1996). Accordingly, we find no error.

[20] Defendant next contends the trial court erred in overruling his objection to a demonstration by the victim's sister, Paula Callahan. After testifying that she and the victim wore the same clothes and were the same size, Callahan demonstrated for the jury that her forearm and head could not be positioned such that the bullet holes matched as they did in the victim's body if an accident had occurred in the way defendant claimed. She based this demonstration on autopsy photos of the victim. Defendant contends this demonstration was not necessary for the trier of fact and that Callahan could easily have faked her inability to position her body. He argues that the demonstration was unduly prejudicial under Rule 403.

Where, as here, the asserted defense is accident, a demonstration tends to "make the existence of [a] fact that is of consequence . . . more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401. The decision of whether to exclude relevant evidence under Rule 403 rests in the discretion of the trial court. *See State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). The trial court conducted a *voir dire* and evaluated the probative and prejudicial value of the demonstration. Having determined it to have been conducted under conditions that were reasonably similar, to be helpful, and not to be overly prejudicial, the trial court determined that the evidence was admissible. We find no abuse of discretion and overrule defendant's assignment of error.

Defendant next contends that evidence of the voice-activated recorder given to the victim by Carolyn Dinekamp violated Rules 401 through 403. As previously determined in considering defendant's second assignment of error, this evidence was relevant to show the victim's state of mind. The exclusion of relevant evidence under Rule 403 rests in the trial court's discretion. *See id.* We find no abuse of that discretion here. This argument is without merit.

[21] Defendant further contends that the trial court erroneously sustained the State's objection to defense counsel's cross-examination of Keith Hanson, the victim's minor son. Defendant asserts that the failure to allow impeachment of the witness with a prior inconsistent statement violates N.C.G.S. § 8C-1, Rule 607. Hanson testified at trial that defendant looked angry immediately before the shooting; no such description was present in the statement he made to police officers immediately after the shooting. The State objected to defense

counsel's question, "Now, you did not tell Detective Underwood that, did you?" The objection was based on the detective's having "barely talked to the boys because they were traumatized." The trial court sustained the objection.

Ordinarily, "the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *Id.* at 290, 389 S.E.2d at 61. It "is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict." *State v. Woods*, 345 N.C. 294, 307, 480 S.E.2d 647, 653, *cert. denied*, — U.S. —, 139 L. Ed. 2d 132 (1997). Hanson had already read to the jury the statement he gave to Detective Underwood. Thus, when the trial court sustained the State's objection, Hanson had already presented the jury with the very evidence defendant sought to elicit in asking Hanson whether he told Detective Underwood that defendant looked angry. Because the State's objection could have been sustained for repetitiveness, we find no abuse of discretion. *See State v. Jaynes*, 342 N.C. 249, 279-80, 464 S.E.2d 448, 467 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). Accordingly, this argument is without merit.

[22] Next, defendant contends that the trial court improperly limited his evidence that his marriage to Debbie Kraft Murillo was happy. Defendant sought to introduce photographs and testimony rebutting the claim of State's witnesses that the apartment defendant shared with his first wife had bullet holes in the walls. He contends the photographs taken eight months before Debbie was killed were relevant to rebut the State's evidence and were necessary to his defense.

After hearing arguments from both attorneys regarding the probative value and prejudicial effect of photographs of Debbie, her sisters, her dog, and defendant, the court allowed the majority of the photos to rebut various contentions of family animosity that were raised by the testimony of Debbie's stepmother. It determined that some could be used to illustrate testimony of the persons pictured. Because no one could testify to taking the pictures of the walls and because they were not necessary or sufficiently dated to illustrate testimony of witnesses who denied seeing bullet holes in the walls, the photos of the walls were disallowed.

"Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. Rule 403 allows the exclusion of relevant evidence that is probative but poses greater danger of confusing the issues, mis-

leading the jury, or being cumulative. *See* N.C.G.S. § 8C-1, Rule 403. The trial court here exercised proper discretion to exclude unreliable photographs, taken at an indeterminate date, that could have been more confusing or misleading than probative. Defendant presented numerous witnesses who testified that he had a happy marriage with Debbie. He has not shown an abuse of discretion by the trial court in excluding these photographs, nor has he shown that he was unable to present a defense without the excluded photographs. This argument is without merit.

In his seventh assignment of error, defendant contends the evidence was insufficient to support his murder conviction based on premeditation and deliberation. He argues that without allegedly inadmissible prejudicial evidence, the jury would not have returned a conviction. He asserts that the uncontroverted facts raise only a suspicion or conjecture that he killed his wife; therefore, his conviction cannot stand under *State v. Lee*, 287 N.C. 536, 215 S.E.2d 146 (1975).

For reasons stated above, defendant's contentions that inadmissible evidence was presented during his trial and prejudiced him are without merit. The evidence presented supports a conviction for premeditated and deliberate murder. This assignment of error is overruled.

[23] In his eighth assignment of error, defendant asserts that the trial court should have intervened *ex mero motu* several times during the prosecutors' closing arguments in the guilt phase. Defendant asserts that the prosecutor asked the jury to find him guilty of first-degree murder because he "got away with it" in the death of Debbie Murillo. Defendant contends that the arguments that he "got away with" something were inherently unfair because the prosecutor knew of defendant's previous conviction for Debbie's death. The trial court had previously ruled, without objection, that evidence of defendant's conviction would be inadmissible unless defendant took the stand. Thus, under *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978), the prosecutor should not have argued that defendant "got away with" anything. Defendant contends that this argument was grossly improper and that the trial court abused its discretion in failing to intervene *ex mero motu*.

" 'Argument of counsel is largely within the control and discretion of the trial judge. Counsel must be allowed wide latitude in the argument of hotly contested cases.' " *State v. Brogden*, 329 N.C. 534,

549, 407 S.E.2d 158, 168 (1991) (quoting *State v. Lynch*, 300 N.C. 534, 551, 268 S.E.2d 161, 171 (1980)). Because defendant did not object,

> "the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial."

State v. Gaines, 345 N.C. 647, 673, 483 S.E.2d 396, 412 (quoting *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995)), *cert. denied*, — U.S. —, 139 L. Ed. 2d 177 (1997).

The trial court had already determined that evidence of Debbie's death was admissible to show intent and lack of accident under Rule 404(b). We have held that this was proper. A review of closing arguments in the guilt phase reveals that the prosecutors did no more than indicate similarities between the two wives' deaths and argue the improbability that an expert shooter would accidentally shoot and kill two of his four wives. These are reasonable inferences from the evidence presented and therefore were proper arguments. *See id.* at 675, 483 S.E.2d at 413. This assignment of error is without merit.

[24] Defendant next contends that the prosecutor impermissibly argued that defendant's forensic expert, Robert Kopec, was paid to lie on the stand. He assigns error to the following argument:

> [SBI Agent] Tom Trochum said no one identifies stippling from a photograph. It is improper, it is unscientific, and it leads to erroneous results, which is exactly what Kopec testified to you. An erroneous result. It is a sad state of our legal system, that when you need someone to say something, you can find them. You can pay them enough and they'll say it.

Defendant cites the Court of Appeals' decision in *State v. Vines*, 105 N.C. App. 147, 412 S.E.2d 156 (1992), to support his argument. However, even in *Vines*, where the Court of Appeals found gross impropriety in the prosecutrix's argument that "[y]ou can get a doctor to say just about anything these days" and in her insinuation that the expert was motivated by "pay," the court determined that a new trial was not warranted in light of the overwhelming case against the defendant. *See id.* at 156, 412 S.E.2d at 162-63. When we have analyzed closing arguments in sentencing proceedings and referred to *Vines*, we have assumed *arguendo* that the statements were error but held them not prejudicial error requiring a new sentencing proceeding. *See State v. Hill*, 347 N.C. 275, 300, 493 S.E.2d 264, 278

(1997) (assuming error *arguendo* in statement that mitigators "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," but finding no entitlement to new sentencing proceeding), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 1099 (1998); *State v. Spruill*, 338 N.C. 612, 652, 452 S.E.2d 279, 300 (1994) (assuming error *arguendo* in statement, "You know, he's been paid, you know darn well he did," but finding no entitlement to new sentencing proceeding), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). While these cases are instructive, they are not controlling because the challenged arguments here were during the guilt phase of defendant's trial.

"[T]his Court has consistently held that 'an expert witness' compensation is a permissible cross-examination subject to test partiality towards the party by whom the expert was called.' " *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 598-99 (1994) (quoting *State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988)). Therefore, evidence that defendant paid the expert was proper; the question is whether it was a proper subject in the closing argument. "[I]t is not improper for the prosecutor to impeach the credibility of an expert during his closing argument." *State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 500 (1997). In assessing the propriety of references to payment of expert witnesses in guilt-phase closing arguments, this Court has relied on common knowledge. We have found no error even when defendant had objected during the arguments. For example, we said:

> The prosecutor also argued that the psychiatrist admitted in his testimony that "he was hired for the sole purpose to form this intoxication defense." Although the record does not show the psychiatrist testified he was hired to form a defense, it is evident this was the reason he was employed.
>
> We hold that the defendant was not unfairly prejudiced by the prosecutor's argument.

State v. Jones, 339 N.C. 114, 150, 451 S.E.2d 826, 845 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). Likewise, in approving an argument by a prosecutor that a defendant's mother "has tried to color this as best she can in the light that is most favorable to [her son;] I mean a mother would do that," we found no prejudicial error because "[i]t is a matter of common knowledge that a mother will likely shade her testimony favorably for her son." *State v. Harris*, 338

N.C. 129, 147, 449 S.E.2d 371, 379 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995).

In light of our previous holdings, we cannot conclude that the prosecutor's arguments were so grossly improper as to require the trial court to intervene *ex mero motu* when, at trial, defense counsel apparently did not believe the argument was prejudicial. *See State v. Campbell*, 340 N.C. 612, 630, 460 S.E.2d 144, 153 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996). Further, even assuming *arguendo* that this portion of the argument was improper, it was not prejudicial to defendant in light of the substantial evidence of his guilt. *See id.* at 631, 460 S.E.2d at 154. This assignment of error is overruled.

[25] In his ninth assignment of error, defendant contends that the trial court erred in allowing the prosecution's improper closing arguments during the sentencing phase. He contends the trial court erroneously overruled defendant's objection to one improper argument and erroneously failed to intervene *ex mero motu* in other improper arguments. Although defendant asserts constitutional claims regarding the closing arguments, he "made no constitutional claims at trial concerning the State's closing arguments and will not be heard on any constitutional grounds now." *Barnes*, 345 N.C. at 237, 481 S.E.2d at 73; *see* N.C. R. App. P. 10 (b)(1). Preliminarily, we note that "trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992).

The only evidence the State presented at sentencing was a certified copy of defendant's record from California with the relevant statute attached. The record, detailing defendant's conviction for the 1970 death of his first wife, showed that the involuntary manslaughter charge was dismissed within one year of defendant's guilty plea. Defendant asserts that it was error for the prosecutrix to tell the jury that dismissals of felony convictions happen all the time. He says the arguments were designed to "denigrate the seriousness that the California judicial system placed on defendant's role" in the shooting of Debbie Murillo.

In *Barnes* we held that defendant's allegation that the prosecutor misstated the law regarding mitigators was not error because the arguments had to be viewed in context and as a whole. *See Barnes*, 345 N.C. at 239, 481 S.E.2d at 75. Here defendant asserts that the prosecutrix misstated the law regarding the sole aggravator by telling the

jury that dismissals such as defendant's are commonplace. Viewing the argument as a whole, however, we conclude that the prosecutrix was explaining why defendant's California conviction still counted as a conviction for purposes of the jury's finding the aggravating circumstance contained in N.C.G.S. § 15A-2000(e)(3) (prior violent felony). The prosecutrix explained how a dismissal may occur and when a dismissal must occur, and illustrated that the dismissal was not an exoneration by referring to several cases. As in *Barnes*, when viewed as a whole, "the argument was correct, and defendant was not prejudiced." *Id.* Further, even if this statement was error, defendant suffered no prejudice from it. Defense counsel was free to argue, and in fact did argue at sentencing, that not all convictions are set aside and that certain conditions must be met for that to occur. Accordingly, this assignment of error is overruled.

[26] Defendant also assigns as error sentencing-phase closing arguments to which he did not object. Our inquiry is as to whether the remarks were "so grossly improper as to require the trial court to intervene *ex mero motu*." *Bishop*, 346 N.C. at 395, 488 S.E.2d at 785. Defendant contends that the prosecutor impermissibly asked the jury to find that some of the nonstatutory mitigators were in fact aggravators. He argues that the following argument required *ex mero motu* intervention:

> Beth Murillo had previously threatened the defendant. Beth Murillo also said that she didn't mean it. Beth said, "I could never do that. I would kill myself first." And I submit to you, if Beth Murillo had been treated like a woman and a lady by a gentle, loving, and caring husband, she would never have even gotten to the point of even uttering such things. But it was Beth that was receiving, especially toward the end of her life, these murderous threats, "Shall I kill you today or shall I wait?"
>
> Mitigating circumstance, members of the jury, for him? What value could you assign to that? Or should it actually go against him? Should it actually be considered against him?
>
> Beth Murillo threatened the defendant that night. The same argument, members of the jury . . . .

Viewing the argument as a whole, *see State v. Ingle*, 336 N.C. 617, 646, 445 S.E.2d 880, 895 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995), we conclude that the prosecutor merely argued the weight of the nonstatutory mitigating circumstances.

> This Court has consistently held that when a jury determines that a *statutory* mitigating circumstance exists, it is not free to refuse to consider the circumstance and must give it some weight in its final sentencing determinations, but the amount of weight any circumstance may be given is a matter left to the jury. We have also consistently held, however, that it is for the jury to determine whether submitted *nonstatutory* mitigating circumstances established by the evidence should be given any mitigating value. As a matter of law, *nonstatutory* mitigating circumstances are mitigating only when one or more jurors deem them to be so.

State v. Keel, 337 N.C. 469, 495, 447 S.E.2d 748, 762-63 (1994) (citations omitted), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995). A prosecutor may argue the weight to be given to mitigators in his arguments at sentencing. *See State v. Walls*, 342 N.C. 1, 57, 463 S.E.2d 738, 768 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996); *State v. Craig*, 308 N.C. 446, 460, 302 S.E.2d 740, 749, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). Here the prosecutor argued that the nonstatutory mitigating circumstances should not weigh heavily in the jurors' minds. There was no additional submission of aggravators; indeed, the prosecution in closing arguments emphasized that only one aggravator was being submitted to the jury. There was no error in the argument and certainly none that would require the trial court to intervene *ex mero motu*. *See State v. Geddie*, 345 N.C. 73, 100, 478 S.E.2d 146, 160 (1996), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 43 (1997).

[27] Defendant next contends that the prosecutor impermissibly argued for imposition of the death penalty because it will deter crime generally, citing the following argument:

> America has been confronted, at various stages in its history, with various crises. America's had to fight evil in various places in various ways. We've had to have a fighting for principles, for justice, for decency, for law and for order. World War II, our young men and women had to go off and they had to fight for the principle of liberty against wickedness. Various other wars. And today, America has to fight for principles of decency and liberty within its own boundaries because of the crime.
>
> Today, look at where we are, where the decent people are literally imprisoned in their homes, not safe in the streets. And you are the ones that can send a message out of [sic]: We will stand

> up, we will have our women and children and men able to walk around free and in safety. It doesn't get fixed without Americans being willing to take the duty that they are required to take under the law, that you said you were willing to take.

We disagree with defendant's characterization of this argument.

This Court has upheld closing arguments reminding jurors that they were "the conscience of the community." *State v. Moseley*, 338 N.C. 1, 52-53, 449 S.E.2d 412, 443 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). In *Walls* we approved a closing argument in a capital-sentencing proceeding that urged jurors to "send a thunderous message to anybody who would think about committing such a wicked, evil, heinous act in the borders of the county." *Walls*, 342 N.C. at 61-62, 463 S.E.2d at 770-71. We previously have distinguished the arguments in *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985) (improper to ask the jury to lend an ear to the community), on which defendant relies, from arguments such as those here. In *Quesinberry* we approved a closing argument, saying, "[h]ere, instead, the prosecutor asked the jury to send a message to the community, not to 'lend an ear to the community.' " *State v. Quesinberry*, 325 N.C. 125, 141, 381 S.E.2d 681, 691 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). Here the prosecutor was reminding the jury of its role and obligation to follow the law in sentencing defendant. The argument did not impermissibly cite to general deterrence, and the prosecutor stayed within the bounds this Court has established when the prosecutor is arguing zealously for the highest penalty. Accordingly, this argument is without merit.

[28] Finally, defendant argues that the prosecutor impermissibly told the jury that the law does not permit sympathy in its consideration of a proper penalty. Defendant asserts error in the following argument:

> I suggest to you, this is not a matter for sympathy or prejudice at this time. This is a matter for you to look at what you have seen. It is wickedness. Don't let the wickedness spread like a bay tree. Cut it down. It is evil. What you have heard is evil to the core. Like a rattlesnake. Get rid of it, members of the jury. And if you follow the law, that's what you will do. There's no question about it.

Although the trial court may not preclude the jury from considering compassion, "the prosecutor may discourage the jury from having

mere sympathy not related to the evidence in the case affect its decision. Such statements are consistent with the prosecutor's role in seeking a recommendation of death." *State v. Rouse*, 339 N.C. 59, 93, 451 S.E.2d 543, 561 (1994) (citations omitted), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). Moreover, the prosecutor here did not tell the jury it could not consider sympathy; rather, he suggested that the jury should not consider sympathy and should instead focus on the facts. This was not a misstatement of the law and "was well within the wide latitude permitted to prosecutors in their arguments." *State v. Richmond*, 347 N.C. 412, 443, 495 S.E.2d 677, 694, *cert. denied*, — U.S. —, — L. Ed. 2d —, 67 U.S.L.W. 3232 (1998). Accordingly, this assignment of error is overruled.

[29] In defendant's tenth assignment of error, he contends that submission of the (e)(3) aggravating circumstance was improper. *See* N.C.G.S. § 15A-2000(e)(3) (1988) (amended 1994). Defendant asserts that although California law allows a dismissed conviction to be pled and proved in a subsequent prosecution, no cases do so when the prior conviction was twenty-two years earlier. Further, he contends that because California capital-sentencing law does not consider a conviction of involuntary manslaughter as an aggravating circumstance, it is unfair to use his California conviction thereof to aggravate his sentence in this case. Finally, he contends that using the prior California conviction in this sentencing defeats the purpose of the California legislature in allowing dismissals. He cites *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982), for the proposition that since the sole aggravator was submitted in error, his death sentence must be vacated.

Under North Carolina law the jury may consider a conviction for involuntary manslaughter as an aggravating circumstance. *See* N.C.G.S. § 15A-2000(e)(3); *Keel*, 337 N.C. at 490-91, 447 S.E.2d at 760. The fact that the conviction originated in another state does not preclude our courts from submitting it under (e)(3). *See State v. Taylor*, 304 N.C. 249, 278-79, 283 S.E.2d 761, 780 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). Defendant concedes that California law, under which he was convicted, allows a dismissed conviction to be pled and proved in any subsequent prosecution. *See People v. Majado*, 22 Cal. App. 2d 323, 325-26, 70 P.2d 1015, 1016 (1937). He does not argue any effect that the dismissal may have on North Carolina's sentencing procedures. Instead, defendant contends that the conviction for involuntary manslaughter was too remote in time to be used to enhance a subsequent conviction. We disagree.

We recently reiterated the requirements for consideration of a prior conviction under the (e)(3) aggravator. N.C.G.S. § 15A-2000(e)(3)

> "requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the 'use or threat of violence to the person,' and that (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose."

State v. Bishop, 343 N.C. 518, 546, 472 S.E.2d 842, 857 (1996) (quoting *State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583 (1979)), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 723 (1997). These requirements were met. We do not find defendant's arguments about frustrating California's legislative intent relevant. This assignment of error is overruled.

Defendant next raises several issues which he correctly notes we have decided contrary to his position, including: (1) that the trial court violated his constitutional rights by denying his motion to require the State to disclose aggravating circumstances; (2) that the trial court violated his due-process rights by preventing him from arguing to the jury about parole eligibility; (3) that the trial court erred in denying his motion to declare the death penalty unconstitutional; (4) that the trial court committed constitutional error by denying his motion to bifurcate the trial; (5) that the trial court's instructions allowing the jury to consider mitigating and aggravating circumstances in equipoise violated his constitutional rights; (6) that the trial court's definition of mitigating circumstances unconstitutionally limited the mitigating evidence the jury could consider; (7) that the trial court's instruction that all evidence in both phases of the trial was competent for sentencing allowed a death sentence to be returned based on nonstatutory aggravating circumstances; (8) that the trial court's instructions defining the burden of proof for mitigating circumstances were vague and erroneously allowed jurors to define the legal standard for themselves; (9) that the trial court's instruction allowed jurors to reject submitted mitigators because they had no mitigating value and thus violated his constitutional rights; and (10) that the trial court's instructions gave the jury discretion to reject proven mitigating circumstances and thus violated his constitutional rights. We have reviewed defendant's arguments, and we find no compelling reason to reconsider our prior holdings. These assignments of error are overruled.

[30] Having found no error in defendant's trial or sentencing proceeding, we now review the record to determine: (1) whether the evidence supports the aggravating circumstance found by the jury; (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 previously had been convicted of a felony involving the use of violence to the person. *See* N.C.G.S. § 15A-2000(e)(3). We conclude that evidence in the record fully supports the finding of this aggravating circumstance. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We therefore turn to our final statutory duty of proportionality review.

[31] 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). 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. *See 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, *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).

This case is distinguishable from each of these cases. First, defendant here was convicted of murder on the basis of premeditation and deliberation. In three of the seven disproportionate cases—*Benson*, *Stokes*, and *Rogers*—the defendants were convicted solely on the basis of the felony murder rule. We have often emphasized that

"[a] conviction based on the theory of premeditation and deliberation indicates a more calculated and cold-blooded crime." *State v. Davis*, 340 N.C. 1, 31, 455 S.E.2d 627, 643, *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83 (1995). Further, the jury found the (e)(3) statutory aggravating circumstance of prior conviction of a violent felony. None of the seven cases in which this Court found a sentence of death disproportionate included this aggravating circumstance. *See Harris*, 338 N.C. at 161, 449 S.E.2d at 387. Moreover, this Court has found the (e)(3) circumstance, standing alone, sufficient to sustain a sentence of death. *See 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); *State v. Keel*, 337 N.C. 469, 447 S.E.2d 748; *see generally 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).

Although defendant did seek medical attention for his victim, as did the defendant in *Bondurant*, we said in *Bondurant*, "we do not mean to imply that this factor is determinative of our proportionality consideration." *Bondurant*, 309 N.C. at 694 n.1, 309 S.E.2d at 183 n.1. Here, unlike in *Bondurant*, there was an expressed motive for the killing; defendant had said that if the victim left him, he would kill her, and evidence indicated that the parties were separated or separating. We also noted in *Bondurant* that there was no history of violence or animosity between the parties; here, by contrast, defendant had physically abused and threatened to kill the victim for years prior to actually killing her. Further, the victim was awakened in her home and killed. The sanctity of the home renders a murder there more deserving of the ultimate penalty. *See 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). We find the instant case distinguishable from each of the seven cases in which we have found the death penalty to be disproportionate.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all 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 it disproportionate or those in which juries have consistently returned recommendations of life

imprisonment. Defendant correctly asserts that many cases of domestic violence ending in murder result in life sentences. Similarity of cases, however, is not the final word on proportionality; it "merely serves as an initial point of inquiry." *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). 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." *Id.* The jury here found eleven of twenty mitigating circumstances but notably rejected five indicating that the violence in the relationship was reciprocal. No member of the jury found any of the following submitted mitigators: Beth Murillo became aggressive while consuming alcohol and was consuming alcohol that night; Beth Murillo had previously threatened defendant; Beth Murillo had threatened defendant that night; Beth Murillo had previously assaulted defendant; Beth Murillo and defendant were engaged in an argument at the cabin prior to the time of the shooting. Additionally, the jury rejected the mitigating circumstance that defendant had a loving relationship with his first wife, Debbie, who also died by his hand.

In light of these factors, the prior violent felony resulting in another death, and the long history of defendant's abuse of the victim, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that the defendant received a fair trial and a fair capital sentencing proceeding, free from prejudicial error.

NO ERROR.

JOHN HARVEY NELSON v. DARYL DEAN C. FREELAND AND BELINDA BRITTAIN FREELAND

No. 216A98

(Filed 31 December 1998)

Negligence § 105 (NCI4th)— premises liability—invitee and licensee distinction—abolished

The distinction between licensees and invitees is eliminated and a standard of reasonable care toward all lawful visitors is adopted. Adoption of a true negligence standard eliminates the complex, confusing, and unpredictable state of premises-liability law and replaces it with a rule which focuses the jury's attention upon the pertinent issue of whether the landowner acted as a reasonable person under the circumstances. The duty imposed upon owners and occupiers of land is only the duty to exercise a reasonable care in the maintenance of the premises for the protection of lawful visitors; owners and occupiers of land are not now insurers of their premises and the intent is not for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. It is further emphasized that a separate classification for trespassers is maintained. This rule is given prospective and retroactive application.

Chief Justice MITCHELL concurring in the result.

Justices LAKE and ORR join in this concurring opinion.

Appeal of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 129 N.C. App. 427, 500 S.E.2d 778 (1998), affirming an order granting defendants' motion for summary judgment entered by Burke, J., on 15 July 1997 in Superior Court, Guilford County. Heard in the Supreme Court 16 November 1998.

Maddox & Gorham, P.A., by E. Thomas Maddox, Jr.; and Harrison, North, Cooke & Landreth, by A. Wayland Cooke, for plaintiff-appellant.

Burton & Sue, L.L.P., by Walter K. Burton, David K. Williams, Jr., and James D. Secor, III, for defendant-appellees.

WYNN, Justice.

The sole issue arising out of the case *sub judice* is whether defendant Dean Freeland's ("Freeland") act of leaving a stick on his porch constituted negligence. Indeed, this case presents us with the simplest of factual scenarios—Freeland requested that plaintiff John Harvey Nelson ("Nelson") pick him up at his house for a business meeting the two were attending, and Nelson, while doing so, tripped over a stick that Freeland had inadvertently left lying on his porch. Nelson brought this action against Freeland and his wife seeking damages for the injuries he sustained in the fall. The trial court granted summary judgment for the defendants, and the Court of Appeals affirmed. *See Nelson v. Freeland*, 129 N.C. App. 427, 500 S.E.2d 778 (1998).

Although the most basic principles of tort law should provide an easy answer to this case, our current premises-liability trichotomy—that is, the invitee, licensee, and trespasser classifications—provides no clear solution and has created dissension and confusion amongst the attorneys and judges involved. Thus, once again, this Court confronts the problem of clarifying our enigmatic premises-liability scheme—a problem that we have addressed over fourteen times. *See, e.g., Cassell v. Collins*, 344 N.C. 160, 472 S.E.2d 770 (1996); *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 467 S.E.2d 58 (1996); *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 414 S.E.2d 339 (1992); *Pulley v. Rex Hosp.*, 326 N.C. 701, 392 S.E.2d 380 (1990); *Branks v. Kern*, 320 N.C. 621, 359 S.E.2d 780 (1987); *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E.2d 583 (1981); *Norwood v. Sherman-Williams Co.*, 303 N.C. 462, 279 S.E.2d 559 (1981); *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 250 S.E.2d 245 (1979); *Husketh v. Convenient Sys., Inc.*, 295 N.C. 459, 245 S.E.2d 507 (1978); *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974); *Freeze v. Congleton*, 276 N.C. 178, 171 S.E.2d 424 (1970); *Game v. Charles Stores Co.*, 268 N.C. 676, 151 S.E.2d 560 (1966); *Thames v. Nello L. Teer Co.*, 267 N.C. 565, 148 S.E.2d 527 (1966); *Jones v. Kinston Hous. Auth.*, 262 N.C. 604, 138 S.E.2d 235 (1964).

As the aforementioned cases demonstrate, we have repeatedly waded through the mire of North Carolina premises-liability law. Nonetheless, despite our numerous attempts to clarify this liability scheme and transform it into a system capable of guiding North Carolina landowners toward appropriate conduct, this case and its similarly situated predecessors convincingly demonstrate that our current premises-liability scheme has failed to establish a stable and

predictable system of laws. Significantly, despite over one hundred years of utilizing the common-law trichotomy, we still are unable to determine unquestionably whether a man who trips over a stick at a friend/business partner's house is entitled to a jury trial—a question ostensibly answerable by the most basic tenet and duty under tort law: the reasonable-person standard of care.

Given that our current premises-liability scheme has confounded our judiciary, we can only assume that it has inadequately apprised landowners of their respective duties of care. Thus, it befalls us to examine the continuing utility of the common-law trichotomy as a means of determining landowner liability in North Carolina. In analyzing this question, we will consider the effectiveness of our current scheme of premises-liability law, the nationwide trend of abandoning the common-law trichotomy in favor of a reasonable-care standard, and the policy reasons for and against abandoning the trichotomy in this state.

I. ANALYSIS

A. CURRENT NORTH CAROLINA PREMISES-LIABILITY LAW

Under current North Carolina law, the standard of care a landowner[1] owes to persons entering upon his land depends upon the entrant's status, that is, whether the entrant is a licensee, invitee, or trespasser. *See Newton*, 342 N.C. at 560, 467 S.E.2d at 63. An invitee is one who goes onto another's premises in response to an express or implied invitation and does so for the mutual benefit of both the owner and himself. *Id.* The classic example of an invitee is a store customer. *See, e.g., Rives v. Great Atl. & Pac. Tea Co.*, 68 N.C. App. 594, 315 S.E.2d 724 (1984). A licensee, on the other hand, "is one who enters onto another's premises with the possessor's permission, express or implied, solely for his own purposes rather than the possessor's benefit." *Mazzacco*, 303 N.C. at 497, 279 S.E.2d at 586-87. The classic example of a licensee is a social guest. *See, e.g., Crane v. Caldwell*, 113 N.C. App. 362, 366, 438 S.E.2d 449, 452 (1994). Lastly, a trespasser is one who enters another's premises without permission or other right. *See Newton*, 342 N.C. at 559, 467 S.E.2d at 63.

In a traditional common-law premises-liability action, the threshold issue of determining the plaintiff's status at the time of the injury is of substantial import. The gravity of this determination stems from

1. We note that the term "landowner" as used in this opinion refers to both owners and occupiers of land.

the fact that there is a descending degree of duty owed by a landowner based upon the plaintiff's status. *Id.* at 561, 467 S.E.2d at 63.

The highest degree of care a landowner owes is the duty of reasonable care toward those entrants classified as invitees. *See Roumillat*, 331 N.C. at 64, 414 S.E.2d at 342. Specifically, a landowner owes an invitee a duty to use ordinary care to keep his property reasonably safe and to warn of hidden perils or unsafe conditions that could be discovered by reasonable inspection and supervision. *See Pulley*, 326 N.C. at 705, 392 S.E.2d at 383.

A landowner's duty toward a licensee, on the other hand, is significantly less stringent. The duty of care owed to a licensee by an owner or possessor of land ordinarily is to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger. *McCurry*, 90 N.C. App. at 645, 369 S.E.2d at 392. Thus, a licensee enters another's premises at his own risk and enjoys the license subject to its concomitant perils. *See Turpin v. Our Lady of Mercy Catholic Church*, 20 N.C. App. 580, 583, 202 S.E.2d 351, 353 (1974).

Finally, with respect to trespassers, a landowner need only refrain from the willful or wanton infliction of injury. *See Bell v. Page*, 271 N.C. 396, 156 S.E.2d 711 (1967). Willful injury constitutes actual knowledge of the danger combined with a design, purpose, or intent to do wrong and inflict injury. *See Howard v. Jackson*, 120 N.C. App. 243, 246, 461 S.E.2d 793, 797 (1995). Similarly, a wanton act is performed intentionally with a reckless indifference to the injuries likely to result. *Id.*

B. PREMISES-LIABILITY NATIONWIDE—THE MODERN TREND OF ABOLISHING THE COMMON-LAW TRICHOTOMY IN FAVOR OF A REASONABLE-PERSON STANDARD

Although the common-law trichotomy has been entrenched in this country's tort-liability jurisprudence since our nation's inception, over the past fifty years, many states have questioned, modified, and even abolished it after analyzing its utility in modern times. At first, states believed that although the policies underlying the trichotomy—specifically those involving the supremacy of land ownership rights—were no longer viable, they nonetheless could find means to salvage it. *See Jones v. Hansen*, 254 Kan. 499, 505-06, 867 P.2d 303, 307-08 (1994); *Heins v. Webster County*, 250 Neb. 750, 757-58, 552 N.W.2d 51, 55-56 (1996). In particular, states attempted to

salvage the trichotomy by engrafting into it certain exceptions and subclassifications which would allow it to better congeal with our present-day policy of balancing land-ownership rights with the right of entrants to receive adequate protection from harm. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31, 3 L. Ed. 2d 550, 554-55 (1959); *Heins*, 250 Neb. at 757-58, 552 N.W.2d at 55-56. Accordingly, North Carolina, along with the rest of the country, witnessed the burgeoning of novel jurisprudence involving entrant-protection theories such as the active-negligence and attractive-nuisance doctrines. *See* Michael Sears, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U. Kan. L. Rev. 175, 179 (1995); *see also Fitch v. Selwyn Village*, 234 N.C. 632, 634, 68 S.E.2d 255, 257 (1951) (discussing attractive-nuisance doctrine); *DeHaven v. Hoskins*, 95 N.C. App. 397, 400, 382 S.E.2d 856, 858 (discussing active-negligence doctrine), *disc. rev. denied*, 325 N.C. 705, 338 S.E.2d 452 (1989). Unfortunately, these exceptions and subclassifications ultimately forced courts to maneuver their way through a dizzying array of factual nuances and delineations. *See Kermarec*, 358 U.S. at 631, 3 L. Ed. 2d at 555 (stating "the classification and subclassification bred by the common law have produced confusion and conflict"); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 103 (D.C. Cir. 1972) (stating that the exceptions and subclassifications have "produced even further confusion and conflict"), *cert. denied*, 412 U.S. 939, 37 L. Ed. 2d 399 (1973); *O'Leary v. Coenen*, 251 N.W.2d 746, 749 (N.D. 1977) (holding that "the many exceptions and distinctions make the use of the common law categories complex, confusing, inequitable, and paradoxically, nonuniform"); *Hudson v. Gaitan*, 675 S.W.2d 699, 702 (Tenn. 1984) (holding that the numerous exceptions and subclassifications engrafted into the trichotomy have created a "complex patchwork of legal classifications which are by no means uniformly interpreted in the various jurisdictions").

Additionally, courts were often confronted with situations where none of the exceptions or subclassifications applied, yet if they utilized the basic trichotomy, unjust and unfair results would emerge. *See Smith*, 469 F.2d at 103 (stating that the trichotomy leads to harsh results); *Rowland v. Christian*, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (noting that "continued adherence to the common law distinctions can only lead to injustice"); *Jones*, 254 Kan. at 508, 867 P.2d at 309 (holding that the negligence standard is needed in premises-liability actions to avoid the harshness resulting from the rigid application of the trichotomy). Therefore, these courts were forced to define terms such as "invitee" and "active conduct" in a

broad or strained manner to avoid leaving an injured plaintiff deserving of compensation without redress. *See Rowland*, 69 Cal. 2d at 114, 443 P.2d at 565, 70 Cal. Rptr. at 101 (noting that courts have been forced to broadly define terms like active conduct to avoid the general rule limiting liability); *Peterson v. Balach*, 294 Minn. 161, 168-69, 199 N.W.2d 639, 644-45 (1972) (discussing the need to have numerous broadly defined exceptions to the trichotomy); *Basso v. Miller*, 40 N.Y.2d 233, 246, 352 N.E.2d 868, 875, 386 N.Y.S.2d 564, 571 (1976) (Breitel, J., concurring) (stating that courts have been forced to broaden the common-law categories to include persons who in the past would have been excluded). Although these broad or strained definitions may have led to just and fair results, they often involved rationales teetering on the edge of absurdity. For example, in *Hansen v. Richey*, 237 Cal. App. 2d 475, 480-81, 46 Cal. Rptr. 909, 913 (1965), under the trichotomy the court would not have been able to compensate the plaintiffs for their licensee son's drowning because the defendant did not maintain his pool in a manner which wantonly or recklessly exposed the decedent to danger. Therefore, to reach a just result, the court in *Hansen* read the phrase "active conduct" broadly to include the general "active" act of having a party. *Id.* Under this strained reading, however, "active conduct" could plausibly exist whenever a landowner "actively" invites someone to his home.

Another example of a broad or strained reading can be found in this Court's holding in *Walker v. Randolph County*, 251 N.C. 805, 112 S.E.2d 551 (1960). In *Walker*, we held that a seventy-seven-year-old woman who went to the county courthouse to look at a notice of sale of realty was an invitee when she fell down the courthouse stairway. This case involved a strained reading of the term "invitee" given that we have always defined that term to include only those individuals who enter another's premises for the mutual benefit of the landowner and himself. *See Crane*, 113 N.C. App. at 366, 438 S.E.2d at 452. That is, we were willing to implicitly conclude that the county somehow benefitted from posting notices it was statutorily required to post in order to classify the plaintiff as an invitee and hence provide compensation. *Walker*, 251 N.C. at 811, 112 S.E.2d at 555. Thus, *Hansen* and *Walker* demonstrate how courts have made strained readings of the trichotomy classifications to reach just and fair results.

The first significant move toward abolishing the common-law trichotomy occurred in 1957 when England—the jurisdiction giving rise to the trichotomy—passed the Occupier's Liability Act which abolished the distinction between invitees, licensees and so-called con-

tractual visitors. *See Rowland*, 69 Cal. 2d at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104; *Peterson*, 294 Minn. at 165, 199 N.W.2d at 642; *Heins*, 250 Neb. at 754, 552 N.W.2d at 53. Shortly thereafter, the United States Supreme Court decided not to apply the trichotomy to admiralty law after concluding that it would be inappropriate to hold that a visitor is entitled to a different or lower standard of care simply because he is classified as a "licensee." *See Kermarec*, 358 U.S. at 630, 3 L. Ed. 2d at 554. In so ruling, the Court noted that "[t]he distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." *Id.* The Court continued:

> In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowners owe to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict.

Id. at 631, 3 L. Ed. 2d at 554-55 (footnote omitted). Ultimately, the Court concluded that the numerous exceptions and subclassifications engrafted into the trichotomy have obscured the law, thereby causing it to move unevenly and with hesitation toward " 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.' " *Id.* at 631, 3 L. Ed. 2d at 555 (quoting *Kermarec v. Compagnie Generale Transatlantique*, 245 F.2d 175, 180 (Clark, C.J., dissenting)).

Nine years later, the Supreme Court of California decided the seminal case of *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97, which abolished the common-law trichotomy in California in favor of modern negligence principles. Specifically, the court in *Rowland* held that the proper question to be asked in premises-liability actions is whether "in the management of his property [the landowner] has acted as a reasonable man in view of the probability of injury to others." *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. Moreover, the court followed both England's and the United States Supreme Court's lead by noting that "[w]hatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of

our modern society." *Id.* at 117, 443 P.2d at 567, 70 Cal Rptr. at 103. The court continued by stating that the trichotomy was "contrary to our modern social mores and humanitarian values . . . [, and it] obscure[s] rather than illuminate[s] the proper considerations which should govern determination of the question of duty." *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

The *Rowland* decision ultimately served as a catalyst for similar judicial decisions across the country. Indeed, since *Rowland*, twenty-five jurisdictions have either modified or abolished their common-law trichotomy scheme—seven within the last five years.

Specifically, eleven jurisdictions have completely eliminated the common-law distinctions between licensee, invitee, and trespasser. *See Smith*, 469 F.2d 97; *Webb v. City of Sitka*, 561 P.2d 731 (Alaska 1977); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971);[2] *Pickard v. City of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969); *Keller v. Mols*, 129 Ill. App. 3d 208, 472 N.E.2d 161 (1984) (abolishing with respect to children only); *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602 (Iowa 1998); *Cates v. Beauregard Elec. Co-op., Inc.*, 328 So. 2d 367 (La.), *cert. denied*, 429 U.S. 833, 50 L. Ed. 2d 98 (1976); *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 706 P.2d 491 (1985); *Moody v. Manny's Auto Repair*, 110 Nev. 320, 871 P.2d 935 (1994); *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Basso*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564.

Further, fourteen jurisdictions have repudiated the licensee-invitee distinction while maintaining the limited-duty rule for trespassers. *See Wood v. Camp*, 284 So. 2d 691 (Fla. 1973); *Jones*, 254 Kan. 499, 867 P.2d 303; *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979); *Baltimore Gas & Elec. Co. v. Flippo*, 348 Md. 680, 705 A.2d 1144 (1998); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Peterson*, 294 Minn. 161, 199 N.W.2d 639; *Heins*, 250 Neb. 750, 552 N.W.2d 51; *Ford v. Board of County Comm'rs*, 118 N.M. 134, 879 P.2d 766 (1994); *O'Leary*, 251 N.W.2d 746; *Ragnone v. Portland Sch. Dist. No. 1J*, 291 Or. 617, 633 P.2d 1287 (1981); *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056 (R.I. 1994); *Hudson*, 675 S.W.2d 699; *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975); *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993).

In summation, nearly half of all jurisdictions in this country have judicially abandoned or modified the common-law trichotomy in

2. In 1990, the Colorado legislature reinstated the distinctions. *See* Colo. Rev. Stat. § 13-21-115(3) (1996).

favor of the modern "reasonable-person" approach that is the norm in all areas of tort law.

C. THE ADVANTAGES AND DISADVANTAGES OF ABOLISHING THE COMMON-LAW TRICHOTOMY

1. HISTORY AND PURPOSE BEHIND THE TRICHOTOMY

To assess the advantages and disadvantages of abolishing the common-law trichotomy, we first consider the purposes and policies behind its creation and current use. The common-law trichotomy traces its roots to nineteenth-century England. John Ketchum, *Missouri Declines an Invitation to Join the Twentieth Century: Preservation of the Licensee-Invitee Distinction in Carter v. Kinney*, 64 UMKC L. Rev. 393, 394 (1995). Indeed, it emanated from an English culture deeply rooted to the land; tied with feudal heritage; and wrought with lords whose land ownership represented power, wealth, and dominance. *Id.*; *see also Kermarec*, 358 U.S. at 630, 3 L. Ed. 2d at 554. Even though nineteenth-century courts were aware of the threat that unlimited landowner freedom and its accompanying immunity placed upon the community, they nevertheless refused to provide juries with unbounded authority to determine premises-liability cases. Rather, these courts restricted the jury's power because juries were comprised mainly of potential land *entrants* who most likely would act to protect the community at large and thereby reign in the landowner's sovereign power over his land. Sears, *Common Law of Premises Liability*, 44 U. Kan. L. Rev. at 176. Thus, the trichotomy was created to disgorge the jury of some of its power by either allowing the judge to take the case from the jury based on legal rulings or by forcing the jury to apply the mechanical rules of the trichotomy instead of considering the pertinent issue of whether the landowner acted reasonably in maintaining his land.

Additionally, the trichotomy was created at a time when principles of negligence were not in existence. Indeed, when English common law was articulating the trichotomy, the principle that a man should be held responsible for foreseeable damages was only hesitatingly recognized in a limited number of cases. Norman S. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 Law. Q. Rev. 182, 184 (1953). Therefore, the trichotomy was perfected at a time when our modern tenet and pillar of tort law—the legal concept of negligence—was largely unrecog-

nized.[3] It was not until the beginning of this country's industrial revolution that the community and the judiciary undertook a greater acceptance of fault-based liability which led to the creation of our modern era of tort law and the law of negligence. Ketchum, *Missouri Declines*, 64 UMKC L. Rev. at 397.

Almost immediately, the emergence of negligence law conflicted with the immunity conferred upon landowners under the trichotomy. Kathryn E. Eriksen, *Premises Liability in Texas—Time For a "Reasonable" Change*, 17 St. Mary's L.J. 417, 421 (1986). Common-law courts, however, decided not to replace the trichotomy with modern principles of negligence law, as they did in almost all other tort areas, but rather "superimposed the new [negligence] principles upon the existing framework of entrant categories." Sears, *Common Law of Premises Liability*, 44 U. Kan. L. Rev. at 176. This combination resulted in our current scheme of premises-liability law which allows judges to maintain control over jury discretion while, at the same time, utilizing "duty of care" principles set forth in negligence theory. *Id.*

2. REASONS FOR AND AGAINST ABOLISHING THE TRICHOTOMY

Although the modern trend of premises-liability law in this country has been toward abolishing the trichotomy in favor of a reasonable-person standard, there are some jurisdictions that have refused to modify or abolish it.[4] One of the primary reasons that some jurisdictions have retained the trichotomy is fear of jury abuse—a fear similar to the reason it was created in the first place. Specifically, jurisdictions retaining the trichotomy fear that plaintiff-oriented juries—like feudal juries composed mostly of land entrants—will impose unreasonable burdens upon defendant-landowners. *See Ouellette*, 116 N.H. at 560, 364 A.2d at 636 (Grimes, J., dissenting). This argument, however, fails to take into account that juries have

3. Indeed, negligence principles were first enunciated in the 1883 case of *Heaven v. Pender*, 11 Q.B.D. 503 (1883), a case decided more than forty years after the common-law trichotomy emerged. Ketchum, *Missouri Declines*, 64 UMKC L. Rev. at 397.

4. *See McMullan v. Butler*, 346 So. 2d 950 (Ala. 1977); *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 639 P.2d 330 (1982); *Baldwin v. Mosley*, 295 Ark. 285, 748 S.W.2d 146 (1988); *Morin v. Bell Court Condominium Ass'n*, 223 Conn. 323, 612 A.2d 1197 (1992); *Bailey v. Pennington*, 406 A.2d 44 (Del. 1979), *appeal dismissed*, 444 U.S. 1061, 62 L. Ed. 2d 744 (1980); *Mooney v. Robinson*, 93 Idaho 676, 471 P.2d 63 (1970); *Kirschner v. Louisville Gas & Elec. Co.*, 743 S.W.2d 840 (Ky. 1988); *Caroff v. Liberty Lumber Co.*, 146 N.J. Super. 353, 369 A.2d 983, *certif. denied*, 74 N.J. 266, 377 A.2d 671 (1977); *Lohrenz v. Lane*, 787 P.2d 1274 (Okla. 1990).

properly applied negligence principles in all other areas of tort law, and there has been no indication that defendants in other areas have had unreasonable burdens placed upon them. Moreover, given that modern jurors are more likely than feudal jurors to be landowners themselves, it is unlikely that they would be willing to place a burden upon a defendant that they would be unwilling to accept upon themselves. *See Smith*, 469 F.2d at 106-07.

Another fear held by jurisdictions retaining the trichotomy is that by substituting the negligence standard of care for the common-law categories, landowners will be forced to bear the burden of taking precautions such as the expensive cost associated with maintaining adequate insurance policies. *See Mariorenzi v. Joseph DiPonte, Inc.*, 114 R.I. 294, 308, 333 A.2d 127, 134 (1975) (Joslin, J., dissenting). This argument, however, ignores the fact that every court which has abolished the trichotomy has explicitly stated that its holding was not intended to make the landowner an absolute insurer against all injuries suffered on his property. *See, e.g., Jones*, 254 Kan. at 510, 867 P.2d at 311 ("a proprietor or operator of a trade or business is not an absolute insurer of the safety of the customers"); *Poulin*, 402 A.2d at 851 ("[t]his does not require an owner or occupier to insure the safety of his lawful visitors"); *Heins*, 250 Neb. at 761, 552 N.W.2d at 57 ("[o]ur holding does not mean that owners and occupiers of land are now insurers of their premises"); *O'Leary*, 251 N.W.2d at 752 ("[w]e do not now hold that land occupiers are now insurers of their premises"). Rather, they require landowners only to exercise reasonable care in the maintenance of their premises. *See Heins*, 250 Neb. at 760, 552 N.W.2d at 56.

Lastly, opponents of abolishing the trichotomy argue that retention of the scheme is necessary to ensure predictability in the law. For example, prior to abolishing its common-law trichotomy, the Kansas Supreme Court declined an invitation to do so because it believed that the replacement of its stable and established system would result in one that is devoid of standards for liability. *See Britt v. Allen County Community Jr. College*, 230 Kan. 502, 638 P.2d 914 (1982). Kansas, however, eventually recognized that the trichotomy and its accompanying exceptions and subclassifications were more complex and confusing than the negligence standard of reasonableness.

The jurisdictions eliminating the trichotomy address the aforementioned concerns and provide well-articulated reasons for their decision to abandon the trichotomy. First, these jurisdictions note

that the trichotomy was created during feudal times when land formed the principal basis of wealth and when it was desirable to provide a landowner free reign to use and exploit his land, without need for vigilant protection of those who entered his property. *See Basso*, 40 N.Y.2d at 245, 352 N.E.2d at 875, 386 N.Y.S.2d at 571 (Breitel, J., concurring). In following this reasoning, the Supreme Court of New Hampshire noted that " 'the consensus of modern opinion is that the special privilege these rules accord to the occupation of land sprang from the high place which land has traditionally held in English and American thought.' " *Ouellette*, 116 N.H. at 554, 364 A.2d at 632 (quoting 2 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* 1432 (1956)). Similarly, the District of Columbia Circuit Court noted that "[t]he prestige and dominance of the landowning class in the nineteenth century contributed to the common law's emphasis on the economic and social importance of free use and exploitation of land over and above [an entrant's] personal safety." *Smith*, 469 F.2d at 101.

After noting the trichotomy's origins, abolishing courts expressed apprehension about applying it in modern times. For example, the Supreme Court of Massachusetts stated:

> Perhaps, in a rural society with sparse land settlements and large estates, it would have been unduly burdensome to obligate the owner to inspect and maintain distant holdings for a class of entrants who were using the property "for their own convenience" but the special immunity which the licensee rule affords landowners cannot be justified in an urban industrial society.

Mounsey, 363 Mass. at 706, 297 N.E.2d at 51 (citation omitted). Likewise, when the Supreme Court of Florida abolished the common-law trichotomy, it noted that it was

> aware of the contiguous property of others which demands concern for the welfare of our neighbor. Life in these United States is no longer as simple as in the frontier days of broad expanses and sparsely settled lands. Inexorably our peoples, gregarious in nature, have magnetized to limited and congested areas. With social change must come change in the law, for as President Woodrow Wilson observed, "The first duty of the law is to keep sound the society it serves."

Wood, 284 So. 2d at 696. Moreover, in *Smith v. Arbaugh's Restaurant, Inc.*, the District of Columbia Circuit Court noted that it did "not

believe the rules of liability imposed by courts in the eighteenth century are today the proper tools with which to allocate the costs and risk of loss for human injury." 469 F.2d at 99. Thus, these courts determined that the social and policy considerations underlying the creation of the common-law trichotomy were no longer viable, and therefore they concluded that it was proper to lay it to rest.

On a more practical level, the trichotomy has been criticized for creating a complex, confusing, and unpredictable state of law. The United States Supreme Court, for example, stated that the trichotomy "bred by the common law [has] produced confusion and conflict." *Kermarec*, 358 U.S. at 631, 3 L. Ed. 2d at 555. Similarly, the California Supreme Court noted that "[t]he common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty . . . [, and] continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion." *Rowland*, 69 Cal. 2d at 118, 443 P.2d at 567, 70 Cal. Rptr. at 104; *see also Peterson*, 294 Minn. at 166, 199 N.W.2d at 643 (stating that "judges have been highly critical of the common-law straitjacket of highly technical and arbitrary classifications which have often led to confusion in the law and inequity in the cases decided").

The complexity and confusion associated with the trichotomy is twofold. First, the trichotomy itself often leads to irrational results not only because the entrant's status can change on a whim, but also because the nuances which alter an entrant's status are undefinable. Consider, for example, the following scenario: A real-estate agent trespasses onto another's land to determine the value of property adjoining that which he is trying to sell; the real-estate agent is discovered by the landowner, and the two men engage in a business conversation with respect to the landowner's willingness to sell his property; after completing the business conversation, the two men realize that they went to the same college and have a nostalgic conversation about school while the landowner walks with the man for one acre until they get to the edge of the property; lastly, the two men stand on the property's edge and speak for another ten minutes about school. If the real-estate agent was injured while they were walking off the property, what is his classification? Surely, he is no longer a trespasser, but did his status change from invitee to licensee once the business conversation ended? What if he was hurt while the two men were talking at the property's edge? Does it matter how long they were talking?

The Supreme Court of Wisconsin made a similar argument in *Antoniewicz* when it asked whether there is any reason why one who invites a guest to a party should have less concern for that individual's well-being than he has for the safety of an insurance salesman delivering a policy to his home. *See Antoniewicz*, 70 Wis. 2d at 854, 236 N.W.2d at 10. The court then inquired whether the life or welfare of the guest should be regarded in a more sacred manner. *Id.* Moreover, it queried whether we realistically can say that reasonable people vary their conduct based upon the status of the entrant. *Id.*

The preceding illustrations demonstrate the complexity associated with the trichotomy. Moreover, they demonstrate that the trichotomy often forces the trier of fact to focus upon irrelevant factual gradations instead of the pertinent question of whether the landowner acted reasonably toward the injured entrant. For instance, in the real-estate agent hypothetical posed above, the trier of fact would be focused on determining the agent's purpose for being on the land at the time of injury instead of addressing the pertinent question of whether the landowner acted as a reasonable person would under the circumstances.

Corresponding to this argument is the fact that "[i]n many instances, recovery by an entrant has become largely a matter of chance, dependent upon the pigeonhole in which the law has put him, e.g., 'trespasser,' 'licensee,' or 'invitee'—each of which has radically different consequences in law." *Peterson*, 294 Minn. at 166, 199 N.W.2d at 643. Significantly, this pigeonholing is essentially an attempt to transmute propositions of fact into propositions of law—a transmutation that has only distracted the jury's vision away from the proper consideration of whether the defendant acted reasonably. For instance, the three experienced Court of Appeals judges who initially decided this case—Judge Smith, Chief Judge Arnold, and Judge Walker—disagreed not only with respect to whether plaintiff was an invitee or a licensee, but also as to whether this case involved a question of law or fact.

Lastly, we note that the trichotomy has been criticized because its underlying landowner-immunity principles force many courts to reach unfair and unjust results disjunctive to the modern fault-based tenets of tort law. For example, the Kansas Supreme Court noted that "modern times demand a recognition that requiring all to exercise reasonable care for the safety of others is the more humane approach." *Jones*, 254 Kan. at 504, 867 P.2d at 307. Likewise, the California Supreme Court noted that using the trichotomy to deter-

mine whether a landowner owed the injured plaintiff a duty of care "is contrary to our modern social mores and humanitarian values." *Rowland*, 69 Cal. 2d at 118, 443 P.2d at 567, 70 Cal. Rptr. at 104. Indeed, modern thought dictates that "[a] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation . . . because he has come upon the land of another without permission or with permission but without a business purpose." *Id.* Simply put,

> "the traditional rule confers on an occupier of land a special privilege to be careless which is quite out of keeping with the development of accident law generally and is no more justifiable here than it would be in the case of any other useful enterprise or activity."

Antoniewicz, 70 Wis. 2d at 851, 236 N.W.2d at 8-9 (quoting 2 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 27.3, at 1440 (1956)).

The aforementioned complexity, confusion, and harshness associated with the trichotomy's application is evidenced in North Carolina's dealings with the question of whether a licensee turns into an invitee when he provides the landowner with some benefit. For example, in *Crane v. Caldwell*, 113 N.C. App. 362, 438 S.E.2d 449, our Court of Appeals determined that the injured plaintiff was an invitee when, at his neighbor's request, he helped his neighbor move a boat from his backyard dock. In making this ruling, the Court stated that the act of helping a neighbor move a boat from his yard was not one "which one neighbor customarily performs for another in the ordinary course of friendly relations." *Id.* at 366, 438 S.E.2d at 452. Yet, at the same time, the Court stated that "[p]laintiff received no benefit from any of the services he performed for defendant." *Id.* Reading these statements together creates an inconsistency—that is, if the plaintiff received nothing for his acts, yet did not do them as a friendly neighbor, then how should we classify his conduct?

The issue of benefit becomes more perplexing when the preceding case is read in light of some other North Carolina decisions. For example, in *Beaver v. Lefler*, 8 N.C. App. 574, 174 S.E.2d 806 (1970), our Court of Appeals classified the plaintiff as a licensee when he was injured helping his neighbor carry meat into his home. Apparently, reading *Beaver* in conjunction with *Crane* leads one to believe that neighbors regularly carry meat into each others' homes, but do not help each other move things. This decision is even more baffling

when read in light of *Briles v. Briles*, 43 N.C. App. 575, 259 S.E.2d 393 (1979), *disc. rev. denied*, 299 N.C. 329, 265 S.E.2d 394 (1980), where our Court of Appeals held that the plaintiff-parents were invitees when, at their son's request, they went to his house to check on his freezer. Logically, this case cannot be reconciled with *Crane* and *Beaver*. Indeed, looking at all three cases as a whole, North Carolina premises-liability jurisprudence appears to stand for the proposition that a friend who carries meat into his neighbor's house is a licensee because he performs a neighborly or friendly act, while a parent who checks her son's freezer is an invitee because she performs some duty which thereby mandates that the parent receive a higher degree of care.

Further, our cases show that the trichotomy is no longer viable because of the complexity and confusion surrounding the numerous exceptions and subclassifications engrafted into it. Indeed, our Court of Appeals noted that "the relevant cases tend to illustrate exceptions to the general rule rather than the rule itself." *Hockaday v. Morse*, 57 N.C. App. 109, 111, 290 S.E.2d 763, 765, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 209 (1982). Consider, for example, just a sample of the trichotomy's exceptions and subclassifications: distinctions between active and passive negligence, *DeHaven*, 95 N.C. App. at 400, 382 S.E.2d at 858; situations where a landlord has control over a common way, *Jones v. Kinston Hous. Auth.*, 262 N.C. at 605-06, 138 S.E.2d at 236; actions involving police officers, *Newton*, 342 N.C. at 562, 467 S.E.2d at 64; failure to warn of a known defect, *Thompson v. DeVonde*, 235 N.C. 520, 522, 70 S.E.2d 424, 425-26 (1952); work by an independent contractor, *Broadway v. Blythe Indus.*, 313 N.C. 150, 155-56, 326 S.E.2d 266, 271 (1985); obvious versus nonobvious dangerous conditions, *Branks*, 320 N.C. at 624, 359 S.E.2d at 783; invitee exceeding the scope of his invitation, *Cupita*, 252 N.C. at 350, 113 S.E.2d at 715; minor and incidental benefits, *McCurry*, 90 N.C. App. at 644, 369 S.E.2d at 391; conditions diverting the injured party's attention, *Walker*, 251 N.C. at 808, 112 S.E.2d at 553; known or knowable criminal activity, *Murrow v. Daniels*, 321 N.C. 494, 500-01, 364 S.E.2d 392, 398-99 (1988); and the attractive-nuisance doctrine, *Fitch*, 234 N.C. at 635, 68 S.E.2d at 257. These exceptions and subclassifications have created a labyrinth of jurisprudence through which the trier of fact must make its way with difficulty to determine liability. Instead of clarifying premises-liability law, these exceptions and subclassifications have created such subtle nuances that a typical landowner can never be sure what constitutes actionable conduct.

Significantly, the fact that judges and justices cannot agree as to whether a landowner's conduct is actionable—as evidenced by dissents in prior cases—evidences that the trichotomy fails to clearly articulate a landowner's standard of care. *See, e.g., Roumillat*, 331 N.C. at 69, 414 S.E.2d at 345 (Frye, Exum, & Lake, JJ., dissenting); *Pulley*, 326 N.C. at 709, 392 S.E.2d at 385 (Meyer & Martin, JJ., dissenting); *Goldman v. Kossove*, 253 N.C. 370, 374, 117 S.E.2d 35, 38 (1960) (Moore & Rodman, JJ., dissenting); *Gray v. Small*, 104 N.C. App. 222, 224, 408 S.E.2d 538, 539 (1991) (Phillips, J., dissenting), *aff'd per curiam*, 331 N.C. 279, 415 S.E.2d 362 (1992); *McIntosh v. Carefree Carolina Communities, Inc.*, 98 N.C. App. 653, 657, 391 S.E.2d 851, 853 (1990) (Greene, J., dissenting), *rev'd per curiam*, 328 N.C. 87, 399 S.E.2d 114 (1991) (based upon dissent); *Starr*, 40 N.C. App. at 148, 252 S.E.2d at 223 (Hedrick, J., dissenting); *Smith v. VonCannon*, 17 N.C. App. 438, 440, 194 S.E.2d 362, 363 (Brock, J., dissenting), *aff'd*, 283 N.C. 656, 197 S.E.2d 524 (1973). This confusion is most disturbing when considered in light of the comparatively simplistic approach set forth in the modern tort principle of negligence and its accompanying standard of reasonable care under the circumstances.

In sum, there are numerous advantages associated with abolishing the trichotomy. First, it is based upon principles which no longer apply to today's modern industrial society. Further, the preceding cases demonstrate that the trichotomy has failed to elucidate the duty a landowner owes to entrants upon his property. Rather, it has caused confusion amongst our citizens and the judiciary—a confusion exaggerated by the numerous exceptions and subclassifications engrafted into it. Lastly, the trichotomy is unjust and unfair because it usurps the jury's function either by allowing the judge to dismiss or decide the case or by forcing the jury to apply mechanical rules instead of focusing upon the pertinent issue of whether the landowner acted reasonably under the circumstances. Thus, we conclude that North Carolina should join the twenty-four other jurisdictions which have modified or abolished the trichotomy in favor of modern negligence principles.

II. THE NEW APPROACH TO PREMISES LIABILITY IN NORTH CAROLINA

Given the numerous advantages associated with abolishing the trichotomy, this Court concludes that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors. Adoption of a true negli-

gence standard eliminates the complex, confusing, and unpredictable state of premises-liability law and replaces it with a rule which focuses the jury's attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

In so holding, we note that we do not hold that owners and occupiers of land are now insurers of their premises. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

Further, we emphasize that we will retain a separate classification for trespassers. We believe that the status of trespasser still maintains viability in modern society, and more importantly, we believe that abandoning the status of trespasser may place an unfair burden on a landowner who has no reason to expect a trespasser's presence. Indeed, whereas both invitees and licensees enter another's land under color of right, a trespasser has no basis for claiming protection beyond refraining from willful injury. *See Ford*, 118 N.M. at 138, 879 P.2d at 770.

Lastly, we note that we are well aware of the principle of *stare decisis* and the important role it plays in maintaining a stable, established, and predictable set of laws. Indeed, we undertake this exhaustive analysis to illustrate our reluctance to abolish parts of our common law. "This Court has never overruled its decisions lightly. No court has been more faithful to *stare decisis*." *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967). Nonetheless, we also are aware that "[i]t is the tradition of common-law courts to reflect the spirit of their times and discard legal rules when they serve to impede society rather than to advance it." *Antoniewicz*, 70 Wis. 2d at 855, 236 N.W.2d at 10. The doctrine is not inflexible, and therefore we will not hesitate to abandon a rule which has resulted in injustices, whether it be criminal or civil. *See Rabon*, 269 N.C. at 20, 152 S.E.2d at 498. "There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right." *Sidney Spitzer & Co. v. Commissioners of Franklin County*, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924). As appropriately stated by Judge Cardozo,

> I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of jus-

> tice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origins it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.

Benjamin Cardozo, *The Nature of the Judicial Process* 120 (1921).

Given that we are convinced that the common-law trichotomy is no longer viable, we should put it to rest. By so doing, we align North Carolina premises-liability law with all other aspects of tort law by basing liability upon the pillar of modern tort theory: negligence. Moreover, we now join twenty-four other jurisdictions which have carefully examined and analyzed this issue, ultimately determining that the trichotomy is no longer applicable in the modern world.

Having adopted a new rule in premises-liability cases, we are obliged to balance countervailing factors to determine whether it should be applied retroactively. *See Cox v. Haworth*, 304 N.C. 571, 573, 284 S.E.2d 322, 324 (1981). These factors include the "reliance on the prior decision, the degree to which the purpose behind the new decision can be achieved solely through prospective application, and the effect of retroactive application on the administration of justice." *Id.* In considering these factors, we begin with a presumption of retroactivity, a presumption which can only be rebutted by compelling reasons. *Id.* After balancing the aforementioned factors, we do not find compelling reasons to apply this rule prospectively only and therefore give it both prospective and retrospective application.

Accordingly, plaintiff Nelson is entitled to a trial at which the jury shall be instructed under the new rule adopted by this opinion. Specifically, the jury must determine whether defendant Freeland fulfilled his duty of reasonable care under the circumstances. This case is therefore remanded to the Court of Appeals for further remand to the Superior Court, Guilford County, for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Chief Justice MITCHELL concurring in the result

In the present case the trial court entered summary judgment in favor of defendants. The majority in the Court of Appeals affirmed the trial court. I am convinced that a jury could find that plaintiff entered defendants' premises as an invitee and defendants violated the duty of care owed an invitee. That being the case, the Court of Appeals erred in affirming the trial court's order of summary judgment for defendants. Accordingly, I find it unnecessary for this Court to consider whether our prior holdings in this area of the common law have been erroneous and must be modified. Further, I think it inadvisable to render an opinion of the magnitude of that entered by the majority in this case when, as here, no party has suggested such a modification of the common law and this Court has not had the benefit of briefs and arguments on the issues decided by the majority.

For the foregoing reasons, I concur only in the result reached by the majority.

Justice Lake and ORR join in this concurring opinion.

STATE OF NORTH CAROLINA v. ELMER RAY McNEILL, JR.

No. 184A96

(Filed 31 December 1998)

1. **Constitutional Law § 343 (NCI4th)— presence of defendant—preliminary swearing of prospective jurors**

Defendant had no right to be present when prospective jurors were preliminarily sworn in, oriented, and generally qualified for service by a deputy clerk in the jury assembly room prior to the time the jurors were assigned to any particular courtroom for jury service.

2. **Jury § 266 (NCI4th)— jurors preliminary sworn by clerk—not statutory violation**

The procedure whereby prospective jurors were preliminarily sworn in, oriented, and generally qualified for service by a deputy clerk in the jury assembly room did not violate the requirement of N.C.G.S. § 9-14 that the jury be sworn "at the

beginning of court" since that phrase refers to the beginning of the term of court rather than to the beginning of an individual trial.

3. Jury § 92 (NCI4th)— voir dire—oath of jurors

Defendant's right to a fair and impartial trial was not violated by his trial before a jury that had been selected during a *voir dire* process that did not require prospective jurors to take an oath that they would "tell the truth" where the record reflects that the jurors took the oath prescribed by N.C.G.S. § 9-14 prior to trial in this case.

4. Evidence and Witnesses § 1240 (NCI4th)— statements to police—absence of Miranda warnings—defendant not in custody

The trial court did not err by denying defendant's motion to suppress his first and second statements to the police because he had not been advised of his *Miranda* rights where defendant voluntarily drove to the police department for questioning as a potential witness; the first interview lasted approximately thirty minutes, was not confrontational, and did not produce any incriminating statements by defendant; the second interview occurred a short time later after defendant voluntarily agreed to answer a few more questions, and defendant was not restrained in any way and did not ask to leave; and the trial court correctly determined that defendant was not in custody at the time his first two statements were given to the police.

5. Constitutional Law § 344.1 (NCI4th)— unrecorded bench conferences—absence of defendant—not constitutional violation

Defendant's federal and state constitutional rights were not violated in this capital trial when the trial court conducted numerous bench conferences out of his presence and without providing a record of the substance of such conferences where defendant was represented by counsel at each of the bench conferences; defendant was present in the courtroom and was in a position to observe the context and to inquire of his attorneys as to the nature and substance of each one of the conferences; and defendant has failed to show the usefulness of his presence or that his presence at the bench would have had a reasonably substantial relation to his opportunity to defend.

6. Criminal Law § 545 (NCI4th Rev.)— State's witness—challenge to defendant to testify—mistrial denied

The trial court did not err or abuse its discretion in denying defendant's motion for a mistrial in this capital case after defendant's older brother, testifying for the State, challenged defendant to take the stand in his own defense where the trial court found that the unsolicited comment was simply blurted out by the witness and took everyone by surprise; the prosecutor responded immediately to avoid further comment; and the trial court instructed the jury not to consider the comment "in any way whatsoever."

7. Evidence and Witnesses § 2908 (NCI4th)— statements volunteered by witness—opening of door by defendant

The trial court did not err by refusing to strike statements by defendant's brother in this prosecution for two first-degree murders that defendant's evidence was a "circus" and that the "victims of this heinous crime deserve more than what they've been getting" where defendant opened the door to this testimony by impugning the character of the witness on cross-examination by implying that the witness had a sexual relationship with the wife of defendant's other brother and that the witness was going to profit by writing a book about the murders.

8. Indigent Persons § 24 (NCI4th)— forensic crime-scene expert—funds denied

The trial court did not err in denying defendant's motions for funds to employ a forensic crime-scene expert in this prosecution for two first-degree murders where the trial court had granted defendant's motions for funds to hire a private investigator, a firearms expert, a fingerprint expert, and an audiologist; and the trial court properly concluded that defense counsel had not made a threshold showing of need for a crime-scene expert or that such assistance was necessary for defendant to receive effective assistance of counsel and a fair trial.

9. Evidence and Witnesses § 668 (NCI4th)— exhibits not admitted—references by witnesses—refusal to strike—not plain error

Assuming *arguendo* that the plain error rule applies to the failure to strike the testimony of witnesses, the trial court did not commit plain error by failing to strike the testimony of several witnesses referring to two exhibits, a Ruger revolver and a Ruger

firearm box, that had not been admitted into evidence where the substance of the testimony of these witnesses could have been obtained without the exhibits.

10. Appeal and Error § 370 (NCI4th)— judicial settlement of record on appeal—allowing evidence—absence of defendant—not error or constitutional violation

The trial court did not err and violate defendant's right to due process by actively soliciting and allowing the presentation of evidence at a hearing to settle the record on appeal without notice to defendant or his counsel where the trial court conducted a hearing in open court upon the record with defense counsel and the prosecutor present; defendant's presence was not required at a hearing to settle the record on appeal; and defendant has failed to show how he was prejudiced by not receiving advance notice since his counsel was present and fully examined the deputy clerk who testified and could have asked her to find and bring any necessary documents to the courtroom.

11. Appeal and Error § 370 (NCI4th)— judicial settlement of record on appeal—ex parte communication with prosecutor—absence of prejudice

Assuming *arguendo* that the trial court's comments and a deputy clerk's testimony during a conference to judicially settle the record on appeal showed the trial court's participation in an *ex parte* communication with the prosecutor, such *ex parte* communication would not be improper because it related only to the administrative functioning of the judicial system, and it appears that the trial court was only being careful to assure that the appellate court would have a complete record to properly resolve issues raised by defendant in the record on appeal.

12. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing—mitigating circumstances—use of "may" in instructions

The trial court's use of the word "may" in its instructions in a capital sentencing proceeding on Issues Three and Four did not make consideration of established mitigating circumstances discretionary.

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

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where

defendant was convicted of both counts of first-degree murder under the theory of premeditation and deliberation; defendant was an integral part of a calculated plan to rob a store and to kill whomever was closing the store to eliminate them as witnesses; defendant procured the murder weapon and shot each of the victims twice in the head, at close range, with a revolver; and the jury found as aggravating circumstances for each murder that the murder was committed for the purpose of avoiding and preventing a lawful arrest, the murder was committed for pecuniary gain, and the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons.

Justice Wynn did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Stephens (Donald W.), J., on 9 April 1996 in Superior Court, Wake County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed 29 October 1996. Heard in the Supreme Court 29 May 1998.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

Elizabeth G. McCrodden for defendant-appellant.

FRYE, Justice.

In a capital trial, defendant was convicted by a jury of first-degree murder of Robert Michael Truelove and John David Ray on the basis of premeditation and deliberation and under the felony murder rule. The jury also found defendant guilty of conspiracy to commit armed robbery and robbery with a firearm. In a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed a sentence of death as to each murder. Defendant was also sentenced to imprisonment for forty years for the robbery with a dangerous weapon conviction, and ten years for conspiracy to commit armed robbery.

Defendant makes thirteen arguments on appeal to this Court. For the reasons discussed herein, we conclude that defendant's trial and

capital sentencing proceeding were free of prejudicial error and that the death sentences are not disproportionate. Accordingly, we uphold defendant's convictions and sentences.

The State's evidence presented at trial tended to show the following facts and circumstances. Late in the evening of 18 September 1993, the wife of victim John Ray arrived at the Food Lion store located at the corner of Strickland Road and Six Forks Road in Raleigh to pick up her husband. After driving over the parcel pickup bell, she waited for her husband. When he did not emerge, she knocked on the front door. When no one came to the front door, she drove around to the back and pressed the night buzzer for truck deliveries. Again no one responded. Mrs. Ray then called 911.

Raleigh police officer Mike Liptak responded to Mrs. Ray's call, arriving at the Food Lion store close to midnight. Officer Liptak called the assistant manager of the Food Lion store, Mr. Lindberg. Through a front window, Officer Liptak observed tills lying on the floor and an open safe. He then proceeded to the back of the store, where he saw an open door but did not enter. Other officers arrived, and the scene was secured. When Lindberg arrived, he and three officers entered the building and found the bodies of two men. One victim, John Ray, was in the meat locker, and the other, Mike Truelove, was in the back of the store. Both men had been shot.

Ms. Flournoy, the store manager, estimated that there was approximately $2,300 in a safe bag missing from the store. Robert McNeill, one of defendant's brothers, was an employee of Food Lion and was immediately a suspect. On 23 September, defendant was questioned because he was part of his brother's alibi.

Chris Thornhill, a friend of defendant, testified that defendant wanted him to come to North Carolina to find work. During a phone conversation, defendant and Thornhill discussed the move, and defendant inquired whether Thornhill still had a .357 revolver. On the night of 17 September, defendant went to South Carolina to get Thornhill. The next day, defendant and Thornhill drove to Raleigh. Thornhill had purchased from Zane Bryant a .357 Magnum revolver, which he showed to defendant on the way to Raleigh. Defendant and Thornhill checked into the Innkeeper Motel between seven and eight o'clock Sunday night, 18 September. Defendant then took Thornhill's revolver and left the motel. When defendant returned to the motel around midnight, he appeared dazed. Defendant told Thornhill that he had sold the gun for three hundred dollars to a man who approached

him at a gas station and that the man had then hit him on the ear. Defendant was having trouble hearing. When defendant and Thornhill arrived in Raleigh, defendant had about one hundred dollars. According to Thornhill's testimony, the next day, defendant had a vinyl bag containing about eight hundred dollars in cash and a thick roll of one-dollar bills.

On 23 September 1993, Sergeant Williams of the Raleigh Police Department obtained from Zane Bryant an empty Ruger Blackhawk .357 Magnum revolver box and a partial box of shells. Bryant testified that in early September he had sold Thornhill the revolver which came in the box and that at the time of the sale the revolver would have been loaded from the opened box of shells.

Special Agent Gavin with the FBI, formerly with the SBI, testified as an expert in forensic firearms. In his opinion, the bullet jackets recovered from the bodies of the victims were all fired from the same firearm, either a Ruger or a Rohm. Bullets recovered from the crime scene were of the same type as contained in the box of ammunition obtained from Bryant. Small gun parts also recovered from the scene were identified as parts of a Ruger single-action revolver.

A latent-fingerprint examiner was able to identify one half of a left palm print belonging to defendant on an exterior rear door of the Food Lion store. Ms. Muse, a Food Lion employee, remembered defendant had been to the store to meet his brother on 12 September 1993. There was conflicting evidence as to how often the doors were cleaned.

Experts in acoustics and audiology conducted sound tests by firing a new Ruger Blackhawk in the Food Lion meat cooler and testified that shots fired from that revolver in the cooler would have caused the shooter to experience significant temporary hearing loss.

Michael McNeill, the older brother of Robert and defendant, testified that, in February 1994, defendant admitted to him that he had killed both men. Michael also testified that he believed defendant was covering up for Robert, who, unlike defendant, was apt to see what he could get away with. Michael also believed defendant was covering up for Thornhill. Michael further testified that he did not want to believe defendant committed the murders, but "he hasn't told me any different."

Defendant testified in his own behalf. He stated that he moved to North Carolina at Robert's invitation and planned to go to college. He

did not get along with Robert's wife, so he talked Thornhill into moving to Raleigh and sharing an apartment with him. Robert had told defendant he needed a gun because someone was harassing his wife. Defendant testified that, after picking up Thornhill in South Carolina and driving back to Raleigh, he called Robert to arrange picking up his clothes and savings. He then went to the Food Lion store, arriving about 10:00 p.m., and waited for Robert. Robert and defendant then drove to Taco Bell in separate cars. There, defendant showed Robert the revolver, and Robert purchased it from him for three hundred dollars. Defendant then drove to Robert's house to wait for Robert, so he could get his clothes and money. When Robert arrived, he was carrying his shirt. Robert wanted defendant to tell Thornhill that he and defendant had been together the entire evening and not to tell Thornhill that he had sold him the gun. Defendant agreed, retrieved his belongings, and left. Defendant testified that he maintained his story to protect Robert, even after hearing about the Food Lion murders. He denied involvement in the murders and denied confessing to his brother Michael.

Craig Stover, formerly a co-employee of Robert McNeill at the Food Lion store at Tower Shopping Center, testified about his involvement with Robert in a robbery of that store in May 1993. He testified that Robert discussed a second robbery and that Robert had talked about killing his manager. Several Food Lion employees at both stores testified that Robert was unable to get along with his coworkers at either store. He had been suspended for two weeks and eventually transferred.

Mr. Bissette, a retired member of the task force which investigated the murders, testified that defendant had cooperated with police and gave permission for a search of his vehicle. He testified that four days after the murders, defendant had no problems with his hearing. Detective Harrell of the Raleigh Police Department testified that Thornhill had given police two different stories.

An expert in otolaryngology testified that there is no way to distinguish trauma-induced hearing loss, such as that from being struck, from acoustically induced hearing loss. He further testified that alcohol can produce significant temporary hearing loss as well.

Robert McNeill testified, for the most part invoking his Fifth Amendment rights. However, he contended that defendant was innocent.

The trial court denied defendant's motions to dismiss made at the close of the State's evidence and again at the close of all the evidence. The jury returned verdicts of guilty of two counts of first-degree murder, conspiracy to commit armed robbery, and robbery with a firearm.

At defendant's capital sentencing proceeding, the State presented no additional evidence. Defendant presented evidence tending to show his good character.

On appeal to this Court, defendant makes thirteen arguments based on nineteen assignments of error. He contends that the trial court committed numerous errors entitling him to dismissal of the charges against him or, in the alternative, a new trial or new capital sentencing proceeding. We find no prejudicial error entitling defendant to a dismissal, new trial, or new capital sentencing proceeding.

[1] In his first argument, based on three assignments of error, defendant contends that the trial court erred "in allowing the case to be tried before a jury that had not been sworn in open court with due solemnity before defendant and his counsel and that had been sworn before the beginning of court." We disagree.

This Court considered similar challenges based on a defendant's constitutional right to be present at all stages of his trial in *State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996). In that case, the defendant argued that his right to be present was violated because prospective jurors were preliminarily sworn, oriented, and generally qualified for service by a deputy clerk in the jury assembly room outside of the defendant's presence. This Court concluded that Workman had no right to be present because his capital trial had not yet commenced. *Id.* at 498, 476 S.E.2d at 310. This Court has also noted that a defendant's right to presence does not include the right to be present during preliminary handling of the jury venire before the defendant's own case has been called. *State v. Rannels*, 333 N.C. 644, 430 S.E.2d 254 (1993).

In the instant case, the record reflects that prospective jurors were sworn in the jury pool room by a deputy clerk of superior court after a juror orientation by that clerk, but prior to the time the jurors were assigned to any particular courtroom for jury service. These jurors were subject to assignment in any one of six superior courts in session as well as any number of district courts. We conclude that our decisions in *Workman* and *Rannels* control here. Defendant has no

right to be present where prospective jurors are preliminarily sworn in, oriented, and generally qualified for service by a deputy clerk in the jury assembly room.

[2] Defendant further contends under this argument that this procedure violated his statutory rights under N.C.G.S. § 9-14 to have the jury sworn "at the beginning of court." We disagree.

N.C.G.S. § 9-14 provides in pertinent part:

> The clerk shall, at the beginning of court, swear all jurors who have not been selected as grand jurors. Each juror shall swear or affirm that he will truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before him and render true verdicts according to the evidence.

N.C.G.S. § 9-14 (1997).

The State contends, and we agree, that the phrase "at the beginning of court," as it applies to the swearing of prospective jurors, refers to the beginning of the term of court as opposed to the beginning of an individual trial, which may be civil or criminal. This interpretation comports with the oath given prospective jurors to "try all issues in criminal and civil actions" that come before a particular juror who is selected to serve. Accordingly, we reject defendant's first argument.

[3] In his second argument, defendant seeks a new trial on the grounds that the trial court erred when it allowed his case to be tried before a jury that had been selected during a *voir dire* process that did not require prospective jurors to take an oath that they would "tell the truth." Defendant argues that the failure of the State to administer such an oath taints the jury selection process and violates defendant's Sixth Amendment right to a fair and impartial jury.

As we indicated earlier, N.C.G.S. § 9-14 requires that jurors "swear or affirm that [they] will truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before [them] and render true verdicts according to the evidence." The record reflects that the jurors took the prescribed oath prior to trial in this case. That oath required that they "truthfully" try all issues and "render true verdicts according to the evidence." There is no indication that the trial court failed to perform any duty required of it in the swearing of the venire. Furthermore, defendant has failed to show that any juror ultimately selected in his case was in any way unquali-

fied to sit or that he was in any way prejudiced because jurors were not required, during *voir dire*, to take an additional oath to "tell the truth." Accordingly, we reject defendant's second argument.

[4] Defendant's third argument asserts that the trial court erred in denying defendant's motion to suppress statements he made to police on 23 September 1993. Defendant contends that this denial violated his Fifth Amendment rights under the United States Constitution. Defendant argues that he was in custody when he gave his first and second statement, and that he had not been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We find no error.

This Court has consistently held that the necessity of a *Miranda* warning and waiver applies only under circumstances where a defendant is subject to custodial interrogation. *See State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997). In order to determine whether a defendant is in custody for *Miranda* purposes, the test is whether a reasonable person in the suspect's position would feel free to leave or would feel compelled to stay. *See State v. Hicks*, 333 N.C. 467, 478, 428 S.E.2d 167, 173 (1993). An appellate court must examine the totality of circumstances surrounding the interrogation, but "the definitive inquiry is whether there was a formal arrest or a restraint on the freedom of movement of the degree associated with a formal arrest." *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405.

In the instant case, it is undisputed that police questioned defendant during three separate interviews without benefit of *Miranda* warnings. However, the record also shows that defendant voluntarily drove to the Raleigh Police Department for questioning as a potential witness. The trial court found that the first interview lasted approximately thirty minutes, was not confrontational, and did not produce any incriminating statements by defendant. The second interview occurred a short time later, at approximately 7:45 p.m., after defendant voluntarily agreed to answer a few more questions. Defendant was not restrained in any way and did not ask to leave. The second interview ended at approximately 8:07 p.m. The third interview followed the voluntary fingerprinting of defendant and search of defendant's truck at approximately 9:50 p.m.

The trial court made extensive findings of fact based on uncontroverted evidence. The trial court found that, during the first two interviews at the police station, defendant's freedom of action was

not restrained in any way, defendant was not impaired, he was not coerced or threatened, and he was cooperative and willing to talk at all times. However, the trial court also found that after 9:50 p.m., a reasonable person would probably have concluded that he was no longer free to leave and that his freedom was being restrained in a significant way. No explanation was given to defendant regarding the need for a third interview by yet another officer.

The trial court concluded that the first two interviews did not constitute custodial interrogation and that defendant's statements were thus admissible, but that the third statement was not admissible because defendant's freedom was restricted and he had neither been advised of nor knowingly waived his *Miranda* rights. After reviewing the totality of the circumstances surrounding defendant's questioning on 23 September 1993, we conclude that the trial court correctly determined that defendant was not in custody at the time his first two statements were given to police. Accordingly, we hold that the trial court did not err in denying defendant's motion to suppress his first and second statements to police.

[5] In his fourth argument, defendant contends that his federal and state constitutional rights were violated when the trial court conducted numerous bench conferences out of his presence and without providing a record of the substance of such conferences. Defendant acknowledges this Court's decision in *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991), but attempts to distinguish this case from *Buchanan*. In *Buchanan*, we rejected defendant's federal and state constitutional challenges to such bench conferences after a careful review of cases by this Court and the federal courts.

After a careful review of the eighteen instances identified by defendant in which the trial court conferred with trial counsel in this case, we conclude that there is no error under *Buchanan*. We note first that the holding and underlying rationale of *Buchanan* have been repeatedly reaffirmed by this Court. *See, e.g., State v. Tyler*, 346 N.C. 187, 485 S.E.2d 599, *cert. denied*, — U.S. —, 139 L. Ed. 2d 411 (1997); *State v. Speller*, 345 N.C. 600, 481 S.E.2d 284 (1997); *State v. Larrimore*, 340 N.C. 119, 456 S.E.2d 789 (1995). Nevertheless, *Buchanan* should not be read as a wholesale approval of unrecorded bench conferences in capital cases. As we said in *Buchanan*,

> If . . . the subject matter of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his oppor-

> tunity to defend, the defendant would have a constitutional right to be present.

Buchanan, 330 N.C. at 223-24, 410 S.E.2d at 845.

Defendant was represented by counsel at each of the unrecorded bench conferences. Defendant was present in the courtroom and was in a position to observe the context and to inquire of his attorneys as to the nature and substance of each one of the conferences. Despite the fact that defendant was not present at the bench, he had, through his counsel, the opportunity to raise, for the record, any matter to which he took exception. Moreover, defendant has failed to show the usefulness of his presence or that his presence at the bench would have had a reasonably substantial relation to his opportunity to defend. Accordingly, we reject defendant's fourth argument.

[6] In his fifth argument, defendant contends that the trial court erred in denying his motion for mistrial after defendant's older brother, Michael McNeill, testifying for the State, challenged defendant to take the stand in his own defense. Defendant argues that despite the trial judge's admonition to the jury not to consider the remark, the admonition came too late, defendant was compelled to testify in his own behalf, and this compulsion violated his Fifth Amendment right to remain silent. He also argues that the right to remain silent is so compelling that the trial court's denial of a mistrial amounted to an abuse of discretion.

N.C.G.S. § 15A-1061 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. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not make or join in the motion.

N.C.G.S. § 15A-1061 (1997). In *State v. King*, 343 N.C. 29, 468 S.E.2d 232 (1996), we said: "It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *Id.* at 44, 468 S.E.2d at 242.

The gravamen of Michael McNeill's testimony was that after reading defendant's statement to the police, he began to question whether his brother was in fact involved in the murders. Michael testified that he questioned defendant, who admitted being there with their other brother, Robert. In addition, he then testified that defendant admitted that he actually killed the two Food Lion employees. The portion of Michael's testimony at issue here is as follows:

> [PROSECUTOR]: Mr. McNeill, why did you wait until the Fall of 1995 to contact me?
>
> A. I had serious doubts about what my brother had told me.
>
> [PROSECUTOR]: Your brother, Ray?
>
> A. Yes. Particularly the part about being the triggerman. I thought he might be covering up for someone because Ray has a warped sense of loyalty.
>
> *And, Ray, if you—if you lied to me, you need to get your scrawny butt on the stand and—*
>
> [PROSECUTOR]: Mike, Mike that's okay.
>
> THE COURT: No, no. Let's don't—Just answer questions, please.
>
> [PROSECUTOR]: It's okay.
>
> THE COURT: Ladies and gentlemen, do not consider that last remark in any way whatsoever.

(Emphasis added.)

While Michael's challenge to defendant was improper, we conclude that nothing in the record reflects that the prosecutor's questions elicited his comment. When considering defendant's motion for a mistrial, the trial court found that the unsolicited comment was simply blurted out by the witness and took everyone by surprise. The prosecutor responded immediately to avoid further comment, and the trial court, acting *ex mero motu*, told the jury not to consider the comment "in any way whatsoever." The trial judge denied defendant's motion for mistrial in light of his curative instruction and the fact that he found no prejudice to defendant. The trial court further offered to instruct the jury that defendant had no burden of proof and no obligation to testify and that, under the law, his decision not to testify could not be held against him. The trial court also offered to ask each

juror if he or she could abide by that law. Defendant declined the trial court's offer.

In this case, neither the trial court nor the prosecutor made any comments referring to defendant's right to remain silent. In fact, the prosecutor attempted to stop the witness from blurting out such comments. Any potential prejudice was cured by the trial court's instruction to the jury not to consider the remark. The court took substantial remedial precautions to insure that defendant continued to receive a fair trial. We conclude that the trial court did not err or abuse its discretion in denying defendant's motion for mistrial.

[7] In his sixth argument, defendant contends that the trial court erred by refusing to strike statements by Michael McNeill that defendant's evidence was a "circus" and by overruling defendant's objections to the same witness' statement that the "victims of this heinous crime deserve more than what they've been getting." Defendant argues that these statements further compounded the prejudice of his earlier challenge to defendant to testify and that failure by the trial court to control these remarks constituted reversible error. We disagree.

The record reflects that defendant, through his attorneys, had impugned the motives of his brother Michael for coming forward and testifying on behalf of the State. The implication of the cross-examination by defense counsel was that Michael McNeill had a sexual relationship with Tamara McNeill, the wife of defendant's brother Robert, and was therefore biased against Robert and defendant. The record shows that defense counsel had previously made this very argument out of the jury's presence. Ultimately, counsel was permitted to ask Michael whether he had a sexual relationship with Tamara McNeill prior to his coming forward with this information to the district attorney. The witness denied any such relationship. Counsel also intimated through his cross-examination that Michael was going to profit by writing a book about the murders.

The record reflects that on redirect examination, the following exchange took place:

> [PROSECUTOR]: Mr. McNeill, Mr. Ellinger asked you a question about whether or not you had aspirations to be a writer. And you said you've thought about it at times. Why are you coming in here into this courtroom and telling these people over here the things that you're telling them?

A. Because it's the truth. Because, as I stated before, I mean, this is not a joke. It's not a game. After watching this circus for the last two days —

[DEFENSE COUNSEL]: Objection.

[DEFENSE COUNSEL]: Motion to strike.

THE COURT: Overruled.

Go ahead.

A. I just—there needs to be—the truth needs to come out and there needs to be some justice. The—the victims of this heinous crime deserve more than what they've been getting.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Go to your next question.

[PROSECUTOR]: Mr. McNeill, did you have any motivation for any kind of personal gain for you personally, Mike McNeill, that motivated you to come forward with this information and to come forward in this courtroom?

A. No.

[PROSECUTOR]: That's all, Your Honor.

"The law 'wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.' " *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998). Defendant opened the door to the witness' response by impugning his character through his line of cross-examination. We conclude that Michael McNeill's responses were in explanation of or in rebuttal to evidence elicited by defendant. The trial court did not err in denying defendant's motion to strike these statements.

[8] In his seventh argument, defendant contends that the trial court erred in denying his motion for funds to employ a forensic crime-scene expert. Defendant argues that he needed a generalist who could review the mass of circumstantial physical evidence, some of which was exculpatory. He contends that denial of this motion violated his due process rights. We disagree.

In order to receive state-funded expert assistance, an indigent defendant must make "a particularized showing that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992); *see also* N.C.G.S. § 7A-450(b) (1995). Furthermore, "the State is not required by law to finance a fishing expedition for the defendant in the vain hope that 'something' will turn up." *State v. Alford*, 298 N.C. 465, 469, 259 S.E.2d 242, 245 (1979). "Mere hope or suspicion that such evidence is available will not suffice." *State v. Tatum*, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976).

In the instant case, defendant filed a number of motions requesting funds to hire experts to assist in his defense. The trial court granted defendant's motions for a private investigator, a firearms expert, a fingerprint expert, and an audiologist. After a hearing, with defendant and his counsel present, the court concluded that defense counsel had not made a threshold showing of need for a crime-scene expert or that such assistance was necessary for defendant to receive effective assistance of counsel and a fair trial.

Defendant makes the argument that at the time the trial court heard the motion for funds to hire a forensic crime-scene expert, there was little other evidence but that contained in the Food Lion store. Defendant contends that evidence was circumstantial and in need of interpretation. However, while a forensic crime-scene expert may have been of some assistance to defense counsel in preparing the case, we agree with the trial court that this was not an adequate showing of particularized necessity to require the State to provide funds for such an expert. Accordingly, the trial court did not err in denying this motion.

[9] In his eighth argument, defendant contends that the trial court committed plain error in not striking *ex mero motu* the testimony of various witnesses pertaining to State's Exhibits 76 and 77. State's Exhibit 77 was a Ruger Blackhawk .357 Magnum revolver purchased by the State for demonstration purposes, and Exhibit 76 was the Ruger firearm box. Although the exhibits were never admitted into evidence, several witnesses referred to them during testimony, and one witness used Exhibit 77 to demonstrate the workings of a Ruger revolver. Defendant neither objected to the use of the exhibits nor moved to strike the testimony of these witnesses. Nevertheless, defendant now contends that he is entitled to a new trial under the

plain error rule because the trial judge did not strike the testimony of the witnesses regarding these exhibits. We disagree.

The plain error rule applies in the exceptional case where, after reviewing the entire record, it can be said that the claimed error is so fundamental that justice could not have been done. *See State v. Weathers*, 339 N.C. 441, 450, 451 S.E.2d 266, 271 (1994); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Assuming *arguendo* that the plain error rule applies to the failure to strike the testimony of witnesses, we reject defendant's contention here. While the exhibits were used in soliciting testimony, the substance of the testimony could have been obtained without the exhibits. For example, the identification of the gun and box by law enforcement officers simply authenticated the purchase of the weapon by the State. The identification of the gun as being similar to a gun previously owned or seen by other witnesses was merely corroborative. The only significant use of the gun in the courtroom was to demonstrate the workings of a Ruger revolver. The witness could have used one of the State's exhibits constituting a working diagram of the Ruger revolver. Clearly, the use of these exhibits to illustrate testimony does not amount to fundamental error justifying a new trial. *Cf. State v. Cannon*, 341 N.C. 79, 459 S.E.2d 238 (1995) (holding that there was no prejudicial error when the jury was permitted to review a diagram which was never admitted into evidence).

In his ninth argument, defendant contends that the trial court erred in denying his motions to dismiss. Defendant concedes that he bases his argument concerning the propriety of the trial court's denial of his motion to dismiss on the failure of the trial court to strike *incompetent* evidence, to wit, the testimony concerning State's Exhibits 76 and 77. Since we have rejected defendant's contention that the trial court committed plain error by failing *ex mero motu* to strike the testimony concerning these exhibits, we also reject defendant's ninth argument.

[10] In his tenth argument, defendant contends that the trial court erred and violated his right to due process by actively soliciting and allowing the presentation of evidence at a judicial settlement conference, without notice to defendant or his counsel. We disagree.

Under Rule 11(c) of the North Carolina Rules of Appellate Procedure, if the parties are unable to agree on the record on appeal, it becomes the duty of the trial judge to settle the record. In the instant case, the parties were unable to agree on the record on

appeal, and the trial judge conducted a hearing in open court upon the record with defense counsel and the prosecutor present. Over defendant's objection, the court heard testimony from Deputy Clerk Helen Sewell regarding the method and manner by which the jurors in this case were sworn by her prior to defendant's case being called for trial. Defense counsel objected on the basis that defendant was not present. We find no error. First, defendant's presence is not required at a hearing to settle the record on appeal. Second, defendant has failed to show how he was prejudiced by not receiving advance notice, since his counsel was present and fully examined Ms. Sewell and could have, but did not during the course of the hearing, ask her to find and bring any necessary documents to the courtroom. Furthermore, defendant has not argued that he was prevented from presenting evidence at the hearing.

[11] In a related eleventh argument, defendant contends that the trial court erred in participating in *ex parte* communications with the prosecutor prior to the judicial settlement conference. Defendant bases his assertions on the deputy clerk's testimony that the prosecutor had asked her to testify and two separate comments made by the trial court during the judicial settlement conference. The trial court first commented:

> THE COURT: Since there appears to be some question in the record with regard to the way it was proposed on behalf of the defendant concerning the oath that the jurors took in this case, and the record clearly indicates that they did take an oath at page 651, I believe, of the record prior to impanelment, both the Court and the Clerk noted that the jurors had been sworn, they were impaneled to try the issues in the case. However, I've ask that the Jury Clerk be available to testify with regard to the circumstances under which the jurors were sworn, since they were not sworn in open court in the presence of the defendant, and I'll allow the State to proceed with calling Helen Sewell.

A later comment by the court during the same judicial settlement conference is as follows:

> THE COURT: Well, I don't believe I would have approved this record, . . . if there had been some question in the record as to whether or not the jurors had been sworn in the case when the defendant was sentenced to death. I would hope you would have anticipated that the Court might make some inquiry as to clarifying that matter.

Assuming, *arguendo*, that the judge's comments and the deputy clerk's testimony somehow showed an *ex parte* communication with the prosecutor, such *ex parte* communication relates only to the administrative functioning of the judicial system and would not be improper. At most, it appears that the trial judge was being careful to assure that this Court have a complete record to properly resolve issues raised by defendant in the record on appeal.

PRESERVATION ISSUE

[12] Defendant raises an additional argument that the trial court erred in using the word "may" in its instructions in sentencing Issues Three and Four. Defendant's specific argument is that the use of the word "may" in the instructions makes consideration of established mitigating circumstances discretionary. This argument has been repeatedly rejected by this Court. *See State v. Geddie*, 345 N.C. 73, 478 S.E.2d 146 (1996), *cert. denied*, —— U.S.——, 139 L. Ed. 2d 43 (1997); *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996); *State v. Basden*, 339 N.C. 288, 451 S.E.2d 238 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995); *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant raises this issue for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving it for any possible further judicial review of this case. We have carefully considered defendant's arguments on this issue and find no compelling reason to depart from our prior holdings. Accordingly, we reject this argument.

PROPORTIONALITY REVIEW

[13] Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. It is our duty in this regard to ascertain: (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1997).

In this case, as to each murder, the aggravating circumstances submitted to and found by the jury were: (1) the murder was committed for the purpose of avoiding and preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (3) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstances submitted to and found by the jury. Further, we find no indication that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In our proportionality review, it is proper to compare the present case with 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, *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. Distinguishing features of the instant case are: (1) defendant was convicted of two counts of first-degree murder under the theory of premeditation and deliberation; (2) defendant was an integral part of a calculated plan to rob a store and to kill whomever was closing the store to eliminate them as witnesses; (3) defendant procured the murder weapon and shot each of the victims twice in the head, at close range, with a .357 Magnum revolver.

Defendant argues to this Court that his sentences of death are disproportionate under the circumstances of these crimes and considering this particular defendant. Defendant notes that in the trial of

his brother and codefendant, Robert McNeill, the jury found the same three aggravating circumstances as in defendant's case, plus a fourth circumstance of having previously been convicted of a felony involving the threat of violence to another person, yet Robert McNeill received life sentences for his participation in the two murders. Defendant also points to testimony that indicated Robert McNeill was the motivating factor behind the murders and that but for Robert McNeill, defendant would not have been at the Food Lion or been involved in the crime at all. Finally, defendant urges this Court to consider the fact that he was the younger brother, that Robert McNeill was described as "greedy" and had been involved in criminal activity before, and that defendant was known for his blind loyalty, even to those who would get him in trouble.

We conclude, however, that the circumstances of the crimes and the attributes of defendant do not render defendant's sentences of death disproportionate.

The sentencing of defendant's brother Robert to life imprisonment for the same crimes also does not require a determination that defendant's sentences were disproportionate. We note that the fact that a defendant is sentenced to death while a codefendant receives a life sentence for the same crime is not determinative of proportionality. *See State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (1998); *State v. Lemons*, 348 N.C. 335, 501 S.E.2d 309 (1998).

In the instant case, defendant procured the murder weapon several days before the robbery and used the weapon to eliminate innocent witnesses to the robbery.

It is also proper to compare this case to those where the death sentence was found proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. However, it is unnecessary to cite every case used for comparison. *Id.* We do note that this Court has consistently held the death penalty proportionate in cases in which the defendant was convicted of killing more than one person. *See, e.g., State v. Warren*, 348 N.C. 80, 129, 499 S.E.2d 431, 459, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 216 (1998); *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. McHone*, 334 N.C. 627, 435 S.E.2d 296 (1993), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994). Even where defendant was convicted of only one count of first-degree murder, this Court has upheld the sentence of death when the motive for the killing was to avoid a lawful arrest. *See State v. McCarver*, 341 N.C. 364, 462 S.E.2d

25 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d. 267 (1985). Here, the jury found that defendant committed each murder for the purpose of avoiding and preventing a lawful arrest.

After comparing this case to other roughly similar cases as to the crime and the defendant, we conclude that this case has the characteristics of first-degree murders for which we have previously upheld the death penalty as proportionate. Accordingly, we cannot conclude as a matter of law that the sentences of death are excessive or disproportionate. Therefore, the judgments of the trial court must be and are left undisturbed.

NO ERROR.

Justice WYNN did not participate in the consideration or decision of this case.

IN THE MATTER OF: BEFORE THE NORTH CAROLINA PESTICIDE BOARD, FILE NOS. IR94-128, IR94-151, IR94-155, H. RAY MEADS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF AGRICULTURE, FOOD AND DRUG PROTECTION DIVISION, PESTICIDE SECTION, RESPONDENT

No. 139A98

(Filed 31 Dec. 1998)

1. Agriculture § 30 (NCI4th)— aerial spraying of pesticide—application within three hundred feet of business—violation of regulation

Substantial evidence supported a decision by the Pesticide Board that petitioner, an aerial pesticide applicator, violated a pesticide regulation prohibiting the aerial application of a pesticide within three hundred feet of an occupied business where the evidence showed that petitioner aerially applied a pesticide to a soybean field during morning hours when a nearby business was occupied, and vegetation samples collected 234 feet from the business contained .10 ppm of Permethrin.

2. Agriculture § 30 (NCI4th)— aerial spraying of pesticide— application within twenty-five feet of roadway—violation of regulation

Substantial evidence supported a decision by the Pesticide Board that petitioner violated a pesticide regulation prohibiting the aerial application of a pesticide within twenty-five feet of a roadway where the evidence tended to show that vegetation samples taken within four feet of a road the day after petitioner sprayed a soybean field with a pesticide contained .17 ppm of Permethrin on the east side of the road and .54 ppm of that substance on the west side of the road.

3. Agriculture § 30 (NCI4th)— aerial spraying of pesticide— application within one hundred feet of residence—violation of regulation

Substantial evidence supported a decision by the Pesticide Board that petitioner violated a pesticide regulation prohibiting the application of a pesticide within one hundred feet of a residence where the evidence tended to show that the day after petitioner aerially applied a pesticide to a soybean field, two vegetation samples collected within forty-seven and sixty feet of a nearby residence contained .10 ppm and .44 ppm of Permethrin; the pesticide label states that the product causes moderate eye irritation; and the person living in the residence encountered a vapor that made her eyes burn and her lips tingle.

4. Agriculture § 30 (NCI4th)— aerial spraying of pesticide— use inconsistent with label—sufficient evidence

Substantial evidence supported a conclusion by the Pesticide Board that petitioner violated statutes making it unlawful to use any pesticide inconsistent with its label where the evidence tended to show that petitioner aerially applied a pesticide to a soybean field; the pesticide label stated that the pesticide should not be applied so as to directly and through drift expose workers or other persons; a resident of land adjoining the soybean field was exposed to a vapor containing the pesticide; and the pesticide was found on vegetation on the land adjoining the soybean field. N.C.G.S. §§ 143-443(b)(3), 143-456(a)(2), and 143-469(b)(2).

5. Agriculture § 30 (NCI4th)— aerial pesticide applicator— operation in careless or negligent manner

Substantial evidence supported a conclusion by the Pesticide Board that petitioner aerial pesticide applicator violated the

statute providing that the Board may revoke a license upon finding that the licensee has operated in a faulty, careless or negligent manner where the evidence showed that petitioner aerially applied a pesticide to a soybean field; a person living on adjoining land exited her home and encountered vapor that made her eyes burn and her lips tingle; and numerous traces of the pesticide were found on vegetation outside the target area.

6. Agriculture § 30 (NCI4th)— aerial pesticide regulations—buffer zones—meaning of "deposit"

As used in the pesticide regulation creating buffer zones where it is unlawful to "deposit" pesticides, two NCAC 9L .1005(e), the term "deposit" means "to let fall." Accordingly, an aerial pesticide applicator violates this regulation whenever he takes any action which results in either the direct or indirect (e.g., drift) falling or placement of a pesticide within a restricted buffer zone.

7. Agriculture § 30 (NCI4th)— aerial pesticide application—inconsistency with label—no reliance on obsolete labeling restriction

The Pesticide Board did not improperly rely upon an obsolete labeling restriction when it determined that petitioner aerially applied a pesticide in a manner inconsistent with its labeling in violation of state statutes where the Board relied upon a labeling restriction stating that the pesticide should not be applied "in such a manner as to directly or through drift *expose* workers or other persons," although the EPA had changed the required warning to state that the pesticide should not be distributed or sold "in a way that will *contact* workers or other persons, either directly or through drift," where a grace period applied so that the new warning label was not required at the time petitioner applied the pesticide in question, and petitioner was not subject to the EPA's amended labeling restrictions because he was not a distributor or seller of pesticides. Therefore, the Pesticide Board was permitted to apply the pesticide label restrictions as they existed at the time of petitioner's application of the pesticide.

8. Agriculture § 30 (NCI4th)— aerial pesticide application—inconsistency with label—statutory violations—sufficiency of evidence

Under N.C.G.S. §§ 143-443(b)(3), 143-456(a)(2), and 143-469(b)(2), an aerial pesticide applicator was forbidden to

apply a pesticide in a manner inconsistent with any written, printed, or graphic material located upon its container and its accompanying materials at or before the time of application. Furthermore, the evidence was sufficient for the Pesticide Board to find that the applicator applied a pesticide in a manner inconsistent with its label warning that it should not be applied in a manner "as to directly or through drift expose workers or other persons" where it tended to show that the applicator aerially sprayed a soybean field, and when the resident of property adjoining the soybean field exited her home on that day, she encountered a vapor that made her eyes burn and her lips tingle.

9. Administrative Law and Procedure § 52 (NCI4th)— constitutionality of pesticide regulations—jurisdiction of trial court—exhaustion of administrative remedies not required

An aerial pesticide applicator who was fined and had his aerial pesticide license revoked by the Pesticide Board was not required, in order to argue before the trial court the constitutionality of aerial pesticide regulations creating certain buffer zones, to exhaust administrative remedies by (1) petitioning the Pesticide Board to amend or appeal the regulation pursuant to N.C.G.S. § 150B-20, or (2) requesting a declaratory ruling from the Pesticide Board pursuant to N.C.G.S. § 150B-4, since it is in the province of the judiciary to make constitutional determinations, and any effort made by the applicator to have the constitutionality of the regulations determined by the Pesticide Board would have been in vain.

10. Agriculture § 30 (NCI4th)— aerial pesticide regulations—buffer zones—not due process violation

Aerial pesticide buffer-zone regulations that prohibit depositing a pesticide within specified distances of schools, hospitals, nursing homes, churches, occupied businesses, roadways, and areas where aquatic life may be harmed do not violate due process under the United States or North Carolina Constitutions because they have the legitimate objective of protecting both people and the environment from the harmful risks accompanying pesticide application, and they utilize a reasonable means of accomplishing this objective. These regulations do not violate due process because they fail to distinguish between harmless and harmful deposit levels or because they do not involve a deter-

mination of whether the deposit was intentional, purposeful, or willfully negligent.

11. Agriculture § 30 (NCI4th)— aerial pesticide regulations—buffer zones—not equal protection violation

Buffer-zone pesticide regulations do not violate equal protection under the United States or North Carolina Constitutions because they treat aerial pesticide applicators differently from ground pesticide applicators since the increased risk of harm to people and the environment associated with aerial applications mandates treating aerial applicators in a distinct manner.

Appeal by respondent pursuant to N.C.G.S. § 7A-30(2) of an unpublished decision of a divided panel of the Court of Appeals, 128 N.C. App. 750, 498 S.E.2d 210 (1998), affirming an order entered by Farmer, J., on 7 February 1997 in Superior Court, Wake County. On 8 July 1998, the Supreme Court allowed petitioner's petition for discretionary review of additional issues. Heard in the Supreme Court 18 November 1998.

Hatch, Little & Bunn, L.L.P., by David H. Permar and Tina L. Frazier, for petitioner-appellant and -appellee.

Michael F. Easley, Attorney General, by Melissa H. Taylor, Assistant Attorney General, for respondent-appellant and -appellee.

Southern Environmental Law Center, by Donnell Van Noppen III, Senior Attorney, on behalf of Agricultural Resources Center, Inc., amicus curiae.

WYNN, Justice.

We are asked in this appeal to determine whether the North Carolina Pesticide Board properly penalized an aerial pesticide applicator for violating various North Carolina pesticide regulations. On initial review, our Court of Appeals affirmed the trial court's reversal of the Pesticide Board's decision. Finding error, we reverse the decision of the Court of Appeals and reinstate the Pesticide Board's decision.

On 26 August 1994, petitioner H. Ray Meads ("Meads") aerially sprayed the pesticide Pounce on James Duncan's ("Duncan") soybean

field located on S.R. 1148[1] in Currituck County. On that same day, Mary Jo Windley ("Windley"), a Currituck County resident whose property adjoins the Duncan field, exited her home and encountered a vapor that made her eyes burn and her lips tingle. Consequently, Windley complained to the North Carolina Department of Agriculture, Food and Drug Protection Division, Pesticide Section ("NCDA").

In response, on 27 August 1994, an NCDA inspector collected vegetation samples from the east and west sides of S.R. 1148, the Windley yard, and the target soybean field. Analysis of the samples revealed varying levels of Permethrin, an active ingredient in Pounce, ranging from 1.6 parts per million ("ppm") in the sprayed target field to .10 ppm in the Windley yard. Permethrin traces were also discovered within twenty-five feet of S.R. 1148; one-hundred feet of Windley's residence; and three-hundred feet of Royster Clark, Inc., a nearby business open at the time of Meads' Pounce application.

On 28 November 1994, the NCDA issued Meads a notice violation citing his alleged violation of the North Carolina pesticide law and regulations.[2] Subsequently, the Pesticide Board held a hearing and concluded that Meads violated N.C.G.S. §§ 143-443(b); 143-469(b)(2); and 143-456(a)(2), (4), and (5) by applying Pounce in a manner inconsistent with its label. The Pesticide Board also concluded that Meads violated N.C.G.S. § 143-456(a)(4) by applying Pounce in a faulty, careless, or negligent manner. Lastly, the Pesticide Board concluded that Meads violated North Carolina Administrative Rule 2 NCAC 9L .1005(b), (c), and (e), respectively, by aerially depositing pesticide within three-hundred feet of the nearby business Royster Clark, Inc.; twenty-five feet of S.R. 1148; and one-hundred feet of the Windley residence. Under N.C.G.S. §§ 143-469(a)(2) and 143-456(a)(5), the Pesticide Board assessed Meads a $1,000 fine and revoked his aerial pesticide license for one year. Thereafter, Meads sought judicial review of the Pesticide Board's decision in Superior Court, Wake County.

In an order entered 7 February 1997, the trial court concluded that the Pesticide Board improperly interpreted rule 2 NCAC 9L .1005

1. S.R. 1148 is also known as North Gregory Road.

2. NCDA issued two other notice violations to Meads on 28 November 1994 for violations of N.C.G.S. § 143-456(a)(5) and 2 NCAC 9L .1005(c). The North Carolina Pesticide Board, however, did not assess a penalty for these violations. Additionally, Meads did not contest the Board's findings regarding these cases.

and erred in its application of obsolete labeling restrictions. Additionally, the court concluded that the Pesticide Board's decision was arbitrary, capricious, and unsupported by substantial evidence. Lastly, the court concluded that the buffer-zone regulations set forth in rule 2 NCAC 9L .1005 violated Meads' constitutional due process and equal protection rights. Accordingly, the trial court reversed the Pesticide Board's decision.

Our Court of Appeals, in an unpublished opinion, affirmed the trial court's ruling that the Pesticide Board's decision was arbitrary, capricious, and unsupported by substantial evidence. *See Meads v. N.C. Dep't of Agric.*, 128 N.C. App. 750, 498 S.E.2d 210 (1998). Because this issue was determinative of the case, the Court of Appeals did not address the trial court's conclusion that the regulations and accompanying penalties violated Meads' constitutional due process and equal protection rights. In dissent, Judge Greene concluded that "the whole record contains substantial evidence to support the [Pesticide] Board's determination."

We are now asked to determine: (1) whether the Pesticide Board's decision was supported by substantial evidence, (2) whether the Pesticide Board's decision was based upon errors of law, and (3) whether the buffer-zone regulations set forth in rule 2 NCAC 9L .1005 violate the Due Process and Equal Protection Clauses of both the United States and North Carolina Constitutions. We address each issue seriatim.

I. WHETHER SUBSTANTIAL EVIDENCE SUPPORTED THE PESTICIDE BOARD'S DECISION

As an administrative agency, the Pesticide Board is subject to the North Carolina Administrative Procedure Act ("APA"), codified at chapter 150B of the General Statutes. *See Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). Under the APA, a reviewing court may reverse or modify an agency's decision if the petitioner's substantial rights may have been prejudiced by findings, inferences, conclusions, or decisions which are arbitrary, capricious, or unsupported by substantial evidence. *See* N.C.G.S. § 150B-51(b) (1991).

Under N.C.G.S. § 150B-51(b), the proper standard of review "depends upon the issues presented on appeal." *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). When the reviewing court is determining whether an agency's decision was

arbitrary, capricious, or unsupported by substantial evidence, as we are in the instant case, it must apply the "whole record" test. *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

"The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Id.* (quoting *Rector v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). Therefore, if we conclude there is substantial evidence in the record to support the Board's decision, we must uphold it. *See McCrary*, 112 N.C. App. at 168, 435 S.E.2d at 365. We note that while the whole-record test " 'does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached,' " *id.* at 167-68, 435 S.E.2d at 364 (quoting *Lackey v. N.C. Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)), the test "does not allow the reviewing court to replace the Pesticide Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*," *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

As stated, the Pesticide Board concluded that Meads violated 2 NCAC 9L .1005(b), (c), and (e) and N.C.G.S. §§ 143-443(b)(3), 143-456(a)(2), and 143-469(b)(2). We address each violation respectively.

[1] Under 2 NCAC 9L .1005(b), it is unlawful to aerially apply a pesticide within three-hundred feet of an occupied business. The Pesticide Board, in concluding that Meads violated this rule, initially noted that Meads aerially applied Pounce on Duncan's soybean field at some point between 9:30 and 11:00 a.m.—a time during which the nearby business Royster Clark, Inc., was occupied. The Pesticide Board found that vegetation samples collected approximately 234 feet from Royster Clark, Inc., contained .10 ppm of Permethrin. From these facts, the Pesticide Board concluded that Meads improperly applied pesticide within three-hundred feet of an occupied business in violation of 2 NCAC 9L .1005(b). We conclude that this evidence provides sufficient support for the Pesticide Board's ruling.

Therefore, we reverse the Court of Appeals' decision that the Pesticide Board's holding with respect to this issue was arbitrary, capricious, and unsupported by substantial evidence.

[2] Under 2 NCAC 9L .1005(c), pesticide may not be aerially applied within twenty-five feet of a roadway. The Pesticide Board, in determining that Meads violated this rule, found that a vegetation sample taken four feet from the pavement along the east side of S.R. 1148 contained .17 ppm of Permethrin, while a vegetation sample taken three feet from the pavement along the west side of S.R. 1148 contained .54 ppm of that same substance. This evidence constitutes substantial evidence to support the Pesticide Board's decision that Meads violated this rule. Thus, we reverse the Court of Appeals' decision to the extent that it found that the Pesticide Board's holding with respect to this rule was arbitrary, capricious, and unsupported by substantial evidence.

[3] Under 2 NCAC 9L .1005(e), pesticide may not be aerially applied within one-hundred feet of a residence. In ruling that Meads violated this rule, the Pesticide Board noted that two vegetation samples collected within forty-seven and sixty feet of Ms. Windley's residence contained .10 ppm and .44 ppm of Permethrin, respectively. Moreover, the Pesticide Board noted that the Pounce label provides that the product "[c]auses moderate eye irritation." The Pesticide Board concluded that the evidence showing that Ms. Windley's eyes burned and her lips tingled showed that there were traces of Pounce within the restricted area. We agree. Accordingly, we reverse the Court of Appeals' decision that the Pesticide Board's holding with respect to this rule was arbitrary, capricious, and unsupported by substantial evidence.

[4] We next address the Court of Appeals' holding that the Pesticide Board's conclusion that Meads violated certain statutes was unsupported by substantial evidence. The Pesticide Board found that Meads violated N.C.G.S. §§ 143-443(b)(3), 143-456(a)(2), and 143-469(b)(2), which make it unlawful for any person to use any pesticide inconsistent with its label. At the time of Meads' aerial application, the Pounce label read in pertinent part: "Do not apply this product in such a manner as to directly or through drift expose workers or other persons." As stated, the Pesticide Board concluded that Ms. Windley was exposed to Pounce upon exiting her home, as evidenced by her irritated eyes and tingling lips—symptoms associated with Pounce exposure. This evidence, combined with the undisputed

fact that Meads aerially applied Pounce to land adjoining Ms. Windley's lot, provides substantial evidence to support the Pesticide Board's conclusion that Meads violated these statutes. Therefore, to the extent that the Court of Appeals overturned the Pesticide Board's decision with respect to these statutory sections, we reverse.

[5] Lastly, we address the Pesticide Board's conclusion that Meads violated N.C.G.S. § 143-456(a)(4), which provides that the Pesticide Board may revoke a license upon finding that the licensee has operated in a faulty, careless, or negligent manner. The preceding evidence, standing alone, provides substantial evidence that Meads' aerial application of Pounce was faulty, careless, or negligent. Additionally, we note that the Pesticide Board further supported its conclusion by pointing to the numerous traces of Permethrin found outside of the target area. Thus, these facts provide substantial evidence to support the Pesticide Board's conclusion regarding this issue.

II. ERRORS OF LAW

We next consider whether the trial court correctly concluded that the Pesticide Board: (1) erroneously interpreted the buffer zone regulations set forth in rule 2 NCAC 9L .1005; and (2) erroneously applied an obsolete labeling restriction when concluding that Meads violated N.C.G.S. §§ 143-443(b)(3), 143-456(a)(2), and 143-469(b)(2) by applying Pounce in a manner inconsistent with its label. Because this issue involves an error of law, N.C.G.S. § 150B-51(b)(4) directs us to utilize *de novo* review. *See Friends of Hatteras Island v. Coastal Resources Comm'n*, 117 N.C. App. 556, 567, 452 S.E.2d 337, 344 (1995).

A. BUFFER-ZONE REGULATIONS

[6] Initially, we determine whether the Pesticide Board erroneously interpreted the term "deposited" as it is used in rule 2 NCAC 9L .1005. Meads argues that the Pesticide Board improperly equated the term "deposited" with the term "detected" when concluding that he unlawfully "deposited" Pounce within the restricted buffer zones.

Rule 2 NCAC 9L .1005 contains the term "deposited" in three pertinent areas. First, 2 NCAC 9L .1005(b) provides that "[n]o pesticide shall be deposited by aircraft within 300 feet of the premises of . . . any building (other than a residence) which is used for business or social activities if either the premises or the building is occupied by people." Further, 2 NCAC 9L .1005(c) provides that "[n]o pesticide

shall be deposited by aircraft on the right-of-way of a public road or within 25 feet of the road, whichever is the greater distance." Lastly, 2 NCAC 9L .1005(e) provides that "[n]o pesticide shall be deposited within 100 feet of any residence." In conjunction, these areas constitute "buffer zones" where it is unlawful to "deposit" pesticides.

Meads argues that the term "deposited," as utilized in the preceding rules, requires a finding that Meads himself "deposited" Pounce within the restricted buffer zone. According to Meads, the only evidence that he "deposited" Pounce within these zones was samples taken from those areas which indicated traces of Permethrin. Meads contends that this evidence shows that Pounce was "detected" in those zones, not "deposited" there.

When a term is not defined or provided a technical meaning, this Court will construe it in accordance with its ordinary meaning. *See State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984). According to *Webster's Dictionary*, the term "deposit" is defined as "to let fall (as sediment)." *Merriam-Webster's Collegiate Dictionary* 310 (10th ed. 1993). Using this definition in the context of aerial pesticide application, we conclude that the term "deposit" refers to any action which results in either the direct or indirect (e.g., drift) falling or placement of pesticide within a restricted buffer zone.

We find further support for this conclusion by using the well-settled principle that provisions should be construed in a manner which tends to prevent them from being circumvented. *See Friends of Hatteras*, 117 N.C. App. at 573, 452 S.E.2d at 348. In the case *sub judice*, Meads argues that we should construe the term "deposited" to include only *intentional* aerial applications of pesticides in a restricted buffer zone. Meads' construction, however, encourages contravention of this rule by allowing aerial applicators to defend their actions based upon an almost unascertainable mental intent. That is, an applicator can simply plead ignorance to a zone's restricted status or to the principles of drift. This, in turn, could allow aerial applicators to carelessly apply pesticides by granting them the "I didn't mean for the pesticides to deposit there" defense.

In summation, we conclude that the trial court correctly concluded that the term "deposited," as set forth in rule 2 NCAC 9L .1005, means "to let fall." Accordingly, an aerial pesticide applicator violates this rule whenever he takes any action which results in either the direct or indirect (e.g., drift) falling or placement of pesticide within a restricted buffer zone.

B. DID THE PESTICIDE BOARD RELY ON OBSOLETE LABELING

[7] We now address Meads' contention that the Pesticide Board improperly relied upon an obsolete labeling restriction when it determined that he applied Pounce in a manner inconsistent with its labeling. Specifically, the Pesticide Board rested its decision upon a labeling restriction which states that Pounce should not be applied "in such a manner as to directly or through drift *expose* workers or other persons." (Emphasis added.) The Environmental Protection Agency ("EPA") requires this warning on every pesticide label. *See* 7 U.S.C. § 136v(b) (1992). The warning itself, however, was changed by the EPA on 20 October 1992 to read: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift." 40 C.F.R. § 156.206(a) (1993). Meads argues that there is a significant difference between the terms "expose" and "contact" and that the Pesticide Board erred in relying upon the old label and its use of the word "expose."

As stated, on 20 October 1992, the EPA changed its pesticide-labeling restriction. Under 40 C.F.R. § 156.200, which governs the scope and applicability of the amended labeling restriction, "[n]o product to which this subpart applies shall be *distributed or sold* without amended labeling by any registrant after April 21, 1994"; and "[n]o product to which this subpart applies shall be *distributed or sold* without the amended labeling by any *person* after October 23, 1995." 40 C.F.R. § 156.200(c)(3), (4) (1993) (emphasis added). Therefore, 40 C.F.R. § 156.200 contained a grace period during which the affected parties could sell or distribute their products without the amended label. Further, the length of this grace period was based upon the seller or distributor's status—that is, whether the affected party was a registrant or person.

In the case *sub judice*, Meads was not a registrant, and therefore the labeling restriction was inapplicable until 23 October 1995. Because the alleged improper application occurred in August 1994, the amended labeling restriction did not apply.

Moreover, 7 U.S.C. § 136(gg) defines the phrase "to distribute or sell" as to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. Under this definition, so long as a pesticide applicator does not deliver unapplied pesticide to an individual, the applicator does not "distribute or sell" it by simply holding or applying it as part of a pest

removal service. 7 U.S.C. § 136(gg) (1992). Indeed, any applicator who holds or applies registered pesticides or who uses dilutions of registered pesticides only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served is not deemed to be a seller or distributor of pesticides. 7 U.S.C. § 136(e)(1).

In the case *sub judice*, Meads was a "certified applicator" of pesticides whose sole service involved the control of pests. Meads never provided any individual with unapplied pesticide. Accordingly, because Meads was not a distributor or seller of pesticides, he was not subject to the EPA's amended labeling restrictions.

[8] Although Meads was not bound by the EPA's amended labeling restrictions, the Board was nonetheless permitted to apply the Pounce label restrictions as they existed at the time of Meads application. Under N.C.G.S. §§ 143-443(b)(3), 143-456(a)(2), and 143-469(b)(2), an applicator may not apply a pesticide in a manner inconsistent with its label. "The term 'label' means the written, printed, or graphic matter on, or attached to, the pesticide (or device) or the immediate container thereof, and the outside container or wrapper of the retail package, if any there be, of the pesticide (or device)." N.C.G.S. § 143-460(19) (1993). Further, the term "labeling" means all labels and other written, printed, or graphic matter which, at any time, were placed upon or accompanied the pesticide, its wrappers, or containers. N.C.G.S. § 143-460(20). Accordingly, Meads was forbidden to apply the pesticide in a manner inconsistent with any written, printed, or graphic material located upon Pounce and its accompanying materials at or before the time of application.

In August 1994, the time of Meads' alleged improper application, the Pounce label stated in pertinent part: "Do not apply this product in such a manner as to directly or through drift expose workers or other persons." Indeed, the Pounce label, which was not required to be changed until 23 October 1995, still contained the old label at the time of Meads' application. Therefore, the Pesticide Board was correct in relying on that label.

With respect to whether Meads applied the pesticide in a manner inconsistent with the label, we note that the term "expose," as used in this context, is defined as "subject to risk from a harmful action or condition." *Merriam-Webster's Collegiate Dictionary* 410. In the case *sub judice*, drift from Meads' aerial application of Pounce entered upon the Windley property. Moreover, Ms. Windley encountered the

drift, as evidenced by her irritated eyes and tingling lips. This encounter subjected Ms. Windley to risk from a harmful condition and therefore exposed her to the product in violation of N.C.G.S. §§ 143-443(b)(3), 143-456(a)(2), and 143-469(b)(2). Accordingly, the Pesticide Board correctly determined that Meads applied Pounce in a manner inconsistent with its label. Therefore, we reverse the Court of Appeals to the extent that it concluded that the Pesticide Board relied upon an obsolete labeling restriction.

III. CONSTITUTIONALITY

We now reach the issue of whether the buffer-zone regulations set forth in rule 2 NCAC 9L .1005 violate the constitutional rights of due process and equal protection.

[9] Initially, we address the NCDA's contention that the trial court lacked subject-matter jurisdiction over this issue as a result of Meads' alleged failure to exhaust his administrative remedies. The NCDA contends that Meads, before arguing the constitutionality of the regulations in the trial court, was required to pursue one of two options: (1) petition the Pesticide Board to amend or repeal the regulation pursuant to N.C.G.S. § 150B-20, or (2) request a declaratory ruling from the Pesticide Board pursuant to N.C.G.S. § 150B-4. We conclude that the NCDA's argument is without merit.

Under N.C.G.S. § 150B-43:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute . . . .

N.C.G.S. § 150B-43 (1991). Accordingly, that statute sets forth five requirements that a party must satisfy before seeking review of an adverse administrative determination: "(1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute." *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992).

In the case *sub judice*, Meads has satisfied all five requirements. First, the fine and revocation levied against Meads clearly make him

an aggrieved party. Second, this case is "contested" because it involves an administrative proceeding to resolve a dispute between an agency and another person with respect to licensing and the levying of a monetary fine. *See* N.C.G.S. § 150B-2(2) (1991) (a "contested case" is one which involves "an administrative proceeding . . . to resolve a dispute between an agency and another person that involves the rights, duties, or privileges, including licensing or the levy of a monetary penalty"). Further, the final three requirements are met because the Pesticide Board's decision constituted a final agency decision which left Meads without an administrative remedy or other adequate statutory procedure for judicial review.

In the NCDA's exhaustion argument, it contends that the two administrative options stated above constituted adequate alternative procedures for judicial review. Therefore, the NCDA argues that Meads was required to exhaust them pursuant to our fourth and fifth requirements. The NCDA's argument, however, ignores our well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board. *See Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961); *see also Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *disc. rev. denied*, 312 N.C. 508, 329 N.C. 392 (1985). Because it is the province of the judiciary to make constitutional determinations, any effort made by Meads to have the constitutionality of the buffer-zone regulations determined by the Pesticide Board would have been in vain. Accordingly, given the constitutional nature of this issue, the NCDA options were inadequate, and therefore Meads was not required to exhaust them. Thus, Meads satisfied the aforementioned requirements and was entitled to judicial review.

With respect to the pertinent question of whether rule 2 NCAC 9L .1005 is constitutional, we note that our scope of review is governed by N.C.G.S. § 150B-51(b)(1). Under that statute, this Court, when reviewing an agency decision, may reverse or modify the decision if the petitioner's substantial rights may have been prejudiced by findings, inferences, conclusions, or decisions which violate the North Carolina or United States Constitution. Further, when a petitioner alleges that an agency violated his constitutional rights, this Court will undertake *de novo* review. *See Air-A-Plane Corp. v. N.C. Dep't of Envir., Health & Natural Resources*, 118 N.C. App. 118, 124, 454 S.E.2d 297, 301, *disc. rev. denied*, 340 N.C. 358, 458 S.E.2d 184 (1995).

A. DUE PROCESS

[10] Under federal due process jurisprudence, legislation is presumed constitutional unless it involves a suspect classification or impinges upon a fundamental personal right. *See City of New Orleans v. Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511 (1976) (per curiam); *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978); *Kennedy v. Hughes*, 596 F. Supp. 1487 (D. Del. 1984). Further, legislation which is presumed constitutional passes federal constitutional muster so long as it is rationally related to a legitimate state interest. *See Ferguson v. Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93 (1963).

Under North Carolina jurisprudence, state "due process" is governed by Section 19 of the Constitution of North Carolina, which provides that "[n]o person shall be deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Although this Court often considers the "law of the land" synonymous with "due process of law," *see A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979), we have reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be obtainable under the Fourteenth Amendment to the United States Constitution, *see Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985). Nonetheless, the twofold constitutional inquiry under both the North Carolina and United States Constitutions is the same: (1) Does the regulation have a legitimate objective; and (2) if so, are the means chosen to implement that objective reasonable? *See A-S-P Assocs.*, 298 N.C. 207, 258 S.E.2d 444; *Treants Enters. v. Onslow County*, 83 N.C. App. 345, 350 S.E.2d 365 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987).

The objectives underlying North Carolina's pesticide regulations are set forth in the preamble to the pesticide law. *See* N.C.G.S. § 143-435 (1993). According to that section, pesticide regulations were adopted "to regulate in the public interest the use, application, sale, disposal and registration of insecticides, fungicides, herbicides, defoliants, desiccants, plant growth regulators, nematicides, rodenticides, and any other pesticides designated by the North Carolina Pesticide Board." N.C.G.S. § 143-435(b). The preamble to the pesticide law provides that

> pesticides . . . may seriously injure health, property, or wildlife if not properly used. Pesticides may injure man or animals, either by direct poisoning or by gradual accumulation of poisons in the tissues. Crops or other plants may also be injured by their

> improper use. The drifting or washing of pesticides into streams or lakes can cause appreciable danger to aquatic life. A pesticide applied for the purpose of killing pests in a crop, which is not itself injured by the pesticide, may drift and injure other crops or nontarget organisms with which it comes in contact.

Id.

The buffer-zone regulations questioned by Meads concern the aerial application of pesticides. Specifically, the buffer-zone regulations prohibit depositing pesticide within enumerated distances of schools, hospitals, nursing homes, churches, occupied businesses, roadways, and areas where aquatic life may be harmed. *See* 2 NCAC 9L .1005 (July 1988). A plain reading of these regulations, in conjunction with the preamble to the pesticide law, convincingly demonstrates that the overriding objective behind our pesticide law is to protect both people and the environment from the harmful risks accompanying pesticide application. Undoubtedly, this is a legitimate objective.

Given our determination that the regulations were created to achieve a legitimate objective, we must now determine whether they utilize a reasonable means of accomplishing it. In making this determination, we note that the Pesticide Board's rule "is endowed with a presumption of legislative validity, and the burden is on [the party challenging the rule] to show that there is no rational connection between the Board's action and its conceded interest." *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198, 59 L. Ed. 2d 248, 254 (1979). Further, the party challenging the rule must prove that the state agency's action is so irrational that no reasonable conception could justify it. *See Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1263 (4th Cir. 1995).

As stated, the underlying purpose behind the pesticide regulations is to reduce or eliminate the risk harmful pesticides place upon humans and the environment. The Pesticide Board determined that the best way to achieve this purpose was to flatly prohibit the depositing of pesticides in certain areas. The logic is simple: If the source of the harm is eliminated, so is the harm itself. This logical connection demonstrates that the Pesticide Board chose a means which is rationally related to its legitimate objective.

In concluding that the buffer-zone regulations violated due process, the trial court based its decision upon two factors: (1) the

regulations failed to distinguish between harmless and harmful deposit levels; and (2) the regulations do not involve a determination of whether the "deposit" was intentional, purposeful, or willfully negligent. We conclude that the trial court's reliance on these factors was misplaced.

With respect to the trial court's finding that the regulations do not discriminate between harmless and harmful pesticide deposit levels, we conclude that the trial court improperly considered this factor. In the case *sub judice*, the undisputed facts demonstrate that Meads' deposit was significant enough to constitute a harmful deposit. Indeed, Meads' own expert testified that the levels found within the rights-of-way and around the Windley home were sufficient to kill beneficial insects and possibly cause Ms. Windley harm. Therefore, the trial court's reliance upon harmless versus harmful levels had no place in the present case.

Additionally, we note that a restriction which prohibits some activities that are harmful as well as some that are safe is not *per se* unconstitutional. *See, e.g., Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907, 913 (3d Cir. 1987) (geographical perimeters of the quarantine zone bore a rational connection to the objective sought; indeed, these "boundaries were selected to cover areas of known infection and to include a five-mile buffer zone so that they could be readily identifiable, thereby avoiding poultry being inadvertently shipped through or out of the quarantine areas"). For example, numerous drugs and pesticides like DDT have been banned from this country even though they may be beneficial for certain uses at specified levels. Further, under the rational-relation test, the means utilized to achieve a legitimate objective need not be narrowly tailored and can be constitutional even though they may be broader than necessary. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88, 99 L. Ed. 563, 572 (1955) ("the law need not be in every respect logically consistent with its aims to be constitutional").

Turning to the trial court's second basis for concluding that the buffer-zone regulations violate due process—the regulations do not involve a determination of whether the deposit was intentional, purposeful, or willfully negligent—we again find the trial court's conclusion misplaced. Simply stated, due process does not require every regulatory provision to contain a state-of-mind element. *See, e.g., State v. Sumner*, 232 N.C. 386, 61 S.E.2d 84 (1950) (holding that a warrant was sufficient to support a conviction of operating a motor vehicle on a public highway at a speed of ninety miles an hour). For

example, we have held that proof of a speeding violation requires nothing more than a showing that the vehicle was traveling above the speed limit. *Id.* Similarly, we have held that statutory rape, as a strict-liability crime, requires nothing more than proof that the defendant committed the act, *see, e.g., State v. Murry*, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970) ("[n]either force[] nor intent [is an] element[] of this offense"); the fact that the defendant failed to act purposefully, intentionally, or with willful negligence is of no consequence.

In the case *sub judice*, the Pesticide Board's decision not to include an intent element in rule 2 NCAC 9L .1005 is rationally related to its legitimate objective of protecting humans and the environment from the risks associated with pesticide application. Specifically, the risk and harm to humans and the environment are the same regardless of whether the pesticide was intentionally deposited in a buffer zone. The only effect an intent element would have upon the rule would be to place an undue burden on the rule's enforcement. Indeed, numerous cases would end up focusing upon the applicator's intent, a focus having no relationship to the regulation's overriding goal.

Accordingly, we conclude that the buffer-zone regulations set forth in rule 2 NCAC 9L .1005 are rationally related to the legislative goal of protecting people and the environment from the risks associated with pesticide use. Moreover, we conclude that the means taken to achieve this goal are reasonable. Therefore, the buffer-zone regulations do not violate due process.

B. EQUAL PROTECTION

[11] The trial court determined that the buffer-zone regulations violate both the state and federal constitutional Equal Protection Clauses because they treat aerial pesticide applicators differently from ground pesticide applicators. In so ruling, the trial court held that there should be no difference in the restrictions placed upon these methods because the resulting harm is the same regardless of which method is used. We disagree.

Although statutes are void as denying equal protection whenever similarly situated persons are subject to different restrictions or are given different privileges under the same conditions, *see State v. McCleary*, 65 N.C. App. 174, 186, 308 S.E.2d 883, 891-92 (1983), *aff'd per curiam*, 311 N.C. 397, 317 S.E.2d 870 (1984), inequalities and classifications do not *per se* render a legislative enactment unconsti-

tutional, *see Cheek v. City of Charlotte*, 273 N.C. 293, 298, 160 S.E.2d 18, 23 (1968). Moreover, "[c]lassifications are not offensive to the Constitution 'when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected.' " *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 67, 366 S.E.2d 697, 700-01 (1988) (quoting *Cheek*, 273 N.C. at 298, 160 S.E.2d at 23). Therefore, "[c]lassification is permitted when (1) it is based on differences between the business to be regulated and other businesses and (2) when these differences are rationally related to the purpose of the legislation." *Id.* at 67, 366 S.E.2d at 701.

In the case *sub judice*, we must determine whether aerial pesticide applicators, as a class regulated under rule 2 NCAC 9L .1005, are treated differently than the allegedly similarly situated class of ground pesticide applicators. Determinative of this issue is the fact that aerial applicators are indeed different from ground applicators.

First, aerial applicators are subject to different licensing requirements under N.C.G.S. § 143-452(d). Under that section, separate classifications or subclassifications are specified for ground and aerial methods of application including the requirement that aerial applicator contractors, as well as pilots, obtain a license. Moreover, rule 2 NCAC 9L .0505 distinguishes aerial and ground classifications as evidenced by comparing subsection (1), which applies to "pesticide applicators and public operators utilizing *ground* equipment," with subsection (2), which applies to "pesticide applicators and public operators utilizing *aerial* equipment." 2 NCAC 9L .0505(1), (2) (Nov. 1984) (emphasis added). Thus, the laws and regulations recognize a distinction between aerial and ground applicators and treat each accordingly.

Significantly, this distinction is necessary to congeal the regulations with the pesticide law's overriding goal of protecting people and the environment. Specifically, the distinction is needed because of the increased risk of drift and other sources of nontarget deposit associated with aerial application. *See* G.W. Ware *et al.*, *Pesticide Drift: Deposit Efficiency from Ground Sprays on Cotton*, 68 J. Econ. Entomology 549, 549-50 (1975). Indeed, Meads' own expert testified that an aerial applicator is ten times more likely to miss a targeted spraying zone than a ground applicator. Therefore, the increased risk of harm to people and the environment associated with aerial applications mandates treating aerial applicators in a distinct

manner. Accordingly, this distinction is rationally related to the pesticide regulations' underlying purpose and therefore is constitutionally permissible.

In summation, the different treatment accorded aerial and ground applicators is not arbitrary; rather, it is reasonable and rests upon the differences in licensing requirements and qualifications associated with each method of application. Moreover, the differences are rationally related to the increased likelihood of an off-target occurrence associated with aerial application. Accordingly, we conclude that the buffer-zone regulations in rule 2 NCAC 9L .1005 comply with both the state and federal constitutional Equal Protection Clauses.

IV. CONCLUSION

We conclude that the Court of Appeals erred in holding that there was not substantial evidence to support the Pesticide Board's decision to assess a civil penalty and revoke Meads' license. We further conclude that the Pesticide Board did not commit any errors of law in reaching its decision. Lastly, we conclude that rule 2 NCAC 9L .1005 does not violate the constitutional rights of due process or equal protection.

Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Wake County, to issue an order affirming the decision of the North Carolina Pesticide Board.

REVERSED AND REMANDED.

MARY LOU ADAMS, EMPLOYEE v. AVX CORPORATION, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 151PA98

(Filed 31 December 1998)

1. Workers' Compensation § 415 (NCI4th)— review of hearing officer's decision by full Commission—credibility of parties—cold record

The Court of Appeals erred in a workers' compensation proceeding by holding that the full Industrial Commission's findings upon review of a hearing officer's decision was not supported by

competent evidence in the record because the Commission failed to consider that the hearing officer was better able to determine the credibility of the parties. N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission, not the hearing officer, and the Commission is not required to demonstrate that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer. To the extent that *Sanders v. Broyhill Furniture Indus.*, 124 N.C. App. 637, is inconsistent with this opinion, it is overruled.

2. Workers' Compensation § 460 (NCI4th)— full Commission—findings of fact—supported by evidence

A workers' compensation award by the full Industrial Commission arising from exposure to acetone and kaolin was upheld where the testimony was conflicting but there was some competent evidence in the record to support the findings of fact by the full Commission. The full Commission's findings of fact were conclusive on appeal and those findings support the conclusions of law found by the Commission and the award entered.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a per curiam, unpublished decision of the Court of Appeals, 128 N.C. App. 748, 496 S.E.2d 850 (1998), reversing an order of the Industrial Commission entered 14 October 1996. Heard in the Supreme Court 17 November 1998.

George W. Lennon and Michael W. Ballance for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Richard M. Lewis and M. Reid Acree, Jr., for defendant-appellees.

ORR, Justice.

This case arises from proceedings before the Industrial Commission in which plaintiff alleged that she suffered an aggravation of preexisting medical conditions, pulmonary disease, and permanent and total disability as the result of an accidental exposure to chemicals, on 4 August 1992, arising out of and in the course of her employment with defendant AVX Corporation. The deputy commissioner found (1) "that an incident at work on 3 or 4 August 1992, if it occurred, did not cause plaintiff to be unable to be gainfully employed after 4 August 1992"; and (2) "that there is insufficient evidence of record from which the [deputy commissioner] can find from

the greater weight that any medical treatment plaintiff received from 3 August 1992 and continuing was made necessary as a result of the incident on 3 August 1992, if it occurred." The findings generated conclusions of law to the effect that if the incident occurred, it did not cause plaintiff any period of disability and did not make medical treatment necessary, and the deputy commissioner thus denied compensation.

Plaintiff appealed to the full Commission, which reconsidered the evidence but did not hear live testimony. The full Commission, with one commissioner dissenting, reversed the deputy commissioner and awarded compensation. Defendants then appealed to the Court of Appeals.

In a unanimous decision, the Court of Appeals stated:

> In the present case, the Commission's findings are not supported by competent evidence in the record. Because the Commission's findings were made simply from a review of the cold record, the Commission, as noted by Commissioner Sellers in her dissent, should have considered that the hearing officer was better able to determine the credibility of the parties. Without competent evidence to support plaintiff's contention she suffered a work place injury, the Commission's determination is in error. Accordingly, plaintiff's contention is without merit.
>
> Because we determine plaintiff did not suffer a work-related injury, we do not reach the remaining assignments of error.

Adams v. AVX Corp., 128 N.C. App. 748, 748, 496 S.E.2d 850, 850 (1998) (per curiam). For the reasons stated herein, we reverse the Court of Appeals.

Plaintiff, who was sixty-three years old at the time of the incident in question, was employed by defendant AVX Corporation and its corporate predecessor, Corning Glass Works, for over thirty years. During that time, plaintiff performed a number of jobs, some of which exposed her to industrial chemicals. Although plaintiff's primary job was as a visual inspector of glass capacitators, sometimes when production was slow, she would work on the "exit end" of the production line unloading ceramic ware. To ensure that ceramic ware being sent through the furnace did not stick to the pallet on which it sat, it was sprayed with a blue chemical compound consisting of acetone and kaolin. Plaintiff alleges she sustained injuries arising out of the occu-

pational exposure to chemicals which resulted in chronic obstructive pulmonary disease and restrictive lung disease. According to plaintiff's statement, the accident occurred when she sprayed herself in the face as she attempted to unclog the nozzle of a malfunctioning spray gun containing the blue acetone and kaolin compound. Defendants contested both the occurrence of the work-related accident of which plaintiff complains and the alleged disability that followed.

Plaintiff testified before the deputy commissioner that she informed two fellow employees who assisted her of the accidental spraying; however, both employees denied that she told them she had suffered a work-related injury. One of the two employees, who was also trained as an emergency medical technician, testified that plaintiff complained of shortness of breath and that her blood pressure was quite high but that she never saw any bluish substance on plaintiff. Three other employees who had contact with plaintiff on the morning of the alleged accident testified that plaintiff complained of a breathing problem but said nothing of an accidental spraying or a work-related injury.

The evidence indicates that after plaintiff rested on a cot, the human-resources secretary took her to Kaiser Permanente, where she was treated, but her medical record for 4 August 1992 makes no reference to a work-related injury. Plaintiff had preexisting respiratory problems, but a nurse practitioner testified that since August 1992, plaintiff's coughing and wheezing had become chronic.

In October 1992, plaintiff was referred by Kaiser to an allergist, Dr. H. Randy Schwartz. Dr. Schwartz found no evidence of allergy but noted possible restrictive lung disease. In November 1992, Kaiser referred her to a pulmonologist, Dr. Robert Alan Durr. After conducting a pulmonary test, Dr. Durr noted that plaintiff's condition was consistent with restrictive lung disease and informed Kaiser of the possibility that chemical exposure played a role in plaintiff's development of chronic bronchitis. After plaintiff suffered a heart attack in April 1994, a second pulmonary test revealed restrictive lung disease. Dr. Durr testified that inhalation of acetone and kaolin is harmful to the lungs and can cause lung disease.

[1] Plaintiff's first argument focuses on the Court of Appeals' determination that the full Commission failed to consider that the hearing officer was better able to determine the credibility of the parties, and thus there was no competent evidence to support plaintiff's con-

tention she suffered a workplace injury. According to the Court of Appeals, that failure resulted in the Commission's findings not being supported by competent evidence in the record and mandated reversal of the Commission's award. We agree with plaintiff and therefore reverse the Court of Appeals.

N.C.G.S. § 97-85 provides in part:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award . . . .

N.C.G.S. § 97-85 (1991). We have stated that "[i]n reviewing the findings found by a deputy commissioner . . . , the Commission may review, modify, adopt, or reject the findings of fact found by the hearing commissioner." *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976).

Defendants rely on *Sanders v. Broyhill Furniture Indus.*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. rev. denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), where the defendant-employer appealed to the Court of Appeals after the full Commission, with one commissioner dissenting, reversed the deputy commissioner's denial of the plaintiff's claim. The Court of Appeals held that "prior to reversing the deputy commissioner's credibility findings on review of a cold record, the full Commission must . . . demonstrate in its opinion that it considered the applicability of the general rule which encourages deference to the hearing officer who is the best judge of credibility." *Id.* at 640, 478 S.E.2d at 225.

This Court has repeatedly held "that our Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968). Under our Workers' Compensation Act, "the Commission is the fact finding body." *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders* states, "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one." *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226. To the extent that *Sanders* is inconsistent with this opinion, it is overruled.

[2] In addition, plaintiff argues that the findings of fact of the full Commission are supported by the evidence and are therefore conclusive on appeal. We agree.

"The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

N.C.G.S. § 97-86 provides that "an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact." N.C.G.S. § 97-86 (1991). As we stated in *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Id.* at 402, 141 S.E.2d at 633. The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence. *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937).

Here, the Commission made comprehensive findings of fact that include:

> 14. Plaintiff's injury by accident with defendant-employer exposed her to Acetone and Kaolin chemicals which were characteristic of and peculiar to her particular trade, occupa-

tion or employment and to the risk of developing chronic bronchitis.

15. As a result of plaintiff's injury by accident, pre-existing medical conditions were exacerbated, she has been unable to return to and sustain any previous employment which she has held and there is no credible evidence that competitive work is available for someone of plaintiff's age, education, background, and work experience, having her physical limitations, much less that plaintiff can obtain the same in an open and competitive labor market.

16. As a result of her injury by accident, plaintiff experiences remissions and exacerbations in her chronic pulmonary condition. She is unable to maintain regular attendance in any employment and unable to sustain full-time or competitive job duties as a result of the combination of her pre-existing and current medical conditions.

While the testimony is conflicting, there is some competent evidence in the record to support the findings of fact of the full Commission. Plaintiff's supervisor and fellow workers testified that plaintiff seemed normal before the alleged incident and that problems with the spray gun plaintiff was using at the time of the alleged incident previously had been reported. Furthermore, plaintiff was taken to the company dispensary and was driven to Kaiser Permanente for medical attention on the day of the alleged incident after complaining of shortness of breath. Because there is some competent evidence in the record to support plaintiff's claim, we hold that the full Commission's findings of fact were conclusive on appeal. We also determine that these findings of fact support the conclusions of law found by the Commission and the award entered.

For the reasons stated, the decision of the Court of Appeals holding that the Industrial Commission's 14 October 1996 order was in error is reversed, and the case is remanded to the Court of Appeals with instructions that the order of the Industrial Commission be reinstated.

REVERSED AND REMANDED.

APPENDIXES

THE CHIEF JUSTICE'S COMMISSION
ON PROFESSIONALISM

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
STATEWIDE MEDIATED SETTLEMENT
CONFERENCES IN SUPERIOR COURT
CIVIL ACTIONS

ORDER ADOPTING STANDARDS OF
PROFESSIONAL CONDUCT FOR
SUPERIOR COURT MEDIATORS

ORDER ADOPTING RULES IMPLEMENTING
SETTLEMENT PROCEDURES IN
EQUITABLE DISTRIBUTION AND
OTHER FAMILY FINANCIAL CASES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE BOARD OF LAW EXAMINERS

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need for the emphasis upon and encouragement of professionalism in the practice of law, the Court hereby creates THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM.

The membership of the Commission shall be as follows:

The Commission's chair will be the Chief Justice or his designee. The chair will appoint the Commission's other members. The Commission's members will reflect the profession's four main constituents: practicing lawyers, judges, law school faculty, and the public. The chair will appoint from the constituents as follows:

1. Judges:

   (a) two judges chosen from those who serve actively on the trial benches of the courts of North Carolina or the United States, and

   (b) an appellate court judge chosen from the North Carolina Supreme Court, the North Carolina Court of Appeals, or the United States Court of Appeals.

2. Law School Faculty: two law school faculty members who are full-time faculty members from accredited North Carolina law schools, chosen on recommendations of the deans thereof.

3. Practicing Lawyers: seven practicing lawyers giving due and appropriate regard for diversity of representation and taking into account such factors as the chair shall deem just.

4. Public Members: Three non-lawyer citizens active in public affairs.

With the exception of the chairman, the members of the Commission shall serve for a term of three years provided, however, in the discretion of the chair, the initial appointments may be for a term of less than three years so as to accomplish staggered terms for the membership of the Commission.

BY THIS ORDER, the Court issues to the Commission the following charge: The Commission's primary charge shall be to enhance professionalism among North Carolina's lawyers. In carrying out its charge, the Commission shall provide ongoing attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of clients and in the public good.

The Commission's major responsibilities should include:

1. to consider and encourage efforts by lawyers and judges to improve the administration of justice;

2. to examine ways of making the system of justice more accessible to the public;

3. to monitor and coordinate North Carolina's professionalism efforts in such institutional settings as the bar, the courts, the law schools, and law firms;

4. to monitor professionalism efforts in jurisdictions outside North Carolina;

5. to conduct a study and issue a report on the present state of lawyer professionalism within North Carolina;

6. to plan and conduct Convocations on Professionalism;

7. to provide guidance and support to the Board of Continuing Legal Education and to the various CLE providers accredited by the Board, in the implementation and execution of a CLE professionalism requirement of not less than one hour per year;

8. to implement a professionalism component in bridge-the-gap programs for new lawyers;

9. to make recommendations to the Supreme Court, the State Bar, the voluntary bars, and the Board of Continuing Legal Education concerning additional means by which professionalism can be enhanced among North Carolina lawyers;

10. to receive and administer grants and to make such expenditures therefrom as the Commission shall deem prudent in the discharge of its responsibilities.

Provided, however, the Commission shall have no authority to impose discipline upon any members of the North Carolina State Bar or to amend, suspend, or modify the rules and regulations of the North Carolina State Bar including the Revised Rules of Professional Conduct.

By order of the Court in conference, this the 22nd day of September, 1998.

s/Orr, J.
Orr, J.
For the Court

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 30th day of December, 1998.

Adopted by the Court in conference the 30th day of December, 1998. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

s/Orr, J.
Orr, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

RULE 1. INITIATING MEDIATED SETTLEMENT CONFERENCES

A. PURPOSE OF MANDATORY SETTLEMENT CONFERENCES

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. 7A-37.1, Arb. Rule 1(b)].

B. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Timing of the Order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.B.(3) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(3) **Content of Order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not

exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an A.O.C. form.

(4) **Motion for Court Ordered Mediated Settlement Conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) **Motion to Dispense With Mediated Settlement Conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(6) **Motion to Authorize the Use of Other Settlement Procedures.** A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE

(1) **Order by Local Rule**. In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the

Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Scheduling Orders or Notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) **Scheduling Conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) **Application of Rule 1.A.** The provisions of Rule 1.B.(4) and (5) shall apply to Rule 1.B. except for the time limitations set out therein.

(5) **Deadline for Completion.** The provisions of Rule 3.B. determining the deadline for completion of the medi-

ated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.B. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of Mediator.** The parties may select and nominate, and the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.C.

RULE 2. SELECTION OF MEDIATOR

A. **SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES.** The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an A.O.C. form.

B. **NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR.** The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and

opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an A.O.C. form.

C. **APPOINTMENT OF MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an A.O.C. form. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Superior Court Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified non-attorney mediator, and if so, the Senior Resident Superior Court Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Superior Court Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in local rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Dispute Resolution Commission shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

D. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the

Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order.

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall

promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES.

A ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the repre-

sentative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance Company Representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT. If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By

stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, the Senior Resident Superior Court Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the Conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator timely to determine that an impasse exists and that the conference should end.

(4) **Reporting Results of Conference.** The mediator shall report to the court on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The mediator's report

shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(5) **Scheduling and Holding the Conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $100 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $100, which is due upon appointment.

C. **INDIGENT CASES.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Dispute Resolution Commission;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, or

(ii) a member in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and

(b) has at least five years of experience as a judge, practicing attorney, law professor or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B. (1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following: (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator:

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the US District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; and

H. Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice

governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 11. DEFINITIONS

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution. Commission.

RULE 12. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

ORDER ADOPTING STANDARDS OF PROFESSIONAL CONDUCT FOR SUPERIOR COURT MEDIATORS

WHEREAS, section 7A-38.2 of the North Carolina General Statutes established the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the mediated settlement conference program established pursuant to N.C.G.S. § 7A-38.1.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), Standards of Professional Conduct for Superior Court Mediators are hereby adopted to read as in the following pages. These Standards shall be effective on the 30th day of December, 1998.

Adopted by the Court in conference the 30th day of December, 1998. The Appellate Division Reporter shall publish the Standards of Professional Conduct for Superior Court Mediators in their entirety at the earliest practicable date.

s/Orr, J.
Orr, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR SUPERIOR COURT MEDIATORS

Adopted by the North Carolina Supreme Court December 30, 1998

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators who participate in mediated settlement conferences pursuant to NCGS 7A-38.1 in the State of North Carolina or who are certified to do so.

Mediation is a private and consensual process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the

mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his judgment whether his skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his serving on grounds of lack of impartiality or

(2) the mediator determines he cannot serve impartially.

III. Confidentiality: A mediator shall, subject to statutory obligations to the contrary, maintain the confidentiality of all information obtained within the mediation process.

A. Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process.

B. Even where there is a statutory duty to report information if certain conditions exist, a mediator is obligated to resolve doubts regarding the duty to report in favor of maintaining confidentiality.

C. A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

D. Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes, provided identifying information is removed.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator

shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He may assist them in making informed and thoughtful decisions, but shall not impose his judgment for that of the parties concerning any aspect of the mediation.

B. Subject to Section A. above and Standard VI. below, a mediator may raise questions for the parties to consider regarding the acceptability, sufficiency, and feasibility, for all sides, of proposed options for settlement—including their impact on third parties. Furthermore, a mediator may make suggestions for the parties' consideration. However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for or against any proposal under consideration.

C. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

D. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may, in areas where he is qualified by training and experience, raise questions regarding the information

presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

ORDER ADOPTING RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

WHEREAS, section 7A-38.4 of the North Carolina General Statutes establishes a pilot program in district court to provide for settlement procedures in equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S. § 7A-38.4(c) provides for this Court to implement section 7A-38.4 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4(c), Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases are hereby adopted. These rules shall be effective on the 1st day of March, 1999.

Adopted by this Court in conference this 30th day of December, 1998. The Appellate Division Reporter shall publish the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases in their entirety, at the earliest practicable date.

s/Orr, J.
Orr, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. 7A-37.1, Arb. Rule 1(b)].

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party in an equitable distribution, child support, alimony, or post-separation support action, shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) **Equitable Distribution Scheduling Conference**. At the scheduling conference mandated by G.S. 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) **Scope of Settlement Proceedings**. All other financial issues existing between the parties when the equitable dis-

tribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from the program.

(3) **Authorizing Settlement Procedures Other Than Mediated Settlement Conference**. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral; and

(d) that all parties consent to the motion.

(4) **Content of Order.** The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) **Court-Ordered Settlement Procedures in Other Family Financial Cases.** Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) **Motion to Dispense With Settlement Procedures.** A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have submitted the action to arbitration or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. **SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES.** The parties may select a mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing

counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who request appointments in said district.

C. MEDIATOR INFORMATION DIRECTORY. To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep

current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.

D. DISQUALIFICATION OF MEDIATOR. Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly. Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

B. FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL. The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties

have executed final documents. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.

C. **PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person an appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court upon the recommendation of the Dispute Resolution Commission, which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before

or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l), which states:

Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for media-

tors or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Conference. The mediator shall report to the Court, or its designee, using an AOC form, within 10 days of the conference, whether or not an agreement was reached by the parties. If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indicating the disposition of the case. If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) **Informational Brochure.** Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment.

C. **PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. **INABILITY TO PAY**. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B.&C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be a practitioner member of the Academy of Family Mediators; or

2. Be certified as a Superior Court mediator prior to December 31, 1998, and have family law or family mediation experience and be recommended by a regular District Court Judge in the applicant's district who has familiarity with the applicant's competence and qualifications in the area of family law or family mediation; or

3. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9 and have additional experience as follows:

(a) as a licensed attorney and/or judge of the General Court of Justice for at least four years; or

(b) as a licensed psychologist, licensed family counselor, licensed pastoral counselor or other licensed mental health professional for at least four years; or

(c) as a mediator having mediated in a community center or other supervised setting at least 5 cases each year for four years after first having completed a 20 hour mediation training program; or

(d) as a certified Superior Court mediator having mediated at least 10 cases in the past two years which may include family mediations, cases in state or federal courts or cases before state or federal administrative agencies; or

(e) as a certified public accountant for at least four years.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission.

C. Be a member in good standing of the State Bar of one of the United States or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties three mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these

rules, or who is a practitioner member of the Academy of Family Mediators, or who is an A.O.C. mediator.

To be certified pursuant to these rules within six months of the adoption of these rules, a person may satisfy the observation requirements of this section by satisfactorily demonstrating that he/she has served as mediator with divorcing parties having custody or family financial disputes in at least five (5) cases or for fifty (50) hours.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Agree to be placed on at least one district's mediator appointment list and accept appointments, unless the mediator has a conflict of interest which would justify disqualification as mediator.

K. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.)

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in

which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to these rules shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections.

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Knowledge of communication and information gathering skills.

(4) Standards of conduct for mediators.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Academy of Family Mediators may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an AFM approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the AFM approved training or in some other acceptable course.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of the procedure requested unless the Court finds that the parties did not agree upon the procedure to be utilized, the neutral to conduct it and the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the

deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of

conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties

and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) **Scheduling and Holding the Proceeding.** It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. **NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. **PRE-CONFERENCE SUBMISSIONS.** No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. **REPLIES TO PRE-CCONFERENCESE SUBMISSIONS.** No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and

the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) Report of Evaluator to Court. Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties,

and the name of the person designated to file judgments or dismissals concluding the action.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. Settlement Judge. A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge.

B. Conducting the Conference. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. Confidential Nature of the Conference. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. Report of Judge. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations, and the Certificate of Organization of the North Carolina State Bar concerning the Board of Law Examiners were adopted by the Council of the North Carolina State Bar at the Council's quarterly meeting on January 15, 1999.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Board of Law Examiners, as particularly set forth in 27 N.C.A.C. 1C Section .0100, be amended as follows (additions in bold type, deletions interlined):

27 N.C.A.C. 1C, Section .0100

Rule .0105 Approval Of Law Schools

Every applicant for admission to the North Carolina State Bar must meet the requirements set out in at least one of the numbered paragraphs below:

(1) The applicant holds an LL.B, J.D., LL.M. or S.J.D. degree from a law school that was approved by the American Bar Association at the time the degree was conferred;

(2) Prior to August 1995, the applicant received an LL.B., J.D., LL.M. or S.J.D. degree from a law school that was approved by the Council of the N.C. State Bar at the time the degree was conferred;

(3) The applicant holds a professional degree from a foreign law school and an LL.B., J.D., LL.M. or S.J.D. degree from a law school that was approved by the Council of the North Carolina State Bar at the time the degree was conferred or a law school which was approved by the American Bar Association at the time the degree was conferred.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly

adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 23rd day of February, 1999.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of March, 1999.

s/Burley B. Mitchell, Jr.
BurleyB. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 3rd day of March, 1999.

s/Wainwright, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendment to the Rules and 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 January 15, 1999.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions in bold type and deletions interlined):

Procedures for the Membership and Fees Committee

27 N.C.A.C. 1D, Section .0900

Rule .0902 Reimbursement from Inactive Status

(a) Eligibility to Apply for Reinstatement

. . .

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) . . .

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that during the period of inactive status, the member has completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter~~.~~ ~~o~~**O**f the required 15CLE hours, ~~12 hours must be earned attending practical skills courses and~~ 3 hours must be earned by attending a 3-hour block course of instruction devoted exclusively to the area of professional responsibility;

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly

adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 23rd day of February, 1999.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of March, 1999.

s/Burley B. Mitchell, Jr.
BurleyB. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 3rd day of March, 1999.

s/Wainwright, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1999.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Sections .1500 and .1600, be amended as follows (additions in bold type, deletions interlined):

27 N.C.A.C. 1D, Section .1500

Rule .1501 Purpose and Definitions

(a) Purpose

. . .

(b) Definitions

. . .

~~(13) "Practical skills courses" are those courses which are devoted primarily to instruction of basic practice procedures and techniques of law as distinct from substantive law. Examples of such courses would include preparation of legal documents and correspondence, and development of specific basic lawyering skills, such as voir dire, jury argument, introducing evidence, and efficient management of a law office.~~

(13) "Participatory CLE" shall mean courses or segments of courses that encourage the participation of attendees in the educational experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates

(14) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, the underlying rationale, and the practical application of the **Revised** Rules of Professional Conduct; b) the professional obligations of the attorney to the client, the court, the public, and other lawyers; and c) the effects of substance abuse and chemical dependency on a lawyer's professional responsibilities. This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

(15) "Professionalism" courses are courses or segments of courses devoted to the identification and examination of, and the encouragement of adherence to, nonmandatory aspirational standards of professional conduct which transcend the requirements of the Revised Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

~~(15)~~**(16)** "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter

~~(16)~~**(17)** "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

~~(17)~~**(18)** "Year" shall mean calendar year.

Rule .1518 Continuing Legal Education Program (Effective January 1, 1999)

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the area of professional responsibility **or professionalism or any combination thereof**; and

(2) at least once every three calendar years, each member shall be required to attend a specially designed three-hour block course of instruction devoted to the area of professional responsibility **or professionalism or any combination thereof** which will satisfy the requirement of Rule .1518(b)(1) above.

(c) ~~During each of the first three years of admission, newly admitted active members shall be required to take a minimum of 9 of the 12 hours of continuing legal education in practical skills courses. The board may provide by regulation for exempting newly admitted members with prior experience as practicing lawyers from the requirements of this paragraph.~~

(c) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b)(1) above, but may not include those hours required by Rule .1518(b)(2) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

Rule .1525 Confidentiality

Unless otherwise directed by the Supreme Court of North Carolina, the files, records, and proceedings of the board, as they relate to or arise out of any failure of any active member to satisfy the requirements of these rules shall be deemed confidential and shall not be disclosed, except in furtherance of the duties of the board or upon the request of the active member affected or as they may be introduced in evidence or otherwise produced in proceedings **before the Disciplinary Hearing Commission or** under these rules.

27 N.C.A.C. 1D, Section .1600

Rule .1602 General Course Approval

. . .

(j) Facilities

Sponsors ~~ordinarily~~ must provide a facility **conducive to learning** with ~~adequate lighting and temperature control ventilation. For a nonclinical CLE activity, the facility should be set up in classroom or similar style to provide a writing surface for each preregistered attendee or~~ sufficient space for taking notes. ~~and shall provide sufficient space between the chairs in each row to permit easy access and exit to each seat. Crowding in the facility detracts from the learning process and will not be permitted.~~

. . .

Rule .1605 Computation of Credit

(a) Computation Formula

. . .

(b) Actual Instruction

Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) ~~keynote speeches or~~ speeches in connection with ~~meals~~ **banquets or other events which are primarily social in nature**;

(5) question and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length **provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CLE**.

(c) Teaching

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of February, 1999.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of March, 1999.

s/Burley B. Mitchell, Jr.
BurleyB. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that

they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 3rd day of March, 1999.

s/Wainwright, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1999.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B, Sections .0100 and .0200, be amended as follows (additions in bold type, deletions interlined):

27 N.C.A.C. 1B, Section .0100

Rule .0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty

. . .

(4) to direct a letter of notice to a respondent **or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;**

. . .

(16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to **a program of law office management training approved by the State Bar** ~~the Board of Continuing Legal Education in accordance with Rule .0112(h) of this subchapter~~ and to so notify the complainant;

(b) The president, vice-chairperson, or **a** ~~senior council~~ member of the Grievance Committee may perform the functions of the chairperson of the Grievance Committee in any matter when the chairperson is absent or disqualified.

(c) The chairperson may delegate his or her authority to the president, the vice chairperson of the committee, or a member of the Grievance Committee.

. . .

Rule .0106 Grievance Committee: Powers and Duties

The Grievance Committee will have the power and duty

. . .

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to **a program of law office management training approved by the State Bar.** ~~the Board of Continuing Legal Education in accordance with Rule .0112(h) of this subchapter.~~

. . .

Rule .0107 Counsel: Powers and Duties

The counsel will have the power and duty

(1) to initiate an investigation concerning alleged misconduct of a member;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Grievance Committee;

(3) ~~(1)~~ to investigate all matters involving alleged misconduct whether initiated by the filing of a grievance or otherwise;

[ensuing paragraphs to be renumbered]

Rule .0109 Hearing Committee: Powers and Duties

Hearing committees of the Disciplinary Hearing Commission of the North Carolina State Bar will have the following powers and duties:

(1) to hold hearings on complaints alleging misconduct, ~~or~~ petitions seeking ~~a~~ determinations of disability or reinstatement, or motions seeking the activation of suspensions which have been stayed, **and to conduct proceedings to determine if persons or corporations should be held in contempt pursuant to G.S. § 84-28.1(b1);**

. . .

(14) to enter orders holding persons and corporations in contempt pursuant to G.S. § 84-28.1(b1) and imposing such sanctions allowed by law.

Rule .0113 Proceedings Before the Grievance Committee

. . .

(j) Letters of Warning

. . .

(3) A copy of the letter of warning will be served upon the respondent ~~as provided in Rule 4 of the North Carolina Rules of Civil Procedure~~ **in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the letter of warning to the respondent's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service**. Within 15 days after service the respondent may refuse the letter of warning and request a hearing before the commission to determine whether a violation of the Rules of Professional Conduct has occurred. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If a refusal and request are not served within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

. . .

(k) Admonitions and Reprimands

. . .

(2) A copy of the admonition or reprimand will be served upon the defendant ~~as provided in Rule 4 of the North Carolina Rules of Civil Procedure~~ **in person or by certified mail. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the admonition or reprimand to the defendant's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the admonition or reprimand in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.**

(l) Censures

. . .

(2) A copy of the notice and the proposed censure will be served upon the defendant ~~as provided in Rule 4 of the North Carolina Rules of Civil Procedure~~ **in person or by certified mail. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the defendant's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the Notice and proposed censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.** The defendant must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.

27 N.C.A.C 1B Section .0200,

Rule .0202 Jurisdiction & Authority of District Grievance Committees

. . .

(e) Authority of District Grievance Committees—The district grievance committees shall have authority to

. . .

(4) find facts and recommend whether or not the State Bar's Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions of the **Revised** Rules of Professional Conduct. The district grievance committee may also make a recommendation to the State Bar regarding the appropriate disposition of the case, including referral to **a program of law office management training approved by the State Bar;** ~~the Lawyers' Management Assistance Program;~~

. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1999.

Given over my hand and the Seal of the North Carolina State Bar, this the 25th day of February, 1999.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of March, 1999.

s/Burley B. Mitchell, Jr.
BurleyB. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 3rd day of March, 1999.

s/Wainwright, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 52 (NCI4th). Judicial review; prerequisites; exhaustion of administrative remedies

An aerial pesticide applicator who was fined and had his aerial pesticide license revoked by the Pesticide Board was not required to exhaust his administrative remedies in order to argue before the trial court the constitutionality of aerial pesticide regulations creating certain buffer zones. **Meads v. N.C. Dep't of Agric.,** 656.

AGRICULTURE

§ 30 (NCI4th). Pest control

Substantial evidence supported decisions by the Pesticide Board that petitioner aerial pesticide applicator violated pesticide regulations prohibiting the aerial application of a pesticide within three hundred feet of an occupied business, the aerial application of a pesticide within twenty-five feet of a roadway, and the aerial application of a pesticide within one hundred feet of a residence. **Meads v. N.C. Dept. of Agric.,** 656.

Substantial evidence supported a conclusion by the Pesticide Board that petitioner aerial pesticide applicator violated statutes making it unlawful to use any pesticide inconsistent with its label. **Ibid.**

Substantial evidence supported a conclusion by the Pesticide Board that petitioner aerial pesticide applicator violated the statute providing that the Board may revoke a license upon finding that the licensee has operated in a faulty, careless or negligent manner. **Ibid.**

As used in the pesticide regulation creating buffer zones where it is unlawful to "deposit" pesticides, the term "deposit" means "to let fall," so that an aerial pesticide applicator violates this regulation whenever he takes any action which results in either the direct or indirect falling or placement of a pesticide within a restricted buffer zone. **Ibid.**

The Pesticide Board did not improperly rely upon an obsolete labeling restriction when it determined that petitioner aerially applied a pesticide in a manner inconsistent with its labeling in violation of state statutes where the Board relied upon a labeling restriction stating that the pesticide should not be applied "in such a manner as to directly or through drift expose workers or other persons," and the EPA's change in the required warning to state that the pesticide should not be distributed or sold "in a way that will contact workers or other persons, either directly or through drift" did not apply to petitioner. **Ibid.**

The evidence supported a decision by the Pesticide Board that an aerial pesticide applicator violated the State statutes by applying a pesticide inconsistent with its label warning that it should not be applied in a manner "as to directly or through drift expose workers or other persons." **Ibid.**

Aerial pesticide buffer-zone regulations that prohibit depositing a pesticide within specified distances of schools, hospitals, nursing homes, churches, occupied businesses, roadways, and areas where aquatic life may be harmed do not violate due process under the United States or North Carolina Constitutions. **Ibid.**

Buffer-zone pesticide regulations do not violate equal protection under the United States or North Carolina Constitutions because they treat aerial pesticide applicators differently from ground pesticide applicators. **Ibid.**

APPEAL AND ERROR

APPEAL AND ERROR—Continued

tified the specific questions or answers which he wants the appellate court to review, and defendant has failed to attach pertinent portions of the transcript as an appendix to his brief or to include a verbatim reproduction of those questions or answers in his brief. **State v. Call,** 382.

ARREST AND BAIL

§ 143 (NCI4th). Pretrial release; crimes of domestic violence

Defendant failed to carry his burden of showing that the detention authorized by G.S. 15A-534.1(b) is facially unconstitutional as violative of substantive due process where defendant was held for almost forty-eight hours as a domestic violence arrestee even though judges were available. **State v. Thompson,** 483.

Defendant failed to carry his burden of showing that the detention authorized by G.S. 15A-534.1(b) following a domestic violence arrest is facially unconstitutional as violative of procedural due process; the statute insures that an arrestee will be detained no longer than forty-eight hours without a hearing and the arrestee should receive a hearing as soon as possible following his or her arrest. **Ibid.**

The defendant did not satisfy his burden of establishing that G.S. 15A-534.1(b) is facially unconstitutional on double jeopardy grounds because the statute does not require pretrial detention or prescribe any minimum period of detention and because these detentions, when administered as intended, are regulatory. **Ibid.**

G.S. 15A-534.1(b) was unconstitutional as applied to defendant in this case where defendant was held on a domestic violence charge for nearly forty-eight hours under a magistrate's order which automatically detained him without a hearing while available judges spent several hours conducting other business. The constitutional violation deprived defendant of liberty well beyond any time necessary to serve any government interest in detaining him without a hearing for regulatory purposes. **Ibid.**

§ 199 (NCI4th). Bail; arrest of principal to effectuate surrender

The arrest provisions of G.S. 58-71-30 did not create a law enforcement officer in the person of the bail bondsman. **State v. Mathis,** 503.

While the contract between a surety and principal authorizes a surety to exercise certain powers as to the principal, this contractual authority cannot be extended to cases where a surety is seeking the principal in the home of a third party where the principal does not reside; however, when the principal himself resides in the home of a third party, the bond agreements authorize the sureties or their agents to enter. **Ibid.**

Sureties or their agents may use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal, but only such force as is reasonably necessary. **Ibid.**

The trial court erred in the prosecution of two bail bondsmen for assault and breaking or entering during an arrest by not instructing the jury concerning the common law and statutory authority of sureties and their agents to search for and seize their principal. **Ibid.**

CONSTITUTIONAL LAW

§ 98 (NCI4th). State and federal aspects of due process

There was no violation of a defendant's due process rights in a capital first-degree murder prosecution due to the cumulative effect of alleged errors surrounding his evaluation of competency to stand trial. **State v. Davis,** 1.

CONSTITUTIONAL LAW—Continued

§ 157 (NCI4th). Particular burdens on commerce; state taxation; income tax

North Carolina acted within its constitutional rights by classifying Polaroid's patent infringement judgment against Kodak as business income and taxing it accordingly. **Polaroid Corp. v. Offerman,** 290.

§ 164 (NCI4th). State's use of false testimony to obtain conviction

There was no prejudicial error in a murder prosecution appealed with an Anders brief where defendant contended that the State knowingly called a witness under a false name. **State v. LaPlanche,** 279.

The record did not show that the contents of a note purportedly handwritten by defendant, and thus the inferences raised by those contents, were false or that the prosecutor knowingly used false evidence to convict defendant. **State v. Call,** 382.

§ 248 (NCI4th). Discovery; production of witnesses' statements or reports

The trial court did not improperly permit prosecutors to withhold pretrial statements made to law officers by two witnesses in violation of *Brady v. Maryland* where neither statement was material within the purview of *Brady*; furthermore, the prosecution satisfied the Brady requirements by providing the defense with the statements at trial in time for defendant to make effective use of them. **State v. Call,** 382.

§ 262 (NCI4th). Right to counsel; generally

A defendant in a capital first-degree murder prosecution was not deprived of his constitutional right to counsel in a proceeding to determine his competency to stand trial. **State v. Davis,** 1.

§ 264 (NCI4th). Attachment of right to counsel

A defendant in a capital prosecution for first-degree murder was not denied his Sixth Amendment right to counsel where the court ordered a competency evaluation by a forensic evaluator but declined to allow defense counsel to be present during the examination. **State v. Davis,** 1.

§ 266 (NCI4th). Particular acts or circumstances as infringing on right to counsel

Defendant's constitutional right to counsel was not violated when the State made substantive use of defendant's Dorothea Dix competency evaluation at his capital sentencing proceeding where the evaluation was performed at defendant's request and defendant presented a mental status defense strategy at the sentencing hearing. **State v. Atkins,** 62.

§ 284 (NCI4th). Right to appear pro se; defendant's dismissal of counsel

The trial court did not err in a capital sentencing proceeding by denying defendant's request that his counsel be released. Defendant did not ask to represent himself and it appears that he was understandably depressed about the guilty verdicts and was not fully aware of the sentencing proceeding's very real consequences, nor was he fully aware of the nature of the sentencing proceeding. **State v. White,** 535.

§ 290 (NCI4th). Effective assistance of counsel; action or inaction of court; miscellaneous

Defendant was not denied his Sixth Amendment right to counsel when defense counsel was not notified in advance that the information generated from a competency evaluation would be used against defendant in the sentencing proceeding. Defense

CONSTITUTIONAL LAW—Continued

that the trial court failed to accommodate a hearing impairment which rendered defendant unable to fully participate in his competency and capital sentencing proceedings. **State v. Atkins,** 62.

The trial court did not err in holding an unrecorded bench conference outside defendant's presence before ruling on the admissibility of a witness's interpreted testimony where defendant was present in the courtroom and his counsel was at the bench. **State v. Call,** 382.

Although the trial court erred by conducting an unrecorded in-chambers conference without defendant's presence concerning the mitigating circumstances to be submitted to the jury in defendant's capital sentencing proceeding, this error was rendered harmless by the trial court's action causing the record to show what had transpired at that conference. **Ibid.**

Defendant's federal and state constitutional rights were not violated in this capital trial when the trial court conducted numerous bench conferences out of his presence and without providing a record of the substance of such conferences where defendant was present in the courtroom and represented by counsel at each of the bench conferences. **State v. McNeill,** 634.

The federal and state constitutional rights to be present of a capital first-degree murder defendant were not violated by three recorded bench conferences. **State v. Murillo,** 573.

There was no error in a capital prosecution for first-degree murder where the court conducted fourteen unrecorded bench conferences with defense counsel and the prosecution to which defendant was not privy, even though he was present in the courtroom. **State v. White,** 535.

§ 345 (NCI4th). Presence of defendant at proceedings; pronouncement of sentence or judgment

Defendant's constitutional right to be present at all stages of his capital trial was not violated by three off-the-record bench conferences involving only counsel during his capital sentencing proceeding where the conferences were conducted in the courtroom with defendant present and able to observe the context of the discussions. **State v. Atkins,** 62.

§ 346 (NCI4th). Right to call witnesses and present evidence generally

The trial court did not deny defendant the right to confront a witness against him in a capital sentencing proceeding by refusing to permit a witness who had been charged with aiding and abetting first-degree murder in this case to answer a question calling for a legal conclusion as to whether she could receive the death penalty. **State v. Atkins,** 62.

There was no plain error in a capital first-degree murder prosecution where the court instructed defendant that he had the right to testify, but that if he did he would be subject to cross-examination on a wide variety of subjects, subject only to the discretion of the court and relevancy. **State v. Davis,** 1.

§ 349 (NCI4th). Right of confrontation; cross-examination of witnesses

Although the trial court erred by not allowing defendant to cross-examine a State's corroborating witness regarding pending charges against him for breaking and entering, defendant was not denied the right of effective cross-examination, and the error was harmless. **State v. Hoffman,** 167.

CONSTITUTIONAL LAW—Continued

§ 352 (NCI4th). Self-incrimination generally

Defendant's constitutional right against self-incrimination was not violated when the State made substantive use of defendant's Dorothea Dix competency evaluation at his capital sentencing proceeding where the evaluation was performed at defendant's request and defendant presented a mental status defense strategy at the sentencing hearing. **State v. Atkins,** 62.

A capital first-degree murder defendant's Fifth Amendment right to be free from self-incrimination was not violated by the cross-examination at trial of a defense expert regarding the contents of defendant's records from Dorothea Dix Hospital, where he was examined for competency to stand trial. **State v. Davis,** 1.

COUNTIES

§ 49 (NCI4th). Construction of grants and power

The trial court erred by granting summary judgment for plaintiffs in an action to enjoin defendant-Harnett County commissioners from moving the location of the Harnett County courthouse from its present site. N.C.G.S. § 153A-169 provides that a county's board of commissioners may designate and redesignate the site for any county building, including the courthouse and N.C.G.S. § 153A-3(d) contains the necessary expression of legislative intent to supersede 1855 and 1859 special local acts mandating the location of the courthouse. **Bethune v. County of Harnett,** 343.

CRIMINAL LAW

§ 20 (NCI4th Rev.). Pretrial hearing to determine insanity

The trial court did not err by permitting the prosecutor to cross-examine a defense expert witness in a capital sentencing proceeding concerning testimony presented at a previous competency hearing. **State v. Atkins,** 62.

§ 75 (NCI4th Rev.). Change of venue generally

Defendant's constitutional rights were not violated by the district attorney's calendaring of defendant's change-of-venue motion in a capital case and the trial court's denial of defendant's motion to continue where defendant argued only that the preparation efforts of one of his attorneys had been focused on another case that week and that his private investigator was unavailable, but defendant was represented by two attorneys at the hearing, and the district attorney agreed to stipulate to the investigator's surveys. **State v. Trull,** 428.

§ 76 (NCI4th Rev.). Motion for change of venue; prejudice, pretrial publicity or inability to receive fair trial

The trial court did not err by denying defendant's motion for a change of venue based upon pretrial publicity. **State Trull,** 428.

§ 98 (NCI4th Rev.). Discovery proceedings; overview

The trial court did not err in a first-degree murder prosecution by denying defendant's motions for discovery and by failing to sanction the State for its failure to provide discovery. Defendant did not indicate that the prosecution suppressed any evidence, but merely asserted disjointed presentation of the statements. **State v. Murillo,** 573.

CRIMINAL LAW—Continued

§ 111 (NCI4th Rev.). Discovery; information subject to disclosure by State; other information

There was no error in an appeal from a first- and second-degree murder conviction on an Anders brief from the trial court's failure to impose sanctions for the State's failure to inform the defense until jury selection began that a witness had given a statement to police concerning what he saw the night of the shootings. **State v. LaPlanche,** 279.

§ 112 (NCI4th Rev.). Discovery; information not subject to disclosure by State; work product

The trial court did not violate G.S. 15A-1415(f) by excluding portions of the State's attorney work-product materials from defendant's post-conviction discovery in a capital case since (1) the expedited post-conviction discovery provided by the statute applies only to cases following completion of direct appeal and defendant had not completed appellate review, and (2) the trial court complied with the statute by reviewing work-product materials in camera and ultimately withholding the materials from discovery. **State v. Atkins,** 62.

§ 115 (NCI4th Rev.). Discovery; information subject to disclosure by defendant; reports of examinations and tests

The trial court did not err by issuing a discovery order requiring defendant's psychiatric expert to disclose a written report and by ordering the expert, during defendant's competency hearing, to supply to the prosecution "all of his notes," where the expert relied on the discovery materials in testifying at defendant's competency hearing and his capital sentencing proceeding. **State v. Atkins,** 62.

§ 122 (NCI4th Rev.). Calendaring of arraignments in superior court

There was no error in a capital prosecution for first-degree murder where defendant was arraigned one week before he was scheduled for trial, objected on the grounds that his arraignment was not on a calendar published for that session, the trial court continued the proceeding until later in the day, and a calendar containing defendant's arraignment was published in the meantime. Defendant's right to due process was in no way impaired and, assuming a violation of G.S. 15A-943(a), defendant nonetheless had a full week's interval between arraignment and trial. **State v. Locklear,** 118.

§ 152 (NCI4th Rev.). Factual basis for plea of guilty generally

A sufficient factual basis for the trial court's acceptance of defendant's plea of guilty of premeditated and deliberate murder of his eight-month-old son was presented by the State's summary of the evidence and medical evidence tending to show that multiple injuries had been inflicted by defendant upon his son over a sustained period of time. **State v. Atkins,** 62.

§ 181 (NCI4th Rev.). Pleas of mental incapacity to plead or stand trial; conclusiveness of court's findings

The trial court did not err in a capital first-degree murder prosecution by finding that defendant had the capacity to stand trial where the testimony of an expert in forensic psychiatry clearly indicates that defendant met each prong of the competency test set forth in G.S. 15A-1001. **State v. Davis,** 1.

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

The prosecutor was attempting to rebut defendant's theory of the case that the victim was killed by defendant's friend rather than by defendant and did not improperly comment on defendant's post-arrest silence by arguing that defendant's friend did not change his appearance and name and leave town, although defendant did all those things. **State v. Call,** 382.

The trial court erred in a capital sentencing proceeding by allowing the prosecution to argue that defendant should be sentenced to death based upon improperly elicited testimony from four of defendant's jailers that he had not confessed or expressed remorse because this testimony resulted in an unconstitutional use of defendant's exercise of his right to silence. **State v. Call,** 382.

§ 433 (NCI4th Rev.). Argument of counsel; defendant's failure to testify; comment by prosecution

The prosecutor's comment during closing argument in a capital trial concerning defendant's attacks on the victim and the State's witnesses, "It's the shotgun approach. Hide your defendant, hide all the evidence that incriminates him and the sinister spin," was not an improper comment on defendant's decision not to testify but was simply a rebuttal of defense counsel's claims made during closing argument. **State v. Trull,** 428.

§ 436 (NCI4th Rev.). Argument of counsel; comment on defendant's character and credibility generally

There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor argued that defendant was there because of choices he had made and that the jury should not let the defense put that fault on the jury. **State v. Locklear,** 118.

§ 439 (NCI4th Rev.). Argument of counsel; defendant characterized as professional criminal, outlaw, or bad person

The trial court did not abuse its discretion in a capital resentencing by failing to sustain defendant's objection to the prosecutor's characterization of defendant's demeanor at trial as "sniveling." **State v. Flippen,** 264.

The prosecutor's reference to defendant as a "predator" during closing argument in a capital sentencing proceeding was not grossly improper. **State v. Trull,** 428.

There was no error in a capital prosecution for first-degree murder where the trial court did not intervene ex mero motu in the prosecutor's closing argument in the guilt phase where defendant asserted that the prosecutor asked the jury to convict defendant of first-degree murder because he "got away with it" in the death of a prior spouse. **State v. Murillo,** 573.

§ 447 (NCI4th Rev.). Argument of counsel; comment on character and credibility of witnesses; expert witnesses

There was no gross impropriety in the prosecutor's argument in a capital sentencing proceeding concerning the potential bias of defendant's psychiatric expert based upon his compensation and his participation in two other death penalty proceedings. **State v. Atkins,** 62.

The prosecutor's closing argument in a capital sentencing proceeding suggested only that the diagnosis of defendant's expert psychiatrist should not be believed and did not improperly contend that all psychiatrists routinely characterize depravity as a type of mental illness. **Ibid.**

CRIMINAL LAW—Continued

The prosecutor's arguments in the guilt phase of a capital first-degree murder prosecution concerning payment of defendant's forensic expert were not so grossly improper as to require the trial court to intervene ex mero motu. Prior cases involving arguments from sentencing proceedings are instructive but not controlling. **State v. Murillo,** 573.

§ 448 (NCI4th Rev.). Argument of counsel; comment on jury's duty

The prosecutor's closing argument in a capital sentencing proceeding sought to illustrate the importance of the jury's role within the system of law enforcement and did not impermissibly urge the jurors to imagine they were potential crime victims and ask the jury to remedy societal problems via general deterrence. **State v. Hoffman,** 167.

There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor argued that the jury was the voice of the community and represented the community. **State v. Locklear,** 118.

The trial court did not abuse its discretion in a capital resentencing by allowing the prosecutor to refer during jury selection to the courage required to vote for the death penalty. **State v. Flippen,** 264.

§ 449 (NCI4th Rev.). Argument of counsel; explanation of roles of judge, prosecutor, defense counsel

It was not grossly improper for the prosecutor in a capital sentencing proceeding to speak for the victim by arguing that the victim and the State cry from her body in the woods, "death, death, death for [defendant]." **State v. Trull,** 428.

§ 452 (NCI4th Rev.). Argument of counsel; inflammatory comments generally; significance or impact of case

The prosecutor did not improperly ask the jury to convict defendant of first-degree murder based upon the victim's worth as a person and the impact of his death on his friends; rather, the prosecutor properly urged the jurors to remember that the victim had been brutally beaten to death and that he was not simply a corpse. **State v. Call,** 382.

§ 453 (NCI4th Rev.). Argument of counsel; comment on rights of victim, victim's family

The prosecutor's victim impact argument in a capital sentencing proceeding that the victim "was a good father, husband, son, brother and friend" was supported by the evidence and was not improper. **State v. Guevara,** 243.

The prosecutor's argument that "I think you can tell from the size of the crowd which had attended most of this trial" that the victim was a family man was not so grossly improper as to require the trial court to intervene ex mero motu. **Ibid.**

§ 457 (NCI4th Rev.). Argument of counsel; comment on sentence or punishment generally

The trial court did not err in a capital sentencing proceeding by allowing the prosecutor's statement that dismissals such as defendant's in the 1970 California killing of his first wife were commonplace. **State v. Murillo,** 573.

§ 458 (NCI4th Rev.). Argument of counsel; comment on aggravating or mitigating circumstances or factors

The prosecutor's closing argument in a capital sentencing proceeding did not mislead the jury into concluding that a decision of the N.C. Supreme Court required a

CRIMINAL LAW—Continued

finding of the (e)(9) especially heinous, atrocious, or cruel aggravating circumstance in all cases in which the victim did not die instantly. **State v. Atkins,** 62.

The trial court did not err by failing to intervene when the prosecutor misstated the law by arguing that a mitigating circumstance "has to have something to do with the death of that child," and the court's instructions corrected any possible harm from the misstatement. **Ibid.**

The prosecutor's closing argument in a capital sentencing proceeding that "they can drag up anything they think has mitigating value. But just because they say it doesn't make it so" did not improperly inform the jury that defendant could submit any matter as a mitigating circumstance. **State v. Atkins,** 167.

The prosecutor's statement in his concluding argument about statutory and nonstatutory mitigating circumstances in a capital sentencing proceeding that he didn't "see how any of these mitigating factors have any mitigating value whatsoever" could not have misled the jurors to believe that they could accord the statutory mitigating circumstances no mitigating value when viewed in the overall context in which the statement was made. **State v. Guevara,** 243.

§ 460 (NCI4th Rev.). Argument of counsel; comment on sentence or punishment; capital cases, generally

Defendant was not prejudiced by the prosecutor's closing argument in a capital sentencing proceeding that, when defendant decided to rob and shoot the victim, "he choose the punishment he's going to get for this crime" where the trial court instructed the jury that it was the jury's duty to determine the punishment. **State v. Atkins,** 167.

The prosecutor's closing argument in a capital sentencing proceeding that if the jury feels "that you should be merciful and not follow the law and just make a choice like [defendant] made when he pulled that trigger, then it's your conscience you have to live with. But if you do what you have all sworn to do, that is, follow the law, you will return a verdict recommending this man be sentenced to death" did not improperly equate mercy with lawlessness and pervert the concept of mitigation. **Ibid.**

Certain of the prosecutor's arguments in a capital sentencing proceeding were not so grossly improper as to require the trial court to intervene *ex mero motu.* The prosecutor of a capital case has a duty to zealously attempt to persuade the jury that the death penalty is appropriate upon the facts presented. **State v. Locklear,** 118.

There was no error in a capital sentencing proceeding where the prosecutor argued that the jury should stop "this" now and not pick up the paper somewhere down the road and read about a new trial. The trial court correctly interpreted the argument as an extension of the prosecutor's specific deterrence argument rather than a comment on the appellate process. **Ibid.**

The prosecutor's arguments in a capital sentencing proceeding did not result in a verdict of death rendered under of the influence of passion, prejudice, or other arbitrary factors. **Ibid.**

The trial court did not err by not intervening *ex mero motu* during the prosecutor's closing arguments in a capital sentencing proceeding where defendant contended that the prosecutor improperly urged the jurors to sentence defendant on behalf of the victims, but the prosecutor's remarks only reminded the jury that he was an advocate for the State and the victims. **State v. Davis,** 1.

The prosecutor's use of the lyrics of a song during his closing argument in a capital sentencing proceeding for the murder of a law officer did not improperly suggest

that the cards were stacked against the State at the sentencing phase or impugn defendant's right to counsel so as to require the trial court to exclude these comments ex mero motu. **State v. Guevara,** 243.

The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor impermissibly asked the jury to find that some of the nonstatutory mitigators were aggravators, but the prosecutor in fact argued that the nonstatutory mitigating circumstances should not weigh heavily in the jurors' minds. **State v. Murillo,** 573.

The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu where defendant contended that the prosecutor impermissibly told the jury that the law does not permit sympathy. **Ibid.**

§ 461 (NCI4th Rev.). Argument of counsel; deterrent effect of death penalty

There was no error in a capital sentencing proceeding in the prosecutor's deterrence argument. **State v. Locklear,** 118.

The prosecutor did not improperly argue general deterrence in a capital sentencing proceeding when he commented that a State's exhibit showed the way the victim was left and his plea was answered and that "unless the killing of a law enforcement officer is dealt with the upmost seriousness, then the disrespect for law and order that is inherent in that despicable act is encouraged"; rather, the comments were a proper argument on the seriousness of the crime. **State v. Guevara,** 243.

The trial court did not err by not intervening ex mero motu in a capital sentencing proceeding where defendant contended that the prosecutor impermissibly argued for imposition of the death penalty because it would deter crime generally. **State v. Murillo,** 573.

§ 462 (NCI4th Rev.). Argument of counsel; comment on judicial or executive review; capital cases, generally

The prosecutor's argument in a capital sentencing proceeding about defendant's psychiatric expert's participation in other death penalty appeals was intended to suggest bias and did not impermissibly suggest that jurors should abdicate their responsibility and rely on appellate review to determine an appropriate sentencing recommendation. **State v. Atkins,** 62.

§ 467 (NCI4th Rev.). Argument of counsel; permissible inferences

There was no error during the guilt phase of a capital first-degree murder prosecution where the prosecutor's argument concerning the shotgun used in the crime was a reasonable inference from the evidence. **State v. Locklear,** 118.

The prosecutor's closing arguments in a capital trial concerning a tire impression at the crime scene, blood spattering, the absence of a significant amount of blood, and the number of blows suffered by the victim were properly based on the evidence or reasonable inferences taken therefrom. **State v. Call,** 382.

§ 468 (NCI4th Rev.). Argument of counsel; matters not in evidence

There was no gross impropriety requiring intervention *ex mero motu* in the prosecutor's opening statement and closing argument in a capital first-degree murder prosecution where defendant contended that the jury could infer defendant's mental competency from the State's argument that defendant understood his rights. **State v. Davis,** 1.

CRIMINAL LAW—Continued

§ 471 (NCI4th Rev.). Argument of counsel; misstatement of evidence

Most of a first-degree murder defendant's contentions that the trial court erred by allowing certain arguments by the prosecutor in his capital sentencing proceeding were without merit. One argument, though not supported by the evidence and inappropriate, was not prejudicial. **State v. Locklear,** 118.

The prosecutor's single reference in his closing argument in a robbery-murder case to "hundreds of rings" that were recovered, if a misstatement of the evidence, could not have affected the verdict and was not prejudicial error. **State v. Atkins,** 167.

§ 472 (NCI4th Rev.). Argument of counsel; explanation of applicable law

Assuming it was error for the prosecutor to state during his argument on malice that "there is no just cause, there is no excuse, there is no justification in this case. Make them tell you where it is," defendant was not prejudiced where the prosecutor and the trial court thereafter stated the proper burden of proof. **State v. Atkins,** 167.

The prosecutor did not improperly argue that the jury could rely on Biblical authority to weigh defendant's flight as evidence of his guilt; rather, the prosecutor was quoting from and relying on a decision of the N.C. Supreme Court to explain the significance of flight to the jury. **State v. Call,** 382.

Even if the prosecutor's closing argument in this first-degree murder case concerning the presumption of malice and intent to kill included misstatements of law, defendant was not prejudiced since he offered no evidence of self-defense or of a killing in the heat of passion that would negate malice, and he offered no evidence that would tend to negate the element of intent to kill. **State v. Trull,** 428.

There was no prejudicial error in a capital prosecution for first-degree murder where the trial court sustained defense counsel's argument defining reasonable doubt with "moral certainty" language. **State v. Bowman,** 459.

§ 473 (NCI4th Rev.). Argument of counsel; comments regarding defense attorney

There was no misconduct so improper as to deprive defendant of his due process right to a fair trial in a capital prosecution for first-degree murder where the prosecutor argued that reasonable doubt is not created by "lawyer trick things." **State v. Bowman,** 459.

There was no plain error in a capital prosecution for first-degree murder where defendant contended that the prosecutor impugned the integrity of counsel for the defense but the prosecutor did not use abusive, vituperative, or opprobrious language and did not impugn the integrity of defense counsel or repeatedly attempt to diminish defense counsel before the jury. Reviewing the argument in context, the prosecutor was merely responding to defense counsel's arguments. **State v. White,** 535.

§ 474 (NCI4th Rev.). Argument of counsel; use of, or reference to, physical evidence

It was not grossly improper for the prosecutor to use properly introduced autopsy photographs during closing arguments in both the first-degree murder trial and the subsequent capital sentencing proceeding. **State v. Call,** 382.

The prosecutor's use in his closing argument in a first-degree murder trial of items that had been introduced into evidence in an attempt to show premeditation and deliberation was not grossly improper. **Ibid.**

CRIMINAL LAW—Continued

The trial court did not err by denying defendant's request to tape record the testimony of prosecution witnesses in order to assist defense counsel in preparing for cross-examination. **State v. Call,** 382.

§ 532 (NCI4th Rev.). Mistrial; misconduct of jurors generally

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by not excusing a juror ex mero motu where the juror twice entered the courtroom inadvertently and fleetingly during hearings. The trial court witnessed all of the events in question and both the existence of misconduct and the effect of misconduct are determinations within the trial court's discretion. **State v. Murillo,** 573.

§ 545 (NCI4th Rev.). Mistrial; misconduct of witnesses during trial

The trial court did not abuse its discretion in denying defendant's motion for a mistrial in this capital case after defendant's older brother, testifying for the State, challenged defendant to take the stand in his own defense. **State v. McNeill,** 634.

§ 550 (NCI4th Rev.). Mistrial; conduct involving prosecutor; examination or cross-examination of witnesses

The trial court did not abuse its discretion by failing to declare a mistrial ex mero motu in a capital prosecution for first-degree murder where defendant contended that the prosecutor repeatedly asked the State's witnesses leading questions and that the witnesses made impermissible and prejudicial statements. **State v. Bowman,** 459.

§ 685 (NCI4th Rev.). Peremptory instruction; effect of failure to request instruction

The trial court did not err in a capital prosecution for first-degree murder by refusing to give peremptory instructions on all the statutory and several nonstatutory mitigating circumstances where defendant did not request peremptory instructions during the charge conference and only raised the issue just prior to closing arguments in the penalty phase. **State v. Locklear,** 118.

§ 690 (NCI4th Rev.). Peremptory instructions involving mitigating circumstances in capital cases generally

The trial court's peremptory instruction on nonstatutory mitigating circumstances that "this factor has been established by the evidence. It is for you . . . to determine whether or not it has mitigating value" was not plain error. **State v. Atkins,** 62.

The trial court's concluding instruction on the impartiality of the court did not negate the potential value of the court's peremptory instructions on nonstatutory mitigating circumstances. **Ibid.**

The trial court did not err in a capital resentencing by denying defendant's request for peremptory instructions on nonstatutory mitigating circumstances where the evidence was controverted in each instance. **State v. Flippen,** 264.

There was no error in a capital sentencing proceeding where defendant contended that the court erred by failing to give peremptory instructions on nonstatutory mitigating circumstances despite having agreed to give such instructions during the charge conference. **State v. White,** 535.

CRIMINAL LAW—Continued

§ 1338 (NCI4th Rev.). Capital punishment; competence of evidence; evidence of prior criminal record or other crimes

In a capital sentencing proceeding for the murder of defendant's eight-month-old son, the trial court properly admitted testimony by the child's mother about earlier abuse of the child and herself by defendant, and testimony by another witness indicating abuse by defendant of the child dating back to the time the child was three weeks old. **State v. Atkins,** 62.

§ 1340 (NCI4th Rev.). Capital punishment; competence of evidence; aggravating and mitigating circumstances

Testimony by four medical experts in a capital sentencing proceeding as to the severity of the child victim's injuries in comparison to injuries suffered by other children whom the experts had treated in their respective medical practices was properly admitted to establish the "especially heinous, atrocious, or cruel" aggravating circumstance by showing that the brutality of the child's death exceeded that normally present in a homicide. **State v. Atkins,** 62.

The exclusion in a capital sentencing proceeding of testimony by a DSS worker which defendant contended would have shown remorse was not prejudicial error. **Ibid.**

Evidence concerning defendant's reading of horror books and his playing of Nintendo was admissible in a capital sentencing proceeding for the murder of defendant's infant son to show that defendant's alleged emotional disorder was simply a recitation of stories from horror books and to show defendant's lack of remorse following his various assaults on his son. **Ibid.**

§ 1342 (NCI4th Rev.). Capital punishment; competence of evidence; prior criminal record or other crimes

The trial court did not err in a capital sentencing proceeding by allowing the State to put before the jury defendant's criminal record before admitting the judgment of defendant's prior felony conviction as proof of the aggravating circumstance of a previous conviction of a felony involving violence. Defendant's criminal record was proffered by the prosecution but never admitted into evidence or put before the jury and the court ruled appropriately in requiring the State to prove the aggravating circumstance by the preferred method. **State v. Locklear,** 118.

The trial court did not abuse its discretion during a capital sentencing proceeding by admitting the testimony of a detective that the victim of defendant's prior assault conviction had been confined to a wheelchair at the time of the assault. **Ibid.**

There was no plain error in a capital sentencing proceeding where the court allowed the prosecution to cross-examine defendant concerning the fact that he was on parole from a conviction in New York at the time he committed these murders. **State v. Bowman,** 459.

§ 1343 (NCI4th Rev.). Capital punishment; competence of evidence; age

The trial court did not abuse its discretion in a capital resentencing for the murder of a child by admitting into evidence a videotape of the victim; the rules of evidence do not apply in sentencing proceedings and trial courts are not required to perform the Rule 403 balancing test during sentencing proceedings. **State v. Flippen,** 264.

CRIMINAL LAW—Continued

§ 1345 (NCI4th Rev.). Capital punishment; instructions; function of jury

The trial court did not err in a capital sentencing proceeding by electing in response to jurors's questions to reinstruct the jurors in the pattern jury instructions in an attempt to avoid a misstatement of the law. **State v. Davis,** 1.

§ 1346 (NCI4th Rev.). Capital punishment; instructions; consideration of evidence

There was no plain error in a capital sentencing proceeding where defendant contended that the court erred by failing to instruct the jury that it could not utilize the evidence of one aggravating circumstance to prove another. **State v. Davis,** 1.

The trial court did not permit the jury to engage in improper "double counting" by submitting to the jury both the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a kidnapping and the (e)(6) aggravating circumstance that the murder was committed for pecuniary gain where both circumstances were supported by independent evidence apart from that which overlapped. **State v. Call,** 382.

§ 1348 (NCI4th Rev.). Capital punishment; instructions; parole eligibility

The plain error rule did not apply to the trial court's failure to instruct the jury in a capital sentencing proceeding that "life means life" when a prospective alternate juror expressed concern about his ability to make a sentencing decision unless he could be assured that a life sentence included a stipulation that there could be no parole. **State v. Atkins,** 62.

§ 1349 (NCI4th Rev.). Capital punishment; instructions; aggravating and mitigating circumstances generally

There was no error in a capital sentencing proceeding in the instructions concerning valuing and weighing statutory and nonstatutory mitigating circumstances. The only time "value" comes into play is in determining whether the statutory catchall or the nonstatutory mitigating circumstances exist because jurors must first find that they have mitigating value in order to find that they exist. Jurors are not required to find value as to statutory mitigating circumstances, but this does not mean that the trial court is required to instruct that statutory mitigating circumstances have value as a matter of law. **State v. Davis,** 1.

The trial court did not err by instructing the jurors that they could reject nonstatutory mitigating circumstances on the basis that they had no mitigating value. **State v. Guevara,** 243.

The trial court did not commit plan error in a capital sentencing proceeding by tendering a shorthand instruction for twenty-four nonstatutory mitigating circumstances and by tendering a single peremptory instruction for all of these nonstatutory mitigating circumstances. **State v. Trull,** 428.

The trial court's use of the word "may" in its instructions on Issues Three and Four in a capital sentencing proceeding did not make consideration of established mitigating circumstances discretionary. **State v. McNeill,** 634.

§ 1351 (NCI4th Rev.). Capital punishment; unanimous decision as to mitigating circumstances

The trial court did not commit constitutional error in a capital sentencing proceeding by its use of the word "may" in sentencing Issues Three and Four. **State v. Guevara,** 243.

ardous to the lives of more than one person and the aggravating circumstance that the murder was part of a course of conduct which included other crimes of violence against another person or persons. There was independent evidence to support each circumstance, although some of the evidence may have overlapped. **Ibid.**

§ 1374 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; murder as course of conduct

There was no error in a capital sentencing proceeding where the court submitted both the aggravating circumstance that defendant knowingly created a risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person and the aggravating circumstance that the murder was part of a course of conduct which included other crimes of violence against another person or persons. There was independent evidence to support each circumstance, although some of the evidence may have overlapped. **State v. Davis,** 1.

Evidence of defendant's participation in two bank robberies in the two months preceding the robbery-murder at issue was sufficient to support the trial court's submission of the course of conduct aggravating circumstance to the jury. **State v. Atkins,** 167.

The trial court did not err in submitting to the jury in a capital sentencing proceeding the (e)(11) course of conduct aggravating circumstance when the jury did not mark whether it found defendant guilty of felony murder. **State v. Guevara,** 243.

§ 1375 (NCI4th Rev.). Capital punishment; consideration of mitigating circumstances; definition

The trial court did not err in a capital sentencing proceeding in its instructions on Issues Three and Four by using the word "may" rather than "must." **State v. White,** 535.

§ 1378 (NCI4th Rev.). Capital punishment; consideration of mitigating circumstances; burden of proof

The trial court did not err by instructing the jury that it must be satisfied that any mitigating circumstances exist. **State v. Guevara,** 243.

§ 1381 (NCI4th Rev.). Capital punishment; particular mitigating circumstances generally

In capital sentencing, the term "value" is found only in the statutory catchall provision, G.S. 15A-2000(f)(9), and has also been applied to nonstatutory mitigating circumstances. The term "weight" or "weighing" is used only in G.S. 15A-2000(b)(2) and (3), referring to the process of weighing the mitigating circumstances found against the aggravating circumstances found. **State v. Davis,** 1.

§ 1382 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; lack of prior criminal activity

The trial court did not err by failing to submit to the jury in a capital sentencing proceeding for the murder of defendant's eight-month-old son the (f)(1) mitigating circumstance of no significant history of prior criminal activity where defendant was involved in an illegal sexual relationship, had a history of violent attacks, and viciously beat his own infant son. **State v. Atkins,** 62.

CRIMINAL LAW—Continued

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where this case involved a robbery during which defendant shot and killed the victim. **State v. Atkins,** 167.

The evidence in a capital resentencing for the beating death of a child fully supported the aggravating circumstance found, there was no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration and the sentence was not disproportionate. **State v. Flippen,** 264.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where the evidence showed that defendant stood in his mobile home and used a rifle to kill a deputy sheriff and that defendant also shot a second officer and severally wounded him. **State v. Guevara,** 243.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant was convicted under theories of both premeditation and deliberation and felony murder; the jury found as aggravating circumstances that defendant had previously been convicted of a violent felony, that this murder was committed while defendant was engaged in the commission of a rape, and that this murder was committed while defendant was engaged in the commission of a kidnapping; and the evidence showed that defendant abducted the victim from her apartment, took her into the woods, tied her to a tree, had intercourse with her, and inflicted three neck wounds with a knife that caused her death. **State v. Trull,** 428.

The record fully supported the aggravating circumstance found by a jury which sentenced defendant to death for a first-degree murder, there was no indication that the sentences were imposed under the influence of passion, prejudice or any other arbitrary factor, and the sentence was not disproportionate. **State v. Bowman,** 459.

In a capital sentencing proceeding for the first-degree murder of an abused spouse, the evidence in the record fully supports the finding by the jury of the aggravating circumstance of a prior felony involving the use of violence and there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. **State v. Murillo,** 573.

A sentence of death for the first-degree murder of an abused spouse was not disproportionate in light of a prior violent felony resulting in another death and the long history of defendant's abuse of this victim. **Ibid.**

A sentence of death for first-degree murder was not imposed under the influence of passion, prejudice, or other arbitrary considerations and the jury's findings of the two aggravating circumstances were supported by the evidence. **State v. White,** 535.

A sentence of death for two first-degree murders was not disproportionate where defendant was found guilty of the premeditated and deliberate murders of two unsuspecting, defenseless victims in their own home in retaliation for his girlfriend leaving him. **Ibid.**

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate where defendant was convicted under the theory of premeditation and deliberation, defendant participated in the robbery of a store and shot each of the victims twice in the head, and the jury found the avoidance of a lawful arrest, pecuniary gain, and course of conduct aggravating circumstances. **State v. McNeill,** 634.

EVIDENCE AND WITNESSES

EVIDENCE AND WITNESSES—Continued

§ 318 (NCI4th). Other crimes, wrongs, or acts; to show identity of defendant; homicide offenses

There was no error in a capital prosecution for first-degree murder in the admission of evidence of defendant's acts and threats of violence toward his girlfriend. **State v. White,** 535.

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence that, two years before these murders, defendant had gone to the house of Georgia Green and Cleveland Wilson (the victims) with a shotgun, pointed it at Cleveland Wilson, and threatened to kill him. **Ibid.**

§ 335 (NCI4th). Other crimes, wrongs, or acts; absence of accident

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting evidence of defendant's first wife's death at his hands in 1970. **State v. Murillo,** 573.

§ 351 (NCI4th). Other crimes, wrongs, or acts; to show motive, reason, or purpose; homicide offenses generally

There was no error in a capital prosecution for first-degree murder in the admission of evidence of defendant's acts and threats of violence toward his girlfriend. **State v. White,** 535.

The trial court did not abuse its discretion in a prosecution for first-degree murder by allowing evidence that eleven months prior to the murders, defendant took his girlfriend by force away from a cookout and fired a shotgun when members of her family came to check on her safety. **Ibid.**

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence that, two years before these murders, defendant had gone to the house of Georgia Green and Cleveland Wilson (the victims) with a shotgun, pointed it at Cleveland Wilson, and threatened to kill him. **Ibid.**

§ 668 (NCI4th). "Plain error" rule in criminal cases

The trial court did not commit plain error by failing to strike the testimony of several witnesses referring to two exhibits that had not been admitted into evidence where the substance of the testimony of these witnesses could have been obtained without the exhibits. **State v. McNeill,** 634.

§ 672 (NCI4th). Introduction of like evidence without objection as waiver

Defendant lost the benefit of an objection concerning instances of "suspicious activity" by defendant where the witness testified about such activity without objection both before and after this objection. **State v. Trull,** 428.

§ 694 (NCI4th). Exceptions and assignments of error; offer of proof; necessity for making record of excluded evidence

A defendant in a capital first-degree murder prosecution who argued that evidentiary rulings denied him the right to present a defense could not show prejudice because the record fails to show what the answers would have been had the witnesses been permitted to respond. **State v. Locklear,** 118.

Defendant failed to preserve for appellate review the issue of whether the trial court erred by excluding in a capital sentencing proceeding testimony by a DSS worker which defendant contended would have shown remorse and a suicide threat by defendant where defendant did not make an offer of proof of the witness's responses to the excluded questions. **State v. Atkins,** 62.

EVIDENCE AND WITNESSES—Continued

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by allowing the victim's sisters and friends to testify as to various beatings that the victim described. **Ibid.**

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by allowing a friend of the victim to testify that she gave the victim a voice-activated tape recorder to use to catch defendant committing adultery. **Ibid.**

There was no prejudicial error in a capital prosecution for the first-degree murder of an abused spouse where the court permitted a witness to testify that the victim had told her that she received a large bruise on her head when defendant threw her into a wall. **Ibid.**

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting testimony that the victim had given part of her paycheck to a friend to create a "nest egg" and that she planned on leaving defendant. **Ibid.**

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting certain statements of the victim as within the state of mind exception. Evidence spanning the entire marriage has been allowed when a husband is charged with murdering his wife. **Ibid.**

§ 881 (NCI4th). Hearsay; statements not offered to prove truth of matter asserted; to show motive

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting testimony which left the inference that the victim and defendant were separating because competent evidence had been introduced that defendant had threatened to kill the victim if she left him. Her statement was relevant to show motive and to show her state of mind. **State v. Murillo,** 573.

§ 887 (NCI4th). Hearsay; statements not offered to prove truth of matter asserted; use to impeach or corroborate; particular cases

The trial court did not err by allowing an officer to testify regarding out-of-court statements a witness made to him that incriminated defendant where the testimony was offered only for corroborative, nonhearsay purposes. **State v. Call,** 382.

§ 920 (NCI4th). Particular evidence as hearsay or not; miscellaneous other statements

The trial court did not err in a capital prosecution for first-degree murder by admitting evidence of what a victim and defendant said in a meeting two days prior to the murder at which the victim had terminated defendant's employment. The conversation showed the circumstances of the crime, particularly the motive for the killings. **State v. Davis,** 1.

The trial court did not err in a prosecution for first-degree murder by admitting the testimony of a coworker of defendant and the victim who was present at defendant's dismissal conference before defendant returned and began shooting. **Ibid.**

§ 929 (NCI4th). Excited utterances generally

The trial court did not err in a capital prosecution for the first-degree murder of an abused spouse by admitting testimony about a phone conversation in which the victim related that defendant had held a gun to her head. The testimony was properly admitted as an excited utterance. **State v. Murillo,** 573.

EVIDENCE AND WITNESSES—Continued

§ 1767 (NCI4th). Experiments and tests; similarity of circumstances or conditions generally

The trial court did not err in a first-degree murder prosecution by admitting the testimony of an SBI expert in firearms where defendant contended that the witness's test with the murder weapon was not conducted under circumstances sufficiently similar to conditions at the time of the crime. **State v. Locklear,** 118.

§ 1776 (NCI4th). In-court demonstration; manner in which death occurred

The trial court did not abuse its discretion in a capital prosecution for the first-degree murder of an abused spouse by allowing the victim's sister to demonstrate, after testifying that she and the victim wore the same clothes and were the same size, that her forearm and head could not be positioned such that the bullet holes matched as they did in the victim's body if an accident had occurred in the way defendant claimed. **State v. Murillo,** 573.

§ 2080 (NCI4th). Opinion testimony by lay persons; ability to form criminal intent generally

The trial court did not err in a capital prosecution for first-degree murder by excluding a jail nurse's opinion of defendant's mental condition where the question called for the lay witness to make a psychiatric diagnosis. **State v. Davis,** 1.

§ 2266 (NCI4th). Particular subjects of expert testimony; opinion that wounds were characteristic of battered child syndrome

Testimony by a neurologist and a pediatric radiologist that the infant victim suffered from battered child syndrome was admissible to show premeditation and deliberation and to support the especially heinous, atrocious, or cruel aggravating circumstance, and testimony that battered child syndrome was the cause of the child's death did not justify a new sentencing proceeding. **State v. Atkins,** 62.

§ 2273 (NCI4th). Particular subjects of expert testimony; conclusion as to body position at time of fatal wound, angle of entry of bullet, and the like

The trial court did not err in a capital first-degree murder prosecution by admitting the testimony of an expert forensic pathologist that a shot pattern that corresponded with test firing the shotgun from three feet most closely matched the wound in the victim's back as well as his expert opinion of the effect on a body of such a shot. **State v. Locklear,** 118.

§ 2309 (NCI4th). Particular subjects of expert testimony; blood tests for presence of alcohol generally

The trial court did not err in a capital first-degree murder prosecution by admitting the testimony of an expert forensic pathologist that the victim's blood level would have been the result of the ingestion of approximately one-half of a beer. **State v. Locklear,** 118.

§ 2399 (NCI4th). Witnesses; court-appointed interpreters

There was plenary evidence to support the trial court's conclusion that an interpreter was qualified to interpret the testimony of a Spanish-speaking witness. **State v. Call,** 382.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 2908 (NCI4th). Redirect examination when defendant "opens door" on cross-examination

The trial court did not err by refusing to strike statements by defendant's brother in this prosecution for two first-degree murders that defendant's evidence was a "circus" and that the "victims of this heinous crime deserve more than what they've been getting" where defendant opened the door to this testimony by impugning the character of the witness on cross-examination. **State v. McNeill,** 634.

§ 2917 (NCI4th). Credibility of witnesses; cross-examination; questions to witness

The trial court did not unduly restrict defendant's cross-examination of witnesses by sustaining the prosecutor's objections to questions regarding inconsistencies in a witness's testimony and his prior statements to officers where the officers had reduced the prior statements only to a narrative, and to questions about whether the witness had a history of domestic violence for which he had not been convicted. **State v. Call,** 382.

§ 2954 (NCI4th). Impeachment; bias or prejudice; payment of witness for testifying

The prosecution was properly permitted to cross-examine defendant's psychiatric expert in a capital sentencing proceeding concerning fees charged by the expert and his role in two other death penalty proceedings for the purpose of showing bias. **State v. Atkins,** 62.

§ 2956 (NCI4th). Impeachment; bias or prejudice; promise of leniency in pending trial

The trial court did not deny defendant the right to confront a witness against him in a capital sentencing proceeding by refusing to permit a witness who had been charged with aiding and abetting first-degree murder in this case to answer a question calling for a legal conclusion as to whether she could receive the death penalty. **State v. Atkins,** 62.

Although the trial court erred by not allowing defendant to cross-examine a State's corroborating witness regarding pending charges against him for breaking and entering, defendant was not denied the right of effective cross-examination, and the error was harmless. **State v. Atkins,** 167.

§ 2970 (NCI4th). Impeachment; bias or prejudice; other suits or proceedings

The prosecution was properly permitted to cross-examine defendant's psychiatric expert in a capital sentencing proceeding concerning fees charged by the expert and his role in two other death penalty proceedings for the purpose of showing bias. **State v. Atkins,** 62.

§ 3121 (NCI4th). Corroboration; real evidence

Testimony in a murder prosecution that cigarette rolling paper and beer cans were found at the edge of a cornfield near the spot at which the murder victim's body was discovered was not improper character evidence but was properly admitted to show a portion of what officers found at the crime scene and to corroborate an assault victim's testimony. **State v. Call,** 382.

HOMICIDE—Continued

§ 244 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation, generally

The trial court did not err in a capital first-degree murder prosecution by failing to dismiss the charge as to a particular victim based upon insufficient evidence that defendant possessed the specific intent to kill that victim where defendant returned to his former workplace after being discharged, proceeded down a hallway firing shots into offices, defendant fired at least three rounds through the office door of this victim as he dove underneath his desk and there was no evidence that this victim had provoked defendant. The jury could reasonably find that defendant formed the requisite premeditation and deliberation based upon the doctrine of transferred intent. **State v. Davis,** 1.

§ 253 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; nature and execution of crime; severity of injuries, along with other evidence

In a first-degree murder prosecution with an Anders brief, a reasonable inference of premeditation and deliberation could be drawn from substantial evidence that the second victim was killed minutes after defendant killed the first, that the second victim was unarmed and hiding in a closet when he was shot, and that he sustained four gunshot wounds to the forehead at close range. **State v. LaPlanche,** 279.

The State's evidence in this first-degree murder prosecution was sufficient for the jury to find that defendant acted with premeditation and deliberation where it tended to show that defendant abducted the victim, took her to the woods, tied her to a tree, raped her, and inflicted three neck wounds that severed her carotid artery and caused her death. **State v. Trull,** 428.

§ 266 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; robbery

There was sufficient evidence of the taking element of armed robbery to support defendant's conviction of felony murder. **State v. Call,** 382.

§ 282 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; rape and kidnapping

There was sufficient evidence that defendant and the victim had intercourse against the victim's will and that the rape and killing occurred pursuant to a continuous transaction so as to support defendant's conviction of felony murder. **State v. Trull,** 428.

§ 469 (NCI4th). Instructions; burden of proof; mental capacity

There was no plain error in a capital first-degree murder prosecution in the court's instructions on lack of mental capacity regarding specific intent where the court used the phase "lack of diminished capacity" as opposed to "lack of mental capacity." The phrase was a mere *lapsus linguae.* **State v. Davis,** 1.

§ 478 (NCI4th). Instructions; transferred intent

The evidence in a capital prosecution for first-degree murder was sufficient to support the transferred intent instruction given by the trial court where defendant returned to his former workplace after being terminated and fired into the doors of offices on the management hallway. The evidence demonstrated that defendant's actions were aimed at the employees of the company, particularly those involved in

management, and this victim was working inside management's office during the shooting. **State v. Davis,** 1.

There was no plain error in a capital prosecution for first-degree murder in the trial court's instructions on transferred intent where defendant contended that the instruction was flawed because it did not specify whom defendant intended to kill. The evidence indicates that defendant sought revenge from the management of his former employer because of his allegedly unjustified dismissal and the jury was properly instructed on transferred intent based on his intent to harm the management of the company. **Ibid.**

§ 552 (NCI4th). Instructions; second-degree murder; mental state generally; intent to kill

The trial court in a capital first-degree murder prosecution properly conveyed the mandatory nature of its instruction that the jury would consider second-degree murder if it found that defendant could not form the specific intent required for first-degree murder. **State v. Davis,** 1.

§ 552 (NCI4th). Instructions; second-degree murder as lesser-included offense of first-degree murder; lack of evidence of lesser crime

The State presented positive and uncontroverted evidence of premeditation and deliberation in this prosecution for first-degree murder so that the trial court was not required to instruct the jury on the lesser-included offense of second-degree murder. **State v. Trull,** 428.

§ 609 (NCI4th). Instructions; self-defense; lack of evidence of apprehension of death or great bodily harm

The trial court did not err in a capital first-degree murder prosecution by failing to instruct on self-defense where defendant in his own statement acknowledged that the victim was unarmed when defendant shot him in the back and defendant offered no evidence that he believed at the time of the shooting reasonably or unreasonably that it was necessary to kill the victim in order to protect himself from imminent death or great bodily harm. **State v. Locklear,** 118.

§ 678 (NCI4th). Instructions; diminished capactiy

The trial court did not err in a first-degree murder prosecution in its instructions regarding defendant's diminished capacity defense. **State v. Davis,** 1.

§ 706 (NCI4th). Cure of error in instructions by conviction of first-degree murder; error in voluntary manslaughter instruction

There was no prejudicial error in a capital prosecution for first-degree murder by not granting defendant's request for a jury instruction on voluntary manslaughter where the jury's verdict of first-degree murder and its rejection of second-degree murder renders any error harmless. **State v. Locklear,** 118.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 54 (NCI4th). Variance between averment and proof; persons and names

There was a fatal variance where the indictment charged an aggravated assault upon Gabriel Hernandez Gervacio and the evidence at trial revealed the assault victim's correct name as Gabriel Gonzalez. **State v. Call,** 382.

INDIGENT PERSONS

§ 24 (NCI4th). Supporting services; other expert witnesses

The trial court did not err in denying defendant's motion for funds to employ a forensic crime-scene expert in this prosecution for two first-degree murders when the trial court had granted defendant's motions for funds to hire other investigators and experts. **State v. McNeill,** 634.

§ 26 (NCI4th). Assistant or additional counsel; in murder cases where death penalty is sought

The trial court may properly allow only one of a capital defendant's attorneys to question jurors during voir dire. **State v. Call,** 382.

INTOXICATING LIQUOR

§ 48 (NCI4th). Sale to, or purchase or possession by, underaged persons generally

The Court of Appeals correctly determined that a plaintiff may not maintain a negligence *per se* action based on a violation of G.S. 18B-302. **Estate of Mullis v. Monroe Oil Co.,** 196.

§ 64 (NCI4th). Compensation for injury caused by sales to underaged persons; grounds for relief

The trial court correctly granted summary judgment for defendants on a common law negligence claim based on the sale of alcohol to a twenty-year-old who was subsequently involved in an automobile accident where the evidence offered by plaintiff indicated merely that defendant sold alcohol to an individual who was later discovered to be underage. Evidence of this alone, without an offer of some additional factor to put the vendor on notice that harm was foreseeable, is insufficient to establish the duty element. **Estate of Mullis v. Monroe Oil Co.,** 196.

A common law negligence suit may be maintained against a commercial vendor based on a sale of alcohol to an underaged person, provided that the plaintiff in such a case presents sufficient evidence to satisfy all elements of a common law negligence suit. **Ibid.**

JUDGMENTS

§ 652 (NCI4th). When interest begins to accrue

A medical malpractice action which was settled against some parties and which reached a verdict against this defendant was remanded for recalculation of the judgment by adding prejudgment interest at the legal rate to the entire compensatory damages award, adding interest at the legal rate to the settlement sum from the date of settlement to the date of judgment, and subtracting the second calculation from the first. **Brown v. Flowe,** 520.

JURY

§ 30 (NCI4th). Competency and qualification of jurors; review of decision

An assignment of error that the trial court failed to properly determine the statutory qualifications of jurors was not before the appellate court where defendant failed to follow the statutory procedures for jury panel challenge and failed to alert the trial court to the alleged improprieties. **State v. Atkins,** 62.

PUBLIC OFFICERS AND EMPLOYEES

§ 66 (NCI4th). Employee grievances and disciplinary actions; actions involving career State employees

A career State employee was entitled to the "just cause" protection of the State Personnel Act and was thereby imbued with a constitutionally protected "property" interest in continued employment. **Peace v. Employment Sec. Comm'n,** 315.

The allocation of the burden of proof to a career State employee in an action contesting the validity of a "just cause" termination pursuant to G.S. 126-35 does not violate procedural due process under the Fourteenth Amendment to the United States Constitution or under North Carolina law. **Ibid.**

RAPE AND ALLIED OFFENSES

§ 90 (NCI4th). Sufficiency of evidence; first-degree rape; force and against will of victim, generally; lack of consent

The State's evidence was sufficient for the jury to find that defendant had vaginal intercourse with the victim without her consent and that he inflicted serious personal injury upon her so as to support his conviction of first-degree rape. **State v. Trull,** 428.

SEARCHES AND SEIZURES

§ 28 (NCI4th). Exceptions to warrant requirement; exigent circumstances

A deputy's warrantless entry into defendant's home to arrest defendant was lawful due to the presence of exigent circumstances. **State v. Guevara,** 243.

TAXATION

§ 92 (NCI4th). Intangible personal property

The trial court erred by dismissing the claims of plaintiffs who paid an intangibles tax without giving notice of a challenge to the legality of the tax where the General Assembly subsequently determined to refund the tax only to taxpayers who had originally protested it. The General Assembly here took a uniformly applicable intangibles tax that was valid and enforceable and attempted to classify retroactively those taxpayers who will not be liable for the tax; such a scheme violates the uniformity provision of the North Carolina Constitution. **Smith v. State,** 332.

§ 114 (NCI4th). Corporate income taxes generally

The Court of Appeals erred by reversing a trial court's summary judgment for the North Carolina Secretary of Revenue in an action to determine the North Carolina tax classification of monies Polaroid received from a patent infringement suit against Kodak. The definition of business income under the North Carolina Corporate Income Tax Act includes the functional test. **Polaroid Corp. v. Offerman,** 290.

The award of lost profits to Polaroid in a patent infringement lawsuit against Kodak constituted business income under the North Carolina Corporate Income Tax Act even though the income was obtained as a result of court proceedings rather than marketplace sales. Since the Kodak judgment constitutes income "in lieu of" profits Polaroid ordinarily would have obtained in the marketplace, the "lost profits" award fits squarely within the functional test for the definition of business income. **Ibid.**

Royalties received as a portion of a patent infringement judgment constitute business income under the functional test for purposes of North Carolina's Corporate

Income Tax Act. The "reasonable royalty" measure is income received in lieu of profits that would constitute business income and be taxable as such absent the infringement. **Ibid.**

Interest received by Polaroid as a result of a patent infringement judgment against Kodak constitutes business income under the North Carolina Corporate Income Tax Act. Although Polaroid argues that it would not have allowed its normal business accounts to be overdue long enough to produce this amount of interest, this interest represented income lost as a result of being unable to earn interest on the monies it should have received from sales absent the infringement. **Ibid.**

§ 208 (NCI4th). Tax liens on realty

State tax liens are superior to local ad valorem tax liens when they are docketed in the office of the county clerk of court prior to the date the ad valorem tax liens are perfected by operation of law. **County of Carteret v. Long,** 285.

§ 216 (NCI4th). Refunds of overpayment of taxes

The Court of Appeals correctly held that respondent improperly intercepted petitioner's 1993 federal income tax refund when petitioner made child support payments in accordance with a court order but had not fully repaid the public assistance debt that he had incurred prior to the paternity adjudication. The petitioner was not delinquent since he was current in his court ordered repayment plan, even though he had not completely extinguished his entire child support debt. **Davis v. N.C. Dept. of Human Resources,** 208.

The Court of Appeals erred by approving respondent's interception of petitioner's state income tax refund where petitioner had paid child support according to a court order but had not fully repaid a public assistance debt incurred prior to a paternity adjudication. Under G.S. 105A-3(b), when an alternative collection means is in progress or available, a claimant agency has an affirmative duty to seek and obtain the Attorney General's advice or opinion before undertaking a state income tax refund interception. **Ibid.**

WORKERS' COMPENSATION

§ 415 (NCI4th). Review by Industrial Commission; reconsideration of findings of fact and conclusions of law

The Court of Appeals erred in a workers' compensation proceeding by holding that the full Industrial Commission's findings upon review of a hearing officer's decision was not supported by competent evidence in the record because the Commission failed to consider that the hearing officer was better able to determine the credibility of the parties. G.S. 97-85 places the ultimate fact-finding function with the Commission, not the hearing officer. **Adams v. AVX Corp.,** 676.

§ 460 (NCI4th). Sufficient evidence to support particular findings of fact

A workers' compensation award by the full Industrial Commission arising from exposure to acetone and kaolin was upheld where the testimony was conflicting but there was some competent evidence in the record to support the findings of fact by the full Commission. **Adams v. AVX Corp.,** 676.

WORD AND PHRASE INDEX